

What does a framework of regulatory quality and hygiene entail?

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Introduction: Three Safeguards for Regulatory Quality and Hygiene

What do all regulations have in common? All articles of law create obligations and impose restraints on government action (Bentham 1970). Laws that govern economic activity limit business entry and exit or product price and quality, whereas social laws alter individual or organisational behaviour, especially when it imposes a cost on others (Litan, n.d.). Beyond the individual rules, however, is “the rule of law” that governs the governors. The rule of law includes procedural principles that define the powers and limits of government action.

This paper, the second in our series of papers on the state of regulatory quality in India, outlines benchmarks to guide rule-making and to establish checks on government action. These benchmarks provide a simplified guidepost to improve regulatory hygiene in India.

Through an extensive literature review, we select three sets of benchmarks critical to ensuring quality of rule-making: the process through which rules are drafted, the express legal authorisation to state action that the rules provide and constraints on private actions that rules sanction (Waldron 2016). We call these the democratic, legal and economic safeguards for regulatory quality. While the first deals with the procedural elements of rule-making, the latter two deal with the substance of the regulation.

Within each of these, we describe processes that introduce evidence-based democratic decision making to new rules (flow) as also to the cumulative stock of rules. In the following sections, we describe what each of these three safeguards contains, at a minimum. In constructing these safeguards, we have adapted principles reflected in the parameters used by five global indices: the World Bank’s Doing Business Rankings and Global Indicators of Regulatory Governance; World Economic Forum’s Global Competitiveness Index; Heritage Foundation’s Economic Freedom Index and OECD’s Indicators of Regulatory Policy and Governance (IREG). In addition, we borrowed elements from the ex-ante and ex post impact assessment methodologies used in the UK and other EU countries. Against each safeguard we also provide a brief case study to elaborate on how high performing countries have embedded these elements to introduce evidence, transparency and accountability in their systems.

To close we propose a check-list approach to measure the quality of rules currently on the books in India. The check-list is a set of distilled minimums based on the three safeguards discussed in the paper.

Democratic Safeguards: Participatory, transparent and accountable rulemaking process

A country is democratic as long as it reflects the will of the people in its decisions. Ex-ante, this requires those in power to consider the public’s views about about rules that constrain their freedom, and to apply evidence to prevent personal biases from operating in the public realm. In addition, the use of evidence to guide policies shields decisions from the ideology of any one political leader or party, and introduces analysis and questioning to bureaucratic chambers. Ex-post, this involves an appraisal of how state decisions have affected stakeholders and undertake course correction if necessary.

Use of tools throughout the lifecycle of a regulation, from drafting to sunset, allows a rule-making body to manage the flow and stock of regulation. Countries have used different mechanisms to ensure that the interests of the affected parties and the public at large are heard and honoured by decision-makers. In this section, we elaborate on procedural elements to accompany the making of regulation adopted across developed countries.

Institutionalised Regulatory Impact Assessment to control the flow of regulation

Any regulation comes with costs for the government, businesses, and citizens. It imposes administrative costs on the government to monitor and enforce the regulations, and compliance costs on businesses

and individuals. In that sense, it is a tax as the administrative and compliance costs are ultimately borne by the citizens (Dunkelberg 2017).

A Regulatory Impact Assessment (RIA) brings a “culture of justification” to law-making (Galhotra 2019). An RIA forces the government to think hard about the costs and benefits of a proposed regulation across stakeholders and across time. An RIA answers the following questions: What are the different ways to solve the problem? Is regulation necessary or can the problem be solved through non-regulatory intervention? Where regulation is the answer, is the tabled proposal the most efficient and effective way to regulate?

The scope may include the impact on public administration, the private sector, environment, international obligations, competitiveness of the market, small and medium-sized enterprises, and inflation. Impacts on the domestic public and private sector are the most commonly measured parameters whereas impact on environment and international obligations the least commonly measured.

65 out of 86 countries that conduct RIAs have guidelines on how to conduct RIAs. The methodology adopted may be qualitative, quantitative or a mix of two. The three most commonly used frameworks are: Cost-benefit analysis, cost-effectiveness analysis and multi-criteria analysis.

