



Centre for
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SOCIAL CHANGE THROUGH PUBLIC POLICY

IMPROVING THE QUALITY OF LAWS IN INDIA

A Qualitative and Quantitative Approach



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Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

Introduction

Laws and regulations impact the social and economic well-being, and freedom of members of society. They alter how individuals interact and trade with each other. While all laws and regulations alter behaviour and impact stakeholders, a good regulation maximises social welfare while minimising the cost and extent of intervention (CUTS International n.d).

A cost-benefit analysis alone is insufficient to assess the quality of a law or regulation. This is, in part, because it is not possible to know all the costs and benefits associated with a specific regulation. Further, while known costs and benefits can be calculated, there will be costs and benefits that are impossible to predict ex-ante (Bastiat 1850). Added to this, is the knowledge problem (Hayek 1945). All the relevant data will never be available to any one individual since this knowledge and data is distributed among individual actors.

To tackle this challenge, we have developed a two-fold method to assess the quality of a law. First, we propose using a 3-part Quality of Laws Toolkit that reviews laws on three safeguards: Representation, Rights, and Resources safeguards. Representation safeguards ensure that the interests of stakeholders and the general public are reflected in a law. Rights safeguards check whether a law protects the rights of individuals. Resources safeguards assess the impact of a law on stakeholders' incentives and the administrative burden it imposes. Second, we use Mercatus Center's RegData to quantify different aspects of a law: volume, restriction, and complexity.

This compendium has three parts. The first part elaborates on the 3Rs of the Toolkit and presents the question-set under each. The second part provides guidance on using the Toolkit by applying the 'Rights' safeguards to all state school education laws. The third part elaborates on the quantitative methodology and applies it to all national laws in India.



Part 1

Quality of Laws Toolkit





Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

WHAT IS THE QUALITY OF LAWS TOOLKIT?

The Quality of Laws Toolkit borrows from various global indices of regulatory quality like the World Bank Global Indicators for Regulatory Governance (GIRG), OECD Indicators of Regulatory Policy and Governance, and the European Union's Better Regulation Toolbox. Last year, Centre for Civil Society released a binary-style Quality of Regulation checklist (Anand et.al 2019). It outlined the minimum set of benchmarks that a law must meet irrespective of the sector governed.

This year, we worked on a scorecard to measure the quality of laws and rules. It constitutes three parts: Representation safeguards (i.e accessibility of laws and public consultation), Rights safeguards (i.e. checks on executive discretion) and Resource safeguards (i.e. administrative burden and change in incentive structure based on Epstein's framework). These safeguards and benchmarks apply to all laws, irrespective of the sector they govern. The safeguards are further explained in the sections that follow.





Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

1. REPRESENTATION SAFEGUARDS

Democratic rule-making requires that each law reflect the will of the people. Representation safeguards ensure that the general public and affected stakeholders are consulted about laws and rules that will affect their lives. This involves both ex-ante and ex-post procedural safeguards.

Ex-ante, those in power must consider the public's views about the law and make the law available for public scrutiny. This process allows the lawmakers to take into account all viewpoints and the concerns of stakeholders before reaching a decision. It partially addresses the knowledge problem as well by encouraging individual actors to provide their assessment.

Part 1A and 1B of this toolkit are based on the 'Democratic Safeguards' section of the Quality of Regulation Checklist 2019 (Anand et.al 2019). To these questions, we have added examples and a scorecard.

1A. Parent Legislation

The following questions assess the ex-ante democratic procedures.

S.No.	Question	Points
1	Was the entire text of the bill made available on the government or legislature's website?	
Info	1 point for YES; 0 points for NO. NA if the law was enacted before 2000	
Eg.	The National Food Security Bill was first placed in the public domain in 2011. It was only passed into law in 2013. YES	1
2	Was the bill open for comments from the general public through a government/legislature's website?	
Info	1 point for YES; 0 points for NO. NA if the law was enacted before 2000	
Eg.	The National Food Security Bill was recommended to a standing committee and comments from the general public were solicited.	



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

3	Was the comment period open for at least 30 days following the draft bill's public release (from the date of announcement)?	
Info	1 point for YES; 0 points for NO. NA if the law was enacted before 2000	
Eg.	The National Food Security Bill allowed comments for over 30 days	1
4	Were all the comments received (or their summary) made available on the government or legislature's website?	
Info	This is mandated by the pre-legislative consultation policy of India. 1 point for YES; 0 points for NO. NA if the law was enacted before 2000	
Eg.	The summary of comments was not made available for the National Food Security Bill	0
5	Were the consultation's results (response to the comments received) on the bill made available on the government or legislature's website?	
Info	This includes a summary of the comments received from the public/ other stakeholders 1 point for YES; 0 points for NO. NA if the law was enacted before 2000	
Eg.	Response to the comments received on the National Food Security Bill was not made available on the government or legislature's website.	0

Tabulation 1.1:

Tabulate the total points you have scored so far and the total number of points available to you. **Questions that are not applicable do not count against your score.** For example, if a law was passed in 1999 then the available points is 0

Points Scored [PS1] :

Available Points [AP1]:



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

An ex-post review helps manage the stock of regulation to ensure that the law in question is valid, cost-effective, efficient and fit for purpose. It also helps identify and record unintended consequences. The toolkit asks four questions to assess the ex-post review mechanism.

S.No.	Question	Points
6	Is the legislation or any of its provision to be periodically reviewed?	
Info	1 point for YES; 0 Points for NO	
Eg.	Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 require review every 5 years.	1
7	Has the line ministry/department conducted any ex-post review of this legislation?	
Info	There is a difference between reviewing the law and reviewing the implementation. Review here means review of the statute not its implementation. 1 point for YES; 0 points for NO. NA if law was passed in the past 5 years	
Eg.	The line ministry has not conducted an ex-post review of the Foreign Trade (Development and Regulation) Act 1992.	0
8	Was an ex-post review conducted?	
Info	If YES award 1 point and answer 8a and 8b. If NO award 0 points and go to question 9. NA if law was passed in the past 5 years	
8a	Were any specific guidelines followed?	
Info	1 point for YES; 0 points for NO.	
Eg.	Since no ex-post review was conducted for the Foreign Trade (Development and Regulation) Act 1992, this question will be skipped.	
8b	If an ex-post review was conducted, were the findings made available on the government or legislature's website?	
Info	1 point for YES; 0 points for NO. NA if law was passed in the past 5 years	
Eg.	Since no ex-post review was conducted for the Foreign Trade (Development and Regulation) Act 1992, this question will be skipped.	