United Kingdom: One of the first countries to have institutionalised RIAs

In August 1997, the United Kingdom (UK) introduced and made RIAs mandatory for any new regulation that would impact business or the voluntary sector. As a part of the UK’s better regulation agenda, compliance for departments conducting RIAs went up from 66% to 97%, between 2003-04 (Warwick and Naru 2017). Policy teams in government departments are tasked with preparing RIAs, and reducing costs to businesses, particularly to small enterprises, through better regulation.

The UK has also put in place several checks and balances to promote effective impact assessments. Each department has a Better Regulation Unit (BRU), responsible for upholding the better regulation principles and advise policymakers. The government has also institutionalised independent scrutiny of departmental RIAs through the Regulatory Policy Committee (RPC). The RPC incentivises departments to conduct quality impact assessments by publishing annual reports on their performance and giving a ‘traffic light’ rating to the assessments undertaken by them.^a Apart from the RPC, several parliamentary committees also review RIAs.^b

Over the last few years, Small Business Enterprise and Employment (SBEE) Act, 2015 has introduced targets for deregulation. In 2010, the rule was ‘one in-one out’; for every pound sterling of new regulatory costs on business, one pound was reduced by repealing existing regulations. Since 2016, the target has been increased to ‘one in-three out’. As a result of these interventions, government surveys in the UK indicate a clear improvement in the perception of business environment (Warwick and Naru 2017).

^a. In most cases, when a department gets a ‘Red’ Opinion on their impact assessment they are likely to revise either the impact assessment or the policy itself. Measures are usually implemented only after they receive a ‘Green Opinion’.

^b. To ensure that efforts undertaken for an RIA is commensurate with the level of expected impact, independent scrutiny and full impact analysis are only applicable when the new direct cost to a business, measured by Equivalent Annual Net Direct Cost to Business (EANDCB), is above £5million. In 2012, UK also introduced a fast-track procedure for proposals that imposed a gross cost of less than £1 million a year on businesses and for deregulation measures. This streamlining ensures that the RPC is focused on more significant regulatory changes and that deregulation measures are enacted quickly.

Systematic public consultations to drive rational regulation

There are typically five ways in which governments consult the public on primary and secondary laws: informal consultation, circulation to relevant stakeholders, public notice-and-comment, public hearings, and advisory committees (Rodrigo and Amo 2006).

An informal consultation leaves all aspects of consultation such as who to consult and how up to the rule-making body. Circulation to relevant stakeholders, while more systematic than an informal

consultation, still allows room for discretion to the regulator in who to reach out to and how to document and include responses. Public notice-and-comment opens the proposal for comments to all interested parties. In some cases, public notice-and-comment also requires the government to issue the rationale and cost-benefit analysis along with the proposal allowing stakeholders to give informed comments. Public hearings are usually done in addition to other consultation processes. Advisory bodies, consisting of members outside of the government, have a fixed mandate and assist the government throughout the cycle of regulation drafting.

While public notice-and-comment is the most stringent of all, it is a lengthy process. Most governments such as the UK and Japan employ some form of informal consultations before and during the drafting of proposal, however, this practice is looked down upon in the US where any closed door consultation is considered unhygienic.¹

Other important considerations include whether public consultation is required by law, whether agencies are allowed to bypass public scrutiny, if the comments are accessible to the public, and if there is an obligation on the state to respond to comments. Unless these arrangements are put in place, the process of public consultation can be easily degraded.

United States: 73 years of experience with public consultation

In the US, when Congress delegates rule-making powers to agencies, public eyes are used to ensure that the agency does not overstep or exploit the delegated power. “Typically a government agency is required to first issue a Notice for Proposed Rulemaking (NPRM), allowing the public 60 days to comment before a final rule is issued. The NPRM typically contains a preamble that highlights the issues the proposed rule attempts to resolve and the method through which the agency reached the solution.

Section 4(b) of the APA states, “the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose.” Besides these, the agency is required to submit a “good cause” if it needs to bypass the consultation.^b

The final regulations are available on the Federal Register, which serves as a rule newspaper. Regulations.gov gives access to all rules, supporting documents, public notices, the facility to comment on the draft and view comments from other parties. In the preamble of the final rule, the agency responds to public comments and criticisms.

^a. Refer to Administrative Procedure Act (APA) of 1946

^b. Despite the strict process, Government Accountability Office (GAO) noted that that 35% of major rules and about 44 percent of nonmajor rules published between 2003 and 2010 did not issue NPRM, due to APA’s “good cause” exemption. Further, in 26 out of 77 cases (based on GAO’s sample), the agency did not respond to the comments received, possibly due to lack of a legal requirement for agencies to do so.

Mandatory and planned ex-post reviews to close a regulation’s life cycle

An ex-post review is an exercise to manage the stock of regulation to ensure that the rule-set in question is valid, cost-effective, efficient and fit for purpose. It closes the regulatory life cycle by revising and verifying the ex-ante impact assessment and evaluating if the regulation lived up to the outcome expectations. It is not just a costing exercise but also identifies if there are any unintended side effects.

As countries mature in their understanding of what an ex-post review entails, several approaches have emerged. These include programmed reviews (such as periodic or rolling reviews and sunseting) where evaluations are embedded in the regulatory framework itself and ad-hoc reviews (such as principles-based and in-depth reviews) that are not scheduled but may be triggered by complaints or principles. Besides these, countries also adopt meta practices to ensure system hygiene for ex-post review. For

1. The US Federal Advisory Committee Act (FACA), adopted in 1972, emphasises the importance of open meetings, public involvement and reporting to prevent undue influence by stakeholders. Closed meetings without adequate reporting are seen as a dilution of open and equal access to all.

example, independent assessment of evaluations, i.e. an assessment of the review methods used, and the introduction of ‘one in, x out’ policies.

Of the 189 countries considered under the Global Indicators of Regulatory Governance 2018, 39 countries conduct ex-post reviews throughout the government whereas 21 countries do it partially. Of the 44 countries tracked by the OECD’s Indicators of Regulatory Policy and Governance, 21 have a sunset clause for regulations.

Australia: OECD best performer on ex-post review

Australia has a well-developed system to review both primary and secondary legislation - exemplifying a standard that presents lessons for the rest of the world. Section 3(f) of the Legislation Act of 2003 in Australia, mandates ex-post reviews by “establishing mechanisms to ensure that legislative instruments are periodically reviewed and, if they no longer have a continuing purpose, repealed...”.

The Australian government’s “Best Practice Regulation,” states that the Regulatory Impact Statement (RIS) of each initiated regulation must also lay down the timeline for its subsequent review. Government agencies are mandated to undertake a Post Implementation Review (PIR) every five years of all regulations that have a large bearing on the economy, do not have sunset clauses or were passed without a satisfactory RIS. Australia employs different principles-based or in-depth reviews, including rolling reviews, legislation-specific reviews, ad-hoc reviews and sunseting.^a

The government carried out a Legislative Review Program under the National Competition Policy to ensure that the overarching framework governing the economic environment, facilitates rather than impedes competition. Beginning in 1996, these reforms were set to be completed by 2000- later extended by the Australian Government to 2005. Due to this initiative, around 1,800 laws regulating economic activity were brought to light for review - of which 85% were reviewed and reformed (Productivity Commission 2005).

The Australian Government also created the Productivity Commission in 1998. The commission is responsible for periodic ex-post reviews of regulations in the country. Since 2007, the commission has also carried out annual reviews to assess the regulatory burden that the existing stock of regulation imposes on businesses.

^a. The Legislative Instruments Act (2003) requires all non-exempt subordinate legislation to lapse after 10 years. Commonwealth instruments started sunseting from early 2015.

Intelligible and comprehensible or ‘Plain’ language

Rules that are written in a clear, concise and simple language are more accessible to average citizens, and likely to encourage public participation in the process of rule-making. Studies find that writing rules in plain language increases compliance, allows for less costly enforcement, reduces drain of resources (in terms of time, effort and money), strengthens the rule of law and protects individual rights by clearly communicating it to the beneficiaries (Emerson and Blake 2017; Kimble 1996).

In the 1960s and 1970s, as citizens became more aware of their right to documents written in ‘plain language’, the United States and the United Kingdom witnessed the development of ‘Plain Language Movement’. This gradually spread to other parts of the world including Singapore, New Zealand, Australia and Sweden among many others (Cornelius 2015; Asprey and Turner 1996).