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

Tabulation 1.2:

Tabulate the total points you have scored so far and the total number of points available to you. **Questions that are not applicable do not count against your score.** For example, if a law was passed 2 years ago then the available points is 1

Points Scored [PS2]: **Available Points [AP2] :**

S.No.	Question	Points
9	Is the entire text of the legislation currently available on the government or legislature's website?	
Info	1 point for YES; 0 Points for NO	
Eg.	The entire text of the Foreign Trade (Development and Regulation) Act including the Amendments made in 2010 are available on the Ministry of Law and Justice website.	1
10	Does the parent legislation mandate that the subordinate legislation is placed before the parliament/state legislature before being notified?	
Info	1 point for YES; 0 Points for NO	
Eg.	Section 3 of The Foreign Trade (Development and Regulation) Act requires all changes be laid before the parliament. "Both Houses agree in making any modification in the rule or the Order or both Houses agree that the rule or the Order should not be made, the rule or the Order, as the case may be, shall thereafter have effect only in such modified form or be of no effect, as the case may be..."	1
11	Does the legislation prescribe consultation with stakeholders while making subordinate legislation?	
Info	1 point for YES; 0 points for NO.	
Eg.	The National Food Security Act 2013 mandates the draft of all rules to be placed in the public domain before enactment.	1



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

Tabulation 1.3:

Tabulate the total points you have scored so far and the total number of points available to you. These 3 questions are applicable to all laws so the available points are 3

Points Scored [PS3] :

Available Points [AP3]:

These procedural checks ensure participatory, transparent and accountable rule-making.



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

1.B Subordinate Legislation

Representation safeguards are required not only for the primary legislation but also for the subordinate legislation that follows. **If you are not looking at the subordinate legislation, skip this section.**

S.No.	Question	Points
1	Was the entire text of the subordinate legislation made available on the concerned department/ministry's website before enactment?	
Info	1 point for YES; 0 points for NO. NA if the law was enacted before 2000	
Eg.	Tamil Nadu Food Security Rules, 2017 were published online before enactment.	1
2	Was the subordinate legislation open for comments from the general public through the concerned department/ ministry's website before enactment?	
Info	1 point for YES; 0 points for NO. NA if the law was enacted before 2000	
Eg.	Tamil Nadu food security rules, 2017 were placed in the public domain in May, 2017 before being enacted in July, 2017.	1
3	Was the comment period open for at least 30 days following the public release of the draft of the subordinate legislation?	
Info	1 point for YES; 0 points for NO. NA if the law was enacted before 2000	
Eg.	Following the release of a notification, comments on the Tamil Nadu Food vSecurity Rules were invited for a period of 15 days.	0
4	Were all the comments received made available on the concerned department/ministry's website?	
Info	1 point for YES; 0 points for NO. NA if the law was enacted before 2000	
Eg.	The summary of the comments received on Tamil Nadu Food Security Rules was not made available on the concerned department/ministry's website.	



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

5	Were results of the consultation (response to the comments received) on the proposed subordinate legislation made available on the concerned department/ministry's website?	0
Info	1 point for YES; 0 points for NO. NA if the law was enacted before 2000	
Eg.	Response to the comments received on the Tamil Nadu Food Security Bill was not made available on the department/ministry's website.	0
6	Is the entire text of the subordinate legislation as on date available on the concerned department/ministry's website?	
Info	1 point for YES; 0 points for NO. NA if the law was enacted before 2000	
Eg.	Tamil Nadu Food Security Rules are available in both English and Tamil.	1
7	Was the subordinate legislation placed before the Parliament/state legislature before being notified?	
Info	1 point for YES; 0 points for NO. NA if the law was enacted before 2000	

Tabulation 1.4:

Tabulate the total points you have scored so far and the total number of points available to you. Questions that are not applicable do not count against your score. For example, if a law was passed in 1999 years ago then the available points are 2.

Points Scored [PS4] :

Available Points [AP4] :



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

Tabulation for Section 1: Representation Safeguards

Count your total points and divide by total available points. Refer to the previous tabulation to collect the scores

Total Points Obtained [PS1+PS2+PS3+PS4] : _____

Available Points[AP1+AP2+AP3+AP4] : _____

Percentage scored P1

[Total Points Obtained/Available Points * 100] : _____



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

2. RIGHTS SAFEGUARDS¹

2. A Parent Legislation

Laws often delegate rule-making and decision-making powers to the executive (such as the power to frame rules and grant approvals). These powers are exercised by unelected officials and have a bearing on the rights and obligations of the people. Each law must therefore instill checks on the executive's exercise of power.

Some of the following questions are based on the 'Legal Safeguards' section of the Quality of Regulation Checklist 2019 (Anand et.al 2019). The authors have modified the questions, added examples, and built a scorecard for them.²

Questions listed below assess a law on Rights Safeguards.

S.No.	Question	Points
1	Does the preamble of the legislation capture why the legislation was introduced?	
Info	Check whether the objective can be classified as market failure, government failure and welfare objective. Market Failure is a situation where the market mechanism alone cannot achieve economic efficiency. Government failure is when a government intervention causes a more inefficient allocation of goods and resources than would occur without that intervention. Welfare objective-promotes vertical equity, horizontal equity or social inclusion. If an objective is laid out, but cannot be classified under one of the three heads above, write NO. 1 point for YES; 0 points for NO.	
Eg.	"An Act to provide for the better regulation of marketing of agricultural produce and the establishment of markets for agricultural produce in the National Capital Territory of Delhi and for matters connected therewith or incidental thereto"—Delhi APMC Act 1998. Although the preamble mentions what the Act sets out to do, the reason for regulating the marketing of agricultural produce is not clear. It does not mention any particular problem that is being tackled through this law.	0

1. We thank Farrah Ahmed and Dr Puneeth Puttaiah for their valuable feedback on this section.
2. Question 3, 3a, 3b, 4, 6, 7, 7a, 7b, 7g, 10, 17, 18, and 19.



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

2	Is the preamble written clearly and unambiguously?	
Info	Indicators of ambiguity: 1. if the words or phrases used have two or more meanings 2. if the words are meaningless by themselves and require the use of a reference for clear interpretation. 1 point for YES; 0 points for NO	
Eg.	"An Act to provide for the establishment of a national standards body for the harmonious development of the activities of standardisation, conformity assessment and quality assurance of goods, articles, processes, systems and services and for matters connected therewith or incidental thereto" -- Bureau of Indian Standards Act 2016. The terms 'harmonious' and 'conformity assessment' are unclear.	0
3	Does the legislation delegate rule-making powers to the executive?	
Info	If YES answer Question 3A and 3B, otherwise move on to question 4	
Eg.	Section 99 and 102 of the Andhra Pradesh Education Act 1982. Such sections are typically at the end of the law and titled as 'Power to make rules' and 'Power to remove difficulties'	
3a	Are the rule-making heads for the subordinate legislation enumerated in the parent legislation?	
Info	1 point for YES; 0 points for NO.	
Eg.	Andhra Pradesh Education Act 1982 mentions the rule heads under section 99	1
3b	Does it specify by when the subordinate legislation must be made?	
Info	1 point for YES; 0 points for NO	
Eg.	Section 36(1) of the Street Vendors Act mentions that rules must be made within one year: "The appropriate Government shall, within one year from the date of commencement of this Act, by notification, make rules for carrying out the provisions of this Act."	1