The role played by plain writing in building an effective regulatory framework is highlighted in a report prepared by the Administrative Conference of the United States (ACUS). Through an examination of scholarly literature and semi-structured interviews with officials at federal agencies, the report finds that plain language advances two purposes- plain requirements, i.e clearly communicating the requirements of a rule to the intended audience, and plain purposes, i.e clearly indicating the reasons behind imposing a particular rule. While the former benefits regulated parties, the latter is likely to facilitate judicial review (Emerson and Blake 2017).

In the United States, *the Plain Writing Act of 2010* requires all government agencies to use plain language in public facing documents, to improve accountability and effectiveness. It defines plain

writing as ‘writing that is clear, concise, well-organized, and follows other best practices appropriate to the subject or field and intended audience’.²

Sweden: Towards a more user-friendly legislation

Beginning in the 1970s, Swedish government has been appointing linguists and experts to revise laws and ordinances and modernise legal language. The harbinger of this plain language movement in Sweden was a 1982 ordinance of the Cabinet Office to ‘encourage the greatest possible simplicity and clarity in the language used in statutes and other decisions’ (Asprey and Turner 1996).

In 1993, the Plain Swedish Group was appointed to facilitate the plain language project in all state agencies. This nine member team, consisting of judges, linguists, political scientists and information managers, has come to play a central role in revising and approving bills before it is printed.

The combination of legal and linguistic advisors serves both purposes: checking the constitutional and formal quality of the text and ensuring that draft laws/acts/guidelines/commission reports/ordinances are easy to reach and understand. Some of the principles put in place by the group include: avoiding long and complex sentences, avoiding vagueness and unnecessary variations, providing short summaries at the beginning of each chapter, include informative headings and using bullet lists wherever appropriate.

The Plain Swedish group conducts special seminars and training sessions for drafters, prepares handbooks and guidelines, arranges plain language conferences and changes ineffective text models. The group also uses a ‘Plain Language Test’ to assess texts for comprehensibility and measure the distance covered by government agencies in reducing the use of archaic, difficult and obscure words, and complicated sentences.

Legal Safeguards: Limits to the opacity of executive action

Administrative agencies are endowed with ‘discretionary powers’ to perform their functions. Typically the executive exercises discretion in two forms: rule-making (quasi-legislative functions) and decision-making (quasi-judicial functions) (Sigler, n.d.). Both these affect the rights and duties of regulatees.

Rule of Law demands the establishment of standards that limit the exercise of discretion by the executive (Waldron 2016). While executive discretion is inevitable, it ought not to be “unguided and uncontrolled”.³ When standards for the exercise of executive discretion are implicit or inadequate, the action risks being struck down by courts, or resulting in regulatory uncertainty and opportunities for rent seeking (Sigler, n.d.). There is a thin line between discretionary powers and the arbitrary exercise of powers.

In exercising discretion, the executive ought to operate within a constraining framework that provides express legal authorisation to and procedural checks against excesses or opacity in executive action. Over time, three tests have evolved for the validity of discretion: illegality, irrationality and procedural impropriety (Jowell and Lester 1988). While illegality and irrationality are typically subjective determinations, checks to ensure procedural propriety can be installed ex-ante.

We discuss two such procedural checks: guidance on what the executive can make rules on, and how the executive makes decisions that affect the rights and duties of regulatees.

Checks on executive powers to make more rules

The legislature often delegates rule-making powers to the administrative under a parent statute. Given time constraints, need for expertise and administrative efficiency, and the inability of the legislature to immerse in details, the executive is entrusted with the responsibility of making rules to operationalise policy intent and law.

2. Refer to Plain Writing Act of 2010.

3. Refer to training module on administrative law by United Nations Development Programme.

However, such delegation is accompanied by the risks of unelected officials suppressing individual rights. Recognising the tension between ‘bureaucracy and democracy’, countries have instilled various checks on the powers delegated to administrators to make rules.

First, the delegated legislation is expected to abide by the parent statute and/or the Constitutional framework, or risk being struck down as *ultra vires*.⁴ In addition, subordinate legislation is valid only so long as the parent statute is valid.

Second, the executive cannot make rules on matters where powers have not been given to it by the parent statute. The ability of the executive to make rules is framed under the delegation clause of the parent statute.

Third, the delegation clause in a parent statute determines the extent of rule-making power given to the executive and how this power is to be exercised. Where the parent statute is vague or expansive in its discussion of subordinate rule-making, it confers a large zone of power on how the executive interprets the intent of the legislature.

Fourth, the administrative authority is expected to act in a reasonable as well as bonafide manner while exercising its power to make such a legislation. At the very least, it must subscribe to transparency and procedural formalities in rule-making.

In many countries this has translated into a three-part procedural check on the bounds of delegated rule-making:

1. A closed and exhaustive listing of heads pertaining to which rules can be made, not an indicative and flexible listing;
2. A clear assignment of the authority who is to make the rules and who bears accountability for legality, rationality and procedural propriety of the rules; and
3. Expectations on how the rules are to be made, including deadlines and processes for consultation, scrutiny and public notification.

Checks on executive powers to determine compliance and breach

The executive is also charged with enforcing the rules. These quasi-judicial functions typically include the “power to make a choice between alternative courses of action” such as determining licensing requirements, granting licenses or withdrawing licenses. Where regulation makes private action dependent on the approval of the executive authority but without clarifying the grounds for approval, there is unqualified power in the hands of the authority.

Clear procedural guidance for exercising discretion provides legitimacy to administrative policies and guards the public against violations (Mantel 2009). Procedural propriety requires that even when an administrative agency has lawfully interfered with the rights of a person, he is entitled to a fair decision-making procedure. Procedural propriety in decision-making involves putting in place process to give due consideration and protection to the interests of the person(s) affected.

This has translated into requirements that the parent statute and the delegated legislation include a decision hierarchy and a penalty ladder.

Procedural checks on the decision hierarchy include a clear articulation of the conditions for compliance with and breach of the rules, objective basis on which decisions will be made, timelines within which decisions will be made, norms to make the decision process transparent, and clear assignment of accountability for meeting due process.

Checks on imposing penalties include requirements for fair hearing, record of arguments in writing, in person submissions, and a correctional mechanism via appeals.

In both these sets of checks transparency and accountability are paramount. To ensure transparency countries adopt the norm of passing reasoned orders, maintaining historical records to assist in recall,

4. The literal meaning of the phrase “ultra vires” is “beyond the powers”. The Doctrine is breached when a body exercises the powers beyond the said extent (Forsyth 1996).

and providing the opportunity for a second look at the decision via an independent or insulated appeals mechanism. These measures are collectively called ‘duties of procedural propriety’ (Oliver 1999).

United States: Encoded the duties of Procedural Propriety in law

The US Administrative Procedure Act provides standards to guide administrative action. Section 4 of the Act provides certain rules for administrative rule making. The decision to make a rule needs to be first published in the form of a notice in the Federal Register. The public is then provided an opportunity to be a part of the rule making by submitting its views and arguments in favour of or against the rule proposed to be made. Further, any administrative regulation takes effect only after thirty days of publication so as to ensure that the delegated legislation is not affected without the knowledge of the interested parties (Schwartz 1948). Consultations and conferences with the interested parties that are likely to be affected by the rule has become a tacit procedure while rule-making.

A large part of the Act sets out procedural requirements that govern administrative adjudications. For example, a person in whose matter an agency hearing is being held is entitled to a written notice of the matter with the time, place, the jurisdiction for the hearing, and the facts and the law asserted under which the matter is to be heard.

All interested parties are afforded the opportunity to submit their facts and arguments. The agency cannot consult a party on any fact without providing a notice and opportunity to other parties to participate in the same. Each interested party is entitled to present his case along with documentary evidence, thereby ensuring a fair hearing. Every agency hearing is concluded with the findings and conclusions along with supporting reasons. It provides procedures for multiple levels of consideration of the decision. An agency adjudication begins with an initial decision and ends in an agency decision which is entitled to judicial review by courts.

Economic Safeguards: Balancing enterprise and consumer interests

There are different rationales for economic regulation. It may be to curb excessive market power, prevent environmental harm, protect consumers, ensure product quality, or sometimes to even protect employees from unemployment.⁵ Broadly, these rules that regulate economic activity affect and are guided by consideration for both market participants: enterprises and consumers. While India is influenced by different frameworks including World Bank’s Doing Business in carrying out economic reforms, it lacks a lucid and explicit regulatory philosophy of its own to guide economic laws. In this section, we highlight the tools and principles that different countries have adopted to balance the competing and sometimes common interests of business enterprises and consumers.