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

4	Does the legislation grant the executive (rule-making authority) power to give retrospective effect to the subordinate legislation?	
Info	1 point for YES; 0 points for NO	
Eg.	Section 99 (2) of Andhra Pradesh Education Act 1982 grants such a power: "Any rule may be made under this Act with retrospective effect and when such a rule is made the reasons for making the rule shall be specified..."	1
5	Does the parent legislation grants the executive power to remove difficulties	
Info	If YES answer 5A. If NO, move to question 6.	
Eg.	Section 8 of the Bihar Non-Government Elementary Schools (Taking Over of Control) Act, 1976 grants the executive the power to remove difficulties. "Power to remove difficulties—If any difficulty arises in giving effect to the provisions of this Act, the State Government may take such action or pass such order as appears to it necessary for the purposes of removing the difficulty."	-
5A	Are there any limits to that power?	
Info	These limits are: 1. The phrase 'not inconsistent with the Act' 2. Time limit beyond which the executive shall cease to have such powers. If both phrases are present, award one point. If one of the two are present award 0.5. If neither are present award 0	
Eg.	Street Vendors Act, 2014 Sec 39: Power to remove difficulties.—(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not in consistent with the provisions of this Act, as appear to it to be necessary expedient for removing the difficulty: Provided that no order shall be made under this section after expiry of three years from the commencement of this Act. (2) Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament	1
6	Does the parent legislation introduce a residual clause as one of its rule-heads?	
Info	1 point for NO; 0 points for YES.	
Eg.	Section 52(2) of the Jharkhand APMC Act 2000 introduces a residual clause: "any other matter for which there is no provision in this Act and for which provision is, in the opinion of the Jharkhand Government, necessary for giving effect to the purposes of this Act."	1



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

Tabulation 2.1:

Tabulate the total points you have scored so far and the total number of points available to you. Questions that are not applicable do not count against your score. For example, if your answer to 3 is NO and 5 is YES the available points is 5 since 3a and 3b are not applicable. If you answer yes to both 3 and 5 total points available is 7.

Points Scored [PS5]:

Available Points [AP5]:

S.No.	Question	Points
7	Does the legislation confer upon the executive the authority to grant approval/licence?	
Info	If YES Answer question 7a to 7g . If NO go to question 8	
Eg.	Section 18 of the Right to Education Act 2009, requires schools to get a certificate of recognition (from the prescribed authority) before establishment. Any such entry requirement, that requires a regulated entity to get permission from the executive would be included here.	
7a	Does the legislation identify the decision-making authority for granting approval/licence?	
Info	1 point for YES; 0 points for NO.	
Eg.	Section 18 of the Right to Education Act does not identify the authority for granting approval. It mentions that the authority shall be 'prescribed'.	0
7b	Does the legislation define criteria for grant of approval?	
Info	If all approvals have a defined criteria mark YES and give 1 point. Otherwise give a score that represents what percentage have defined criteria. For instance, if 3 approvals out of 4 have specified criteria, this should receive 0.75. If none mark NO and award 0 points	
Eg.	The Andhra Pradesh Education Act 1982 confers upon the executive 10 approval functions (including recognition, alienation of property of land and buildings of educational institutions, etc). Of these, it only defines the criteria for one approval function. Section 53 (2) enlists the criteria on the basis of which the government may approve transfer of land or buildings.	0.1



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

7c	Does the legislation delegate the power to define the criteria for approval to the executive?	
Info	If all approvals have delegated criteria mark YES and give 0 points. Otherwise give a score that represents what percentage have been delegated. For instance, if 3 approvals out of 4 have delegated criteria, this should receive 0.25 (1-0.75). If none mark NO and award 1 point	
Eg.	The Andhra Pradesh Education Act 1982 confers upon the executive 10 approval functions. Of these, it delegates the power to define the criteria for approval in 4 provisions (Section 21, 33b, 45, and 79) . So the score is calculated as (10-4)/10	0.6
7d	Are there any arbitrary conditions laid down for the grant of approval?	
Info	An arbitrary condition is one that has no nexus or connection with the purpose. If there are no arbitrary conditions in ANY approval function mark NO and award 1 point. Otherwise, give a score based on how many approval functions have at least one arbitrary condition. For instance, if 3 approvals out of 4 have at least one arbitrary condition, this should receive 0.25 (1-0.75). If all approval functions have at least one arbitrary condition, mark YES and award 0 points.	
Eg.	One of the conditions that the Andhra Pradesh Education Act 1982 introduces for those who wish to establish a school is to prove the 'need' for such a school in the first place (Section 23). It is not clear how this condition has any nexus with the objective of the Act. Such a condition is arbitrary. Of the 10 approval functions, one function has an arbitrary criteria.	0.9
7e	Are there any excessive conditions laid down for the grant of approval?	
Info	Excessive conditions are ones that go overboard. To check this, ascertain if the legislation introduces the least restrictive measure to achieve its purpose. If there are no excessive conditions in ANY approval function mark NO and award 1 point. Otherwise, give a score based on how many approval functions have even one excessive condition. For instance, if 3 approvals out of 4 have an excessive condition, this should receive 0.25 (1-0.75). If all approval functions have excessive conditions, mark YES and award 0 points.	
Eg.	Section 19 (read with schedule 1) of the Right to Education Act 2009 lays down input and infrastructure norms that schools must meet to get recognised. These norms are excessive and can impose a heavy burden on budget private schools.	0



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

7f	Does the legislation set a time limit for grant of approval/licence?	
Info	If a time limit is laid down for all approval functions mark YES and give 1 point. Otherwise give a score that represents what percentage have time limits For instance, if 3 out of 4 have time limits, this should receive 0.75. If none mark NO and award 0	
Eg.	Section 18(2) of the Right to Education Act 2009 does not prescribe the time-limit. It delegates this function to the executive: "The authority prescribed under sub-section (1) shall issue the certificate of recognition in such form, within such period, in such manner...as may be prescribed"	0
7g	Does the legislation mandate the decision-making authority to provide reasons in writing (for denial or approval)?	
Info	If the mandate is laid down for all approval functions mark YES and give 1 point. Otherwise give a score that represents what percentage have mandates For instance, if 3 out of 4 have mandates, this should receive 0.75. If none mark NO and award 0 points. Ensure that the compliance is mandatory and not discretionary. The provisions should not use phrases like 'may provide reasons for order in writing'. Mark yes only if there is a mandate for reasoned order.	
Eg.	Section 29 of the Clinical Establishments Act mandates the authority to record reasons if it denies approval: "Provided that the authority shall record its reasons, if it disallows an application, for permanent registration."	0.5



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

Tabulation 2.2:

Tabulate the total points you have scored so far and the total number of points available to you. **Questions that are not applicable do not count against your score.** For example, if your answer to 7 is NO the available points is 0 since 7a to 7g are not applicable. If your answer to 7 is yes to the total points available is 7.