Creating an enabling environment for enterprise

Most high income countries share certain features and values that guide their economic laws, including a high degree of openness, low economic burden, increased competition and an enabling environment for the private sector (Hafeez 2003).

Economic regulation encompasses the whole set of rules that govern enterprise behaviour throughout its lifecycle, i.e market entry, operating costs and exit from the market. Across these three touchpoints, where the state interacts with the market, enterprises are either governed by common standards/rules applicable to all, or differential standards that either prefer or adversely affect some players. Creating a favorable business environment thereby entails as minimums the following two aspects: first, easing entry and exit barriers and second, introducing rules that create a level-playing field and allow for competition to thrive.

5. Refer to ‘Regulation’ under the Glossary of Statistical Terms, OECD.

Easing entry and exit barriers in the market

Entry barriers, facilitate in screening new entrants to ensure that consumers buy high-quality products from ‘desirable sellers’. However, a study of 85 countries reveals that heavy regulation of market entry is typically associated with corruption, unofficial economies, poor social outcomes, and not better quality goods (Djankov et al. 2002). High entry barriers result in adverse consequences for entrepreneurship (Klapper, Laeven, and Rajan 2006; Sobel, Clark, and Lee 2007), new firm creation and employment growth in any industry (Bailey and Thomas 2017). Besides, the slow process of entry lowers productivity by insulating incumbents from competition.

As countries realise the importance of reducing regulatory burdens, easing entry and exit barriers and providing enterprises with a favourable environment, the ease of doing business movement gains momentum around the globe. Between May 2017 and June 2019, 128 governments introduced 314 reforms to improve the ease of doing business for small and medium scale enterprises (World Bank 2018).

Hong Kong: More Economic Freedom, always

Apart from being rated as the world’s freest economy for 25 consecutive years, dominating doing business rankings, and having a score of 5 on World Bank’s GIRG, Hong Kong is also credited as being one of the most ‘consistent reformers’.

Guided by its philosophy of ‘positive non-intervention’ and ‘big market, small government’, the Hong Kong government has been able to build a resilient economy on the back of private players. While maintaining distance from the market (as reflected in the small-sized public sector), the government provides the requisite infrastructure for markets to flourish. As noted by the Heritage Foundation, this includes ‘a predictable regulatory environment, stable government, rule of law, low taxes and minimum government interference’.

In early 2007, following a series of consultations between the Hong Kong government and the business sector on the licensing system, the government identified areas of improvement and launched the ‘Be Smart Regulator’ Programme.^a With the help of 29 departments, efforts were made to improve the regulatory regime by streamlining the licensing processes and reducing compliance costs. The primary focus of this program is to make the licensing process transparent, efficient and ‘customer friendly’.

Beginning in 2007, the Hong Kong government introduced a series of reform efforts to provide businesses a more favourable environment, in particular easing entry and exit. Recently, in July 2019, all the departments participating in the ‘Be Smart Regulator Program’ completed 83 out of the 132 business facilitation measures they devised/ formulated.^b These measures have contributed in enhancing Hong Kong’s competitiveness as a business hub.

^a. Refer to “Be the Smart Regulator” Programme on the website of the Hong Kong Government.

^b. Refer to “Be the Smart Regulator” Programme on the website of the Hong Kong Government.

Boosting competition through fair play

Rules that ease entry and boost competition create greater pressure on existing firms to increase their efficiency, productivity and innovation. Studies around the globe, highlight that regulatory reforms which introduce greater competition have a positive impact on productivity levels and long-term income per capita (Pilat 1996; Maher and Wise 2005; Boylaud 2000; Jamasb et al. 2005). As a result, there is growing realisation in the developing world of the need to establish legal and institutional frameworks that fight anti-competitive practices.

Equally essential, however, is to ensure that the principles of competition are sufficiently integrated into the general regulatory philosophy. Laws that govern economic activity, in the process of defining standards for product/service quality, controlling prices, placing marketing restrictions and managing production processes, may unduly restrict a supplier’s ability to compete (Wise 2002). Checks against preferential or adverse treatment of some firms vis-a-vis others must be placed at all levels of rule-making.

This requires creating a level-playing field not only for all private enterprises in a comparable situation, but also between private and state-owned enterprises. Many countries abide by the principle of competitive neutrality, in formulating their laws, to minimise the market advantage or disadvantage experienced by the government owned enterprises that compete with the private sector (Healey 2015).