Points Scored [PS6] :

Available Points [AP6] :

S.No.	Question	Points
8	Does the legislation mandate a pre-decisional hearing (or issuance of a show-cause notice) in case of denial of approval?	
Info	If the mandate is laid down for all approval functions mark YES and give 1 point. Otherwise give a score that represents what percentage have mandates For instance, if 3 out of 4 have mandates, this should receive 0.75. If none mark NO and award 0 points.	
Eg.	Section 64 (3) of the Electricity Act 2003, mandates that an applicant must be given a reasonable opportunity to be heard before their application is rejected: "Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application."	
9	Does the legislation allow for appeal against the decision on denial of approval?	
Info	<p>The answers can also include provisions which provide for revision of orders, or other similar phrase, provided they satisfy the following criteria:-</p> <ol style="list-style-type: none"> 1. The affected party has the right to approach an authority to challenge an order made against him 2. The decision on revision/appeal is given by an authority different from the authority which made the impugned order <p>If the legislation allows for appeal in all approval functions mark YES and give 1 point and answer 9a to 9d. Otherwise give a score that represents what percentage allows for appeal. For instance, if 3 out of 4 approval functions allow for appeal, this should receive 0.75. If none mark NO and award 0 points and go to question 10.</p>	



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

Eg.	Section 36 of the Clinical Establishments Act allows for appeal against the decision on denial of certificate of registration: "Any person, aggrieved by an order of the registering authority refusing to grant or renew a certificate of registration or revoking a certificate of registration may, in such manner and within such period as may be prescribed, prefer an appeal to the State Council"	1
9a	Is there a limitation period within which the aggrieved has to file an appeal?	
Info	If there is a limitation period in all appeals mark YES and give 1 point. Otherwise give a score that represents what percentage have limitation periods. For instance, if 3 out of 4 appeals have limitation periods, this should receive 0.75. If none mark NO and award 0 points	
Eg.	Section 36 of the Clinical Establishments Act leaves it up to the executive to prescribe the limitation period: "Any person, aggrieved by an order of the registering authority..may...within such period as may be prescribed, prefer an appeal..". This is the only provision for appeal against denial of approval, making the score 0.	0
9b	Has the appellate authority been empowered to condone the delay in appropriate cases?	
Info	If the appellate authority can condone the delay in all appeals mark YES and give 1 point. Otherwise give a score that represents what percentage allows condoning delays.. For instance, if 3 out of 4 allow you to condone delays, this should receive 0.75. If none mark NO and award 0 points	
Eg.	Section 36 of the Clinical Establishments Act allows the appellate authority to condone delay in appropriate cases: "Provided that the State Council may entertain an appeal preferred after the expiry of the prescribed period if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time."	1
9c	Does the legislation prescribe the time-limit within which the appellate authority must dispose of the appeal?	
Info	If the legislation prescribes a time-limit n all appeals mark YES and give 1 point. Otherwise give a score that represents what percentage have time limits. For instance, if 3 out of 4 have time limits, this should receive 0.75. If none mark NO and award 0 points	
Eg.	Section 36 of the Clinical Establishments Act does not prescribe a time-limit for the appellate authority to dispose of the appeal. Therefore the score will be 0.	0



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

9d	Can the appellate authority extend the time limit if there is a reasonable cause for delay?	
Info	If the appellate authority allows time extensions for all appeals mark YES and give 1 point. Otherwise give a score that represents what percentage allows extension . For instance, if 3 out of 4 allow extensions, this should receive 0.75. If none mark NO and award 0 points	
Eg.	Since Section 36 of the Clinical does not prescribe any time-limit for the appellate authority, this question is not applicable.	

Tabulation 2.3:

Tabulate the total points you have scored so far and the total number of points available to you. **Questions that are not applicable do not count against your score.** For example, if your answer to 9 is NO the available points are 2 since 9a to 9d are not applicable. If your answer to 9 is yes, the total points available is 6.

Points Scored [PS7] : **Available Points [AP7]** :



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

S.No.	Question	Points
10	Does the legislation identify the authority for carrying out enforcement actions?	
Info	1 point for YES; 0 points for NO	
Eg.	Section 18 (3) of the Right to Education Act, gives the prescribed authority, the power to withdraw the recognition of a school: Since it only mentions 'prescribed authority', i.e. the power to define this authority has been delegated to the subordinate rules the answer is NO	0
11	Does the legislation define the criteria for a breach?	
Info	If the criteria is laid down for all breaches mark YES and give 1 point. Otherwise give a score that represents what percentage have criteria laid down For instance, if 3 out of 4 have criteria laid down, this should receive 0.75. If none mark NO and award 0 points.	
Eg.	The Andhra Pradesh School Education (Community Participation) Act, 1998 confers upon the executive the authority to ensure enforcement in only one provision (Section 18). This provision clearly defines the criteria for breach: "(2) Government may remove any member of the above mentioned committees at any time, on proven misconduct, non-performance or misuse of funds...". Since this is the only enforcement function, and the criteria is laid down, the score will be 1.	1
12	Does the legislation delegate the power to define the criteria for a breach to the executive?	
Info	If the criteria is delegated for all breaches mark YES and give 0 points. Otherwise give a score that represents what percentage are delegated For instance, if 3 out of 4 are delegated, this should receive 0.25 (1-0.75). If none mark NO and award 1 point.	
Eg.	Section 32 (read with Section 12) of the Clinical Establishments Act 2010 allows the cancellation of the registration of a clinical establishment if it does not comply with the conditions prescribed by the executive "If, at any time after any clinical establishment has been registered, the authority is satisfied that,— (a) the conditions of the registration are not being complied with...it may... cancel its registration"	0.9