Competitive neutrality is “a regulatory framework i) within which public and private enterprises face the same set of rules and ii) where no contract with the state brings competitive advantage to any market participant” (Capobianco et al. 2009). It requires writing rules in a manner that the executive as a market participant is not given special treatment.

Australia: ensuring a level-playing field

In Australia, the Competition Principles Agreement (1995), outlines an overarching *competitive neutrality policy* that is applicable to the Commonwealth of Australia and all states and territories.^a The principle was laid down to ensure that the government businesses do not enjoy market privileges by virtue of their public sector ownership.^b Each state was required to form its own agenda for implementing the principles of competitive neutrality laid out in the Agreement (National Practices Concerning Competitive Neutrality 2012).

The Agreement mainly focuses on the following specifics to achieve competitive neutrality:

1. Government businesses are exempt from paying a range of taxes that are applicable to private businesses. The Competitive Neutrality Agreement seeks to impose these taxes on government business agencies as well.
2. Government businesses have government guarantees on debts which permit their businesses to continue at a loss without the threat of insolvency. The Agreement seeks to impose debt guarantee fees to offset the advantage that government businesses have as a result of the guarantees.
3. Private sector businesses are subject to a number of regulations like protection of environment, planning and approval processes, etc. The Agreement seeks to make such regulations applicable to government businesses as well.^c

^a. The Competition Principles Agreement applies competitive neutrality to only ‘significant business activities’ and not non-business activities of government entities.

^b. Refer to Competition Principles Agreement, 1995.

^c. Refer to Policy Statement on Competitive Neutrality, Government of Western Australia, June 1996.

Expanding consumer choice and welfare

In regulating markets, an important object of the state is to establish minimum quality standards, increase consumers’ access to non-hazardous products, increase the information available to consumers and curb abusive business practices that impinge on the rights of the consumers (Wood 2017).

While instituting safety and quality standards through licensure and permits is important, when stricter than needed, it can create artificial scarcity, reduce product variety and raise prices for consumers (OECD 2011). Heavily regulated entry and constraints on competition has a direct bearing on consumer choice. By limiting the availability of goods, a law may coerce consumers to make ‘rational choices’, disproportionately increase the cost borne by low-income households and reduce innovation (Koopman and Ghei 2013).

In fact, heavy-handed regulations may impede market responses to changing consumer preferences (Issacharoff 2011). For example, studies show that changes made in food labeling and calorie posting requirements by the Food and Drug Association in the United States, has limited effect on consumer choice and mixed public health outcomes, but imposes significant compliance costs on producers and reduces their ability to respond to the market (Koopman and Ghei 2013; Williams and Konieczny 2018).

Many OECD countries use market-based instruments and prize self regulation to empower consumers to participate as independent actors in the market. An attempt is made to bridge the information gap between consumers and sellers by mandating information/ product disclosures.

OECD: A 6-step approach to consumer policy

OECD's consumer policy toolkit and competition assessment toolkit, are practical guides for OECD countries to aid them in expanding consumer choice.

The OECD Consumer policy toolkit has developed in response to the key market trends that have influenced consumers in recent years. These include: greater competition, greater variety of goods, increased complexity and changing spending patterns. It advocates for a 6-step approach in responding to consumer problems: identifying the nature of the problem and its source (for instance, insufficient choices or unavailability of products); measuring consumer detriment (this includes both tangible detriment in the form of money and intangible detriment in the form of limited choice and opportunity for consumers); determining whether the detriment requires policy action; identifying a range of policy actions; evaluating and selecting policy options; and developing a policy review process (OECD 2010).

The Australian Government has embodied these principles in several ways. It uses regulatory impact assessments to determine the most appropriate policy action from a range of policy options. Further, by regularly collecting survey data under the Australian Consumer Survey, the government gathers information on areas of consumer detriment to guide their policy intervention (Griggs 2011). Another tool that guides the early stages of policy-making in OECD countries is the competition assessment toolkit. By recognising the interlinkages between competition and consumer choice, the checklist introduces a set of 'threshold questions', including ones that pertain to limits on consumer choice and information, to indicate whether a law is likely to harm competition.