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

13	Are these conditions/criteria clear and unambiguous?	
Info	If all the criteria are clear and unambiguous mark YES and give 1 point. Otherwise give a score that represents what percentage are clear and unambiguous. For instance, if 3 out of 4 criteria are clear and unambiguous , this should receive 0.75. If none mark NO and award 0 points.	
Eg.	Section 60 of the Andhra Pradesh Education Act 1982 sets an unclear/ ambiguous criteria for breach:“(1) Where the Government are of opinion that the management of any educational institution should either in the public interest or in order to secure the proper management of the said educational institution be taken over, they may...direct by notification, that the management of the said educational institution, shall...therein vest in the Government...” Similarly Section 62 of the Act allows the government to cancel any contract, if it is found to be “detrimental to the interests of the educational institution”. Of the 27 enforcement powers given to the executive under this Act, 2 provisions have an unclear and ambiguous criteria. The score will be calculated as: [(27-2)/27].	0.925
14	Are any of these criteria for breach arbitrary?	
Info	If all the criteria are arbitrary mark YES and give 0 points. Otherwise give a score that represents what percentage is arbitrary. For instance, if 3 out of 4 criteria are arbitrary , this should receive 0.25 (1 - 0.75). If none mark YES and award 1 point. A criteria is arbitrary if it has no nexus with the objective of the Act.	
15	Are any criteria for breach excessive?	
Info	If all the criteria are excessive, mark YES and give 0 points. Otherwise give a score that represents what percentage is excessive . For instance, if 3 out of 4 criteria are excessive, this should receive 0.25 (1 - 0.75). If none mark YES and award 1 point. Please note: this deals with conditions not consequences	
Eg.	The Karnataka Education Act 1983 aims to improve the quality of education and ensure “harmonious development of the mental and physical faculties of students”. One of its provisions prohibits employees of a recognised school to give private tuition to any individual (Section 4). Given the law’s objective, a complete prohibition on giving tuition to any individual is excessive. Of the 18 enforcement functions the law lists, one function has an excessive criteria for breach. The score will thus be 17/18, i.e. 0.95.	0.95



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

16	Are all the measures proportionate to the breach?	
Info	If all the measures are proportionate, mark YES and give 1 point. Otherwise give a score that represents what percentage is proportionate. For instance, if 3 out of 4 measures are proportionate this should receive 0.75 Please note: this deals with consequences not conditions. 1 point for YES; 0 point for NO	
Eg.	Under Section 9 of the Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act 1983, "Whoever contravenes the provisions of this Act or the rules made thereunder shall on conviction be punishable with imprisonment for a term which shall not be less than three years but which shall not exceed seven years". Imprisonment for contravention with any provision of the Act (which regulates fees) is excessive.	0.75
17	Does the legislation mandate the enforcement authority to provide reasons for its decision in writing?	
Info	If the legislation mandates a reasoned order for all its decisions, mark YES and give 1 point. Ensure that the compliance is mandatory and not discretionary. The provisions should not use phrases like 'may provide reasons for order in writing'. Mark yes only if there is a mandate for reasoned order. Otherwise give a score that represents what percentage have mandates for a reasoned order. For instance, if 3 out of 4 have a mandate, this should receive 0.75. If none mark NO and award 0 points.	
Eg.	Section 18 (3) of the Right to Education Act: "On the contravention of the conditions of recognition, the prescribed authority shall, by an order in writing, withdraw recognition..." Of the 5 enforcement functions in the Act, only one provision has the mandate for reasoned order.	0.2
18	Does the legislation mandate a pre-decisional hearing (or issuance of show cause notice)?	
Info	If the legislation mandates a pre-decisional hearing for all its decisions, mark YES and give 1 point. Otherwise give a score that represents what percentage have mandates for a pre-decisional hearing. For instance, if 3 out of 4 have a mandate, this should receive 0.75. If none mark NO and award 0 points.	



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

Eg.	Section 18 (3) of Right to Education Act: "...Provided further that no recognition shall be so withdrawn without giving an opportunity of being heard to such school, in such manner, as may be prescribed." Of the 5 enforcement functions in the Act, three provisions have a mandate for pre-decisional hearing.	0.6
19	Does the legislation allow for appeal against the decisions of the enforcement authority?	
Info	<p>If the legislation allows for appeal for all its decisions, mark YES and give 1 point and answer questions 19a to 19d. Otherwise give a score that represents what percentage allows appeal.. For instance, if 3 out of 4 allow for an appeal, this should receive 0.75. If none mark NO and award 0 points and go to question 20.</p> <p>The answers can also include provisions which provide for revision of orders, or other similar phrase, provided they satisfy the following criteria:-</p> <ol style="list-style-type: none"> 1. The affected party has the right to approach an authority to challenge an order made against him 2. The decision on revision/appeal is given by an authority different from the authority which made the impugned order. 	
Eg.	Section 32(3) of the Right to Education Act 2009: "Any person aggrieved by the decision of the local authority may prefer an appeal to the State Commission for Protection of Child Rights". The Act mentions appeal for only one enforcement function (out of 5).	0.2
19a	Is there a limitation period within which the aggrieved has to file an appeal?	
Info	If all appeals have a limitation period mark YES and give 1 point. Otherwise give a score that represents what percentage have a limitation period. For instance, if 3 out of 4 have a limitation period, this should receive 0.75. If none mark NO and award 0 points.	
Eg.	Section 41 (6) of the Clinical Establishments Act 2010: "Any person aggrieved by the decision of the authority may prefer an appeal to the State Council within a period of three months from the date of the said decision"	0.67
19b	If yes, has the appellate authority been empowered to condone the delay in appropriate cases?	
Info	If all appeals that have a limitation period allow you to condone a delay, mark YES and give 1 point. Otherwise give a score that represents what percentage allows delay. For instance, if 3 out of 4 have allow delay this should receive 0.75. If none mark NO and award 0 points.	



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

Eg.	Of the three provisions that allow for appeal against enforcement decisions in the Clinical Establishments Act 2010, none empower the authority to condone delays.	0
19c	Does the legislation prescribe the time-limit within which the appellate authority must dispose of the appeal?	
Info	If all appeals that have a time limit mark YES and give 1 point. Otherwise give a score that represents what percentage have time limits. For instance, if 3 out of 4 have time limits this should receive 0.75. If none mark NO and award 0 points.	
Eg.	Of the three provisions that allow for appeal against enforcement decisions in the Clinical Establishments Act 2010, none prescribe a time-limit to dispose appeals.	0
19d	Can the appellate authority extend the time limit if there is a reasonable cause for delay?	
Info	If the appellate authority allows time extensions for all appeals mark YES and give 1 point. Otherwise give a score that represents what percentage allows extension . For instance, if 3 out of 4 allow extensions, this should receive 0.75. If none mark NO and award 0 points	
Eg.	This question will not be applicable to the Clinical Establishments Act 2010.	
20	Does the Act provide for an independent appeal mechanism?	
Info	1 point for YES; 0 points for NO	
Eg.	Section 15 of the Jharkhand Education Tribunal Act 2005 introduces an independent appeal mechanism: "Appeal against the order/ directions/judgements passed by the Tribunal will be before the Jharkhand High Court [within a period of ninety (90) days...]"	1
21	Does the legislation introduce provisions that are redundant, archaic or out-dated?	
Info	1 point for NO; 0 points for YES	
Eg.	Karnataka Education Act 1983 introduces penalties that are outdated. Section 113 (2) of the Act states: " If any parent fails to comply with an attendance order...he shall, on conviction, be punished with fine not exceeding two rupees..."	0



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

Tabulation 2.4:

Tabulate the total points you have scored so far and the total number of points available to you. If you answer Yes to 19, there are 16 points available. If you answer no to 19 there are 12 points available.

Points Scored [PS8] :

Available Points [AP8] :



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

2B. Subordinate Legislation

This section of the toolkit checks how the executive exercises its powers under the Parent law and identifies abuse of power (if any). Please ignore this section if you are not studying subordinate legislation.

S.No.	Question	Points
1	Does the legislation identify the authority for carrying out enforcement actions?	
Info	1 point for YES; 0 points for NO	
Eg.	Andhra Pradesh Educational Institutions (Establishment, Recognition, Administration and Control of Institutions of Higher Education) Rules, 1987: "In exercise of the powers conferred by Sections 20 and 21 read with Section 99 of the Andhra Pradesh Education Act, 1982 (Act No.1 of 1982)..."	1
2	Does the subordinate legislation sub-delegate rule-making powers?	
Info	UNSCORED	
Eg.	Rule 43 of the Delhi School Education Rules 1973 sub-delegates rule-making powers: "The Administrator may, if he is of opinion that in the interest of school education in Delhi it is necessary so to do, issue such instructions in relation to any matter, not covered by these rules, as he may deem fit."	
3	If the subordinate legislation sub-delegate rule-making powers, does it have a mandate from the parent legislation?	
Info	1 point for YES; 0 points for NO. Ignore if NA	
Eg.	Section 23 of the Delhi School Education Act allows sub-delegation: "(1) The Administrator may delegate all or any of his powers, duties and functions under this Act to the Director or any other officer."	1
4	Has the subordinate legislation been given retrospective effect?	
Info	Check if the date on which it comes into force is before the date on which it is notified. 1 point for NO; 0 points for YES	
Eg.	The Madhya Pradesh Ashasakiya Shikshan Sanstha Anudan Niyam, 2008 came into effect retrospectively.	0



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

5	Does the subordinate legislation introduce any provision(s) under the residual powers clause of the parent legislation?	
Info	0 points for YES; 1 point for NO	
Eg.	Rules 34-37 of the Delhi School Education Rules, 1973 mandate an enforceable code of conduct for students in educational institutions. This does not fall under any of the rule-heads of the Delhi School Education Act, 1973 (except the residual clause).	0
6	Does the subordinate legislation introduce any provision that does not fall under the clause(s)/ rule-head(s) it has invoked?	
Info	1 point for YES; 0 points for NO. ignore if NA	
Eg.	Goa, Daman and Diu School Education Rules, 1986, Rule 127: No leaving certificate is valid unless it is in the form prescribed by the Director of Education and is signed by the Head of the school himself. This does not correspond to any rule-head under the parent Act.	0
7	Does the subordinate legislation introduce any criterion for approval that is inconsistent with the objective of the parent legislation?	
Info	1 point for NO; 0 points for YES	
Eg.	Andhra Pradesh Educational Institutions (Establishment, Recognition, Administration and Control of Schools Under Private Managements) Rules, 1993, Rule 8: "(2)...In respect of Secondary Schools, however, the permission granted shall be only up to class VIII. The educational agency shall be permitted to open classes IX and X only after obtaining due recognition and only from second and third year respectively after the commencement of class VIII. For example if class VIII is commenced in the academic year 1994 95, the class IX can be commenced in the next year and class X in the year 1996 97". This provision creates a limitation that is not mentioned in the parent legislation.	0
8	Does the subordinate legislation introduce any criterion for a breach that is inconsistent with the objective of the parent legislation?	
Info	1 point for NO; 0 points for YES	
Eg.	Rule 36 (a) of the Delhi School Education Rules creates an odd criteria for breach (not mentioned in the parent Act). A student below 14 years of age can be shifted by an administrator to a 'special school', if (among other things) they do not spit in a spittoon.	0



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

9	Does the subordinate legislation introduce any measures of enforcement that is inconsistent with the objective of the parent legislation?	
Info	1 point for NO; 0 points for YES	
Eg.	Rule 23 of Goa, Daman and Diu School Education Rules, 1986 states: "In case of breach of discipline by a student below the age of 14 years, if the Director is satisfied that continuance of such a student in the school in which he is studying, is likely to be detrimental to the general tenor or discipline of the school, he may send such a student to such special school as he may think fit". Such disciplinary measures are not mentioned in the parent Act.	
10	Was the subordinate legislation made within the time frame mentioned (if any) in the parent legislation?	
Info	1 point for NO; 0 points for YES	
Eg.	Section 36 of the Street Vendors Act 2014 requires rules to be made "within one year from the date of commencement of this Act". However, the Delhi Street Vendors (Protection of Livelihood and Regulation of Street Vending) Rules were notified in 2016.	

Tabulation 2.5:

Points Scored [PS9] :

Available Points [AP9] :

Tabulation for Section 2: Rights Safeguards

Count your total points and divide by total available points. Questions that are not applicable do not count against your score.

Total Points Obtained [PS5+PS6+PS7+PS8+PS9] : _____

Available Points [AP5+AP6+AP7+AP8+AP9] : _____

Percentage scored P2

[Total Points Obtained/Available Points * 100] : _____



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

3. RESOURCES SAFEGUARDS

Laws aim to achieve one or more of the following: advance a welfare objective, tackle a market failure or overcome a government failure (World Bank 2017). Regardless of the purpose, each law imposes costs and effects a change in the behaviour of individual actors. Epstein categorises 'administrative costs' into three types: (i) compliance costs, borne by the regulated entities (individuals and private enterprises) to ensure compliance with the law; (ii) enforcement costs, incurred by the government in implementing and enforcing the law; and (iii) error costs incurred by both players in case non-compliance is identified incorrectly (Epstein 2009).

Epstein argues that the administrative costs imposed by a law must be justified based on whether they improve the overall incentive structure of individuals. He presents 4 scenarios/possibilities on what a law may do:

- Increase administrative costs that will create superior incentive structures;
- Increase administrative costs that will create inferior incentive structures;
- Decrease administrative costs that will create superior incentive structures;
- Decrease administrative costs that will create inferior incentive structures. (Epstein 2009)

In the second and the third case, there is no trade off required. It is clear that the second scenario needs to be avoided and the third scenario must be welcomed. The first and the fourth case, however, are more complicated and an informed decision in these scenarios would require a cost-benefit analysis. The magnitude of the administrative costs need to be compared to the magnitude of benefits (i.e. gains from a superior incentive structure) (Epstein 2009).