Closing remarks

As a follow up to our previous paper on the absence of regulatory hygiene in India, this paper describes tools used across the world to ensure regulatory hygiene. We describe a set of democratic, legal and economic safeguards to ensure the government upholds rule of law, consistently writes high quality rules and that high quality rules are not the exception but the norm. We present different methods used globally, supported with case studies.

To build a well-functioning and non-intrusive regulatory regime we in India need to introduce tools that allow, what the Political Scientist Reagan referred to as, 'a kind of meta-regulation of regulation' (Grabosky 2017). This means development of a 'set of institutions and processes that embed regulatory review mechanisms into the every-day routines of governmental policy-making' (Morgan 2003).

The principles include checks and balances to prevent abuse of power, public scrutiny to ensure transparency, reporting to foster accountability, and use of evidence to bring thoughtful and ideology-free decisions to government chambers. These do not apply to any one department, regulator or agency but to all. The goals are not temporal. It need not be the slogan of any one ruling party but must be a duty of all to continuously abide by these principles.

Research shows that high-performing countries persistently strive to introduce such institutions and mechanisms to create a transparent, answerable and accountable government. Before the dawn of the 21st century, for example, 22 of 31 OECD countries had already adopted ex-ante impact assessment (Kirchhoff and Nikolka 2017). United States was the first to introduce a cost-benefit analysis of regulations in 1981 followed by the UK in the mid-1980s. While there have been efforts in India to evaluate the impact of single rules, little attention has been paid to a comprehensive evaluation of all regulations, across industries over a period of time to assess the cumulative cost of regulation. These costs, however, have a bearing on growth rate (Coffey, Peretto, and McLaughlin 2016).

Any new principles or mechanisms must be adopted keeping in mind the recent work in economics and political science that highlights the importance of state capacity for sustained growth. State capacity refers to the ability of the state to realise its objectives through mobilising financial

resources, regulating and guiding economic activity, creating consensus, and enforcement (“State Capacity” 1995). While it is important to consider state capacity to implement and enforce before the introduction of any regulation, it is equally important to consider capacity to institutionalize these regulatory review mechanisms.

For change to be sustainable, we need to change the rules of the game and the incentives of the players forever. It is not great people that will drive institutional quality but the incentives that govern the people within the institutions. The incentives come from the contract between the parliament and the regulator.

One step in this direction is to introduce a common administrative law, along the lines of the US Administrative Procedure Act, which subjects regulators to public consultation, procedural must-dos written in the law, ex-ante and ex-post impact assessment.

Another step is to track the stock of regulations currently in play across the country. Accumulation of laws over time deters business and economic growth (McLaughlin, Wilt, and Ghei 2018). While a single new regulation may not impact businesses considerably, the sum total of all regulations may stifle innovation or dampen market enthusiasm. How can the backlog of incomprehensible laws be organised, understood and reduced if necessary? Is there a systematic way of understanding which industries are more heavily regulated than others? Which agencies regulate more than others? Given the sheer size of existing regulation by the central and state government, it may be useful to apply technology to answer these questions.

A third step is to apply a check-list approach to evaluate laws currently on the books and to guide any future law making. Asking a set of ten questions can help us steer clear of a runaway government, and improve the ease of doing business as also living in India. These questions include:

1. How accessible, transparent and participatory is the process by which the rule-set was made?
2. Do the rules make a serious effort of considering stakeholder views?
3. Are the rules written in plain language?
4. Has the rule-set been enacted following a publicly-available assessment of the costs and benefits it imposes on stakeholders?
5. Has there been a review of post-implementation of the rule set? Did it meet legislative intent?
6. What guidance is put in place for the exercise of rule-making and decision-making by administrative officials?
7. How is executive discretion contained?
8. How does the rule-set affect market entry and exit for enterprises?
9. How is competition affected due to the operation of the rule-set?
10. How is consumer choice affected by the rule-set?

Mandating that the legislature and the executive ask these questions and make the answers publicly available will add greatly to the quality of regulation in India. What we need is a whole-of-government approach for regulation of regulation.

We propose a check-list to begin measuring the quality of individual rules in India. The check-list is a distilled set of minimums that any rule-set ought to conform to. Our hope is the checklist can help identify specific areas where individual rules don't make standard and to find ways to course correct through a meta-regulation of regulation.

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