Based on Epstein's framework of simple rules a law may fall under one of the following 4 categories. Please select the category that most accurately represents the nature of the law you are assessing.



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

S.No.	Question	Points
1	Does the law increase administrative costs while aligning the incentive structure?	
Info	If you pick this statement the score will be 0.5	
2	Does the law increase administrative costs while misaligning the incentive structure?	
Info	If you pick this statement the score will be 0	
3	Does the law decrease administrative costs while aligning the incentive structure?	
Info	If you pick this statement the score will be 1	
4	Does the law decrease administrative costs while misaligning the incentive structure?	
Info	If you pick this statement the score will be 0.5	

Tabulation 3:

Points Scored [PS10] : **Available Points [AP10] :**

Percentage scored P3

[Total Points Obtained/Available Points * 100] :



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

TABULATION FOR GRAND TOTAL

Count your total points and divide by total available points. Questions that are not applicable do not count against your score.

Percentage in Representation Safeguards [P1] : _____

Percentage in Rights Safeguards [P2] : _____

Percentage in Resource Safeguards [P3] : _____

Average Percentage $[(P1 + P2 + P3)/3]$: _____

Part 2

Assessing State School Education Laws On Rights Safeguards¹



1. This paper was first published in the Comparative Constitutional Law & Administrative Law Journal of National Law University, Jodhpur



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

INTRODUCTION

The National Education Policy, 2020¹ (NEP) emphasises the need to review and revise the existing regulatory framework for school education in India. The NEP points out that the laws governing education should aim at improving the overall quality of education imparted. While the NEP gives the nudge to reform, states need a clear roadmap on the direction and nature of reform. This requires a systematic review of the gaps in the current regulatory framework. At present, research on the *de jure* regulatory environment for private schools in India is sparse (Centre for Civil Society 2019).

This paper attempts to fill the gap by analysing all laws governing K-12 education² across sixteen states of India using the Quality of Laws (QoL) Toolkit (Narang and Bedi 2021). This includes Andhra Pradesh (six laws), Delhi (two laws), Gujarat (seven laws), Haryana (four laws), Jammu and Kashmir (two laws), Jharkhand (four laws), Karnataka (five laws), Kerala (one law), Madhya Pradesh (three laws), Maharashtra (seven laws), Nagaland (one law), Puducherry (three laws), Rajasthan (three laws), Telangana (six laws), Uttar Pradesh (nine laws), and West Bengal (seven laws). The paper also analyses all the rules under these laws.

The Toolkit assesses laws on three parameters: representation, rights, and resources. *Representation safeguards* ensure that the preferences and interests of stakeholders are reflected in the law. *Rights safeguards* ensure that the principles of natural justice and proportionality are incorporated into the law to protect the rights of individuals. *Resources safeguards* ensure that the impact of the law on stakeholders' incentives is positive, and the administrative burden imposed by it is limited (Narang and Bedi 2021). For analysing state school education laws, the authors have only focused on the '*rights*' safeguards (Rubin 1984).

This paper studies seventy laws that regulate several aspects of school education, such as the establishment of schools, fees charged, admission process, teacher training and salaries, medium of instruction, the establishment of school boards and tribunals, disbursement of grants, and transfer/takeover of management. These require bureaucrats to take administrative decisions that have a bearing not only on the rights and liberties of individuals but also the ease with which schools can be established and operated. For instance, under state school education laws, the government has the authority to derecognise or shut schools. This has a bearing on children's right to education and affects the livelihood of school owners, along with their teaching and non-teaching staff. Although there are procedures in place to shift students to nearby schools, such closures impinge on their freedom and choice.

1. Ministry of Human Resource and Development, National Education Policy (2020).

2. K-12 refers to the school education system (including primary and secondary education).



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

In the following sections, the authors provide an overview of the quality of school education laws in sixteen states and highlight the best and worst practices. Our analysis can be used to draw insights into the regulatory hurdles that make it difficult for school owners to operate and could come in the way of providing quality education. Ultimately, insights from this paper could help guide deliberations on reforming the existing regulatory architecture for school education.

METHODOLOGY

Since the early twentieth century, the role of the administrative state has expanded considerably. The executive now exercises a wide range of adjudicative and legislative powers. In education, the government exercises discretionary powers at several touchpoints. Some of the adjudicative functions performed by the government include decisions on granting recognition to schools and approving their fee structures. Along with this, the state legislatures have also granted the government quasi-legislative powers. These include drafting rules that specify the manner of conducting school inspections, minimum qualifications of teaching and non-teaching staff, and conditions for recognition of schools, among others. In the following sections, the authors elaborate on how a wide range of these adjudicative and legislative powers are discretionary.

As the field of discretion expands, so does the room for arbitrary conduct (Frankfurter 1927). Given that these powers have a bearing on the rights and obligations of people, they must be constrained by the same traditional procedural restrictions that are applicable to judicial decisions (Rubin 1984). These procedural restrictions include due process and the principles of natural justice.

A law must ensure that it protects the rights of all individuals to fare well on the 'rights' safeguards of the QoL Toolkit in the following four ways:

- (i) provides clear and sufficient guidance for bureaucratic decision making (Mantel 2009);
- (ii) encodes due process and principles of natural justice by mandating pre-decisional hearing (Byse 1952), reasoned order (Chauhan 1995), and recourse to appeal for all decisions that have a bearing on an individual's life, liberty or property (Halsbury's Laws of India 2019);
- (iii) introduces provisions that are proportional to its objective and the problem it intends to tackle (Mathews 2017);
- (iv) sets clear contours for the executive's rule-making powers (including subject matter and timelines) and maintains strict control over it (Singh and Dash 2017).



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

A law that lacks these basic safeguards leaves room for abuse of powers by the executive and fails to protect individual liberties (Rubin 1984).

Administrative safeguards act to protect against “*individualised oppression by the government*” and impose absolute limits on the government’s scope of powers (Rubin 1984). In this paper, the authors review how state school education laws fare on four integral administrative safeguards: due process and principles of natural justice, legislative guidance on discretion, proportionality and nexus, and checks on the executive’s rule-making powers. We will briefly discuss these four safeguards in this section.

A. Due Process and Principles of Natural Justice

Any government action which deprives an individual of their life, liberty, or property must follow due process and the principles of natural justice. At the minimum, this includes: getting an advance (and adequate) notice of such government action, an order detailing the reasons for undertaking the particular action, and a reasonable opportunity to be heard before such a deprivation (Minattur 1978; Chauhan 1995). These principles are derived from common law and precede the Indian Constitution (Deshpande 1978).

Once the decision is taken, an individual should have recourse to appeal against the decision or get it reviewed by another authority (Halsbury’s Laws of India 2019). Central to this appeal process is its independence. One of the key principles of natural justice is “*nemo iudex in causa sua*”, which literally translates as “*no one must be a judge in their own case*” (Minattur 1978). This ensures that bias and conflict do not creep into the decision-making process.

Another important procedural safeguard is a check against inaction by bureaucrats since delay in decision making may adversely impact individual rights. A study by the Centre for Civil Society reveals that for some schools, the application to obtain a Certificate of Recognition³ remained under review for over five years (Centre for Civil Society 2019). One way in which laws check against such delays is by prescribing an upper time limit or deadline within which the executive must make a decision. For instance, under the Haryana Education Rules, 2003 (Rule 29), the “*appropriate authority*” is required to decide on a school owner’s application seeking permission to establish within ninety days⁴. In case the authority fails to do so, the establishment of the school will be “*deemed to have been permitted*”. Without such deadlines, it becomes difficult for the judiciary to hold the government accountable for inaction or slow action (Gersen and Connell 2008).

3. Schools in most states require this certificate to operate legally.

4. Haryana School Education Rules, 2003, Gazette of Haryana, § 24 (Apr. 30, 2003).



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

Another safeguard that enhances procedural efficiency includes clear identification of the decision-making authority (Anand et al 2019). A law must encode all these principles and make it binding for the executive. Without such an express mandate, the executive may bypass, overlook, or compromise on them while undertaking its functions.

B. Legislative Guidance on Discretion

Given that performing quasi-judicial functions does not fall within the realm of the executive's competence, discretion must be guided (Mantel 2009). The rule of law requires discretionary powers to be guided by certain guidelines. Without guiding norms, *"it may be difficult to assess whether a particular administrative decision is bona fide and based on merits and proper considerations or is mala fide and motivated by some improper and corrupt consideration"* (Halsbury's Laws of India 2019). This implies that clearly defined guidance provides the necessary basis to bring action into question and thereby helps ensure better accountability on the part of the public officials. Unguided discretion opens room for corruption, arbitrariness, and misuse of powers.

One way to curb abuse of power is to ensure that the criteria on the basis of which the executive takes decisions are laid down in the law itself (Anand et al 2019). Clear mention of the criteria in a statute helps introduce predictability (Mantel 2009; Stack 2015).. For instance, laws must clearly enlist the criteria based on which the executive should grant approvals or impose a penalty. A school owner must know the criteria they have to meet to get recognised. Similarly, a law that elaborates on the criteria for breach increases the school's awareness of actions that could result in a penalty or sanction. The key challenge lies in developing guidance that is *"sufficient"* to curb abuse of power while also providing flexibility to the executive to administer the law efficiently (Sigler, 1934).

C. Proportionality and Nexus

The third way to establish a check on the executive's exercise of powers and protect the rights, property, and freedom of individuals is to use the test of proportionality and nexus. Principles of proportionality help ensure that there is the link between an intervention and the intended outcome. The majority of the school education laws across states aim to better organise and develop school education.⁵ The purpose of the proportionality test is to ensure that *"when the government acts, the means it chooses should be well adapted to achieve the ends it is pursuing"* (Mathews 2017). As a result, in order to pass the test of proportionality,

5. As stated in the preamble of laws such as The Haryana School Education Act, 1995 and the Delhi School Education Act, 1973.



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

these laws must choose a method that aligns with the aforementioned policy objective and is the least restrictive way to achieve it (Barak 2012).

The proportionality test has four elements: (i) legitimacy; (ii) suitability; (iii) necessity; and (iv) proportionality *stricto sensu* (Mathews 2017). It helps in two ways: *first*, to ascertain if the objective aligns with what is needed to tackle the problem identified, and *second*, to check if the measures used by the law (such as penalties sanctioned) align with the stated objective of the law (European Commission 2017). In the section above, we highlighted the need for laws to mention the criteria on the basis of which the executive must decide. However, to pass the test of proportionality, the criteria set must also be reasonable. In other words, the criteria set must be neither arbitrary nor excessive (Chandra 2020).

Arbitrary conditions are the ones that have no nexus or connection with the purpose of the legislation or statute. Each law, through its preamble, must make its objective clear and highlight the issue it intends to tackle. This is a necessary precondition to ascertain whether the measures introduced by the law are arbitrary or not. Excessive conditions are the ones that go overboard. Measures are deemed to be excessive if there exists a less restrictive alternative that could achieve the same intended result. The least restrictive method is the one that puts the least restrictions on the freedoms of an individual. For instance, the penalties imposed by law must not be disproportionate to the misconduct or violation (Craig 2013).⁶

D. Checks on Executive's Rule-Making Powers

Apart from taking decisions on a case-by-case basis, the executive is also responsible for putting in place general rules applicable to all. Implementing a law requires technical and localised knowledge. As a result, the parent legislation only outlines the broad principles and often leaves matters of administrative details to be elaborated upon by the executive based on the ground realities. This helps the executive to be more responsive to changes (Carr 1941).

However, since rules are not made by elected representatives or subject to close scrutiny, the legislature must ensure that these rules are not in contravention to the interests of the people and the key stakeholders. Safeguards in the parent legislation helps ensure that the quasi-legislative powers are not used indiscriminately (King 2020; Byrne 1976). The parent legislation can establish this check on the extent and volume of the subordinate legislation in multiple ways.

6. Arbitrariness and excessiveness are used to judge whether an administrative action is reasonable; In this paper, we use the lens of reasonableness to evaluate the provisions introduced under state school education laws.



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

First, the parent legislation must closely guide the subject matter on which the executive can frame rules to limit the scope of their powers.⁷ *Second*, the legislation should provide a time frame within which these rules must be framed (Singh and Dash 2017). This becomes especially salient when most provisions of the law can be realised only once the rules notify the details. *Third*, to ensure that the rules are in line with the statute and that the executive does not overreach its powers, the law must prescribe that the rules made under it be laid before the Parliament for approval (Driedger 1960). In some cases, laws also mandate the executive to consult the relevant stakeholders before notifying a rule.⁸ If the delegation of quasi-legislative power is not guided by procedural safeguards, it may be deemed as “*excessive delegation*” (Halsbury’s Laws of India 2019). Similarly, the executive must exercise its powers within the framework set by the parent statute. For instance, the executive must not sub-delegate its powers unless it has an express authority to do so.

HOW DO STATE EDUCATION LAWS FARE ON THE ADMINISTRATIVE SAFEGUARDS?

State school education laws govern several aspects of a school’s lifecycle, such as entry/ establishment, regulation of fees, operation in line with set norms, upgradation, and exit. Given that these powers are exercised by the executive (unelected officials), the laws must limit their scope to avoid abuse. The executive ought to operate within a constrained framework and only perform actions for which it has express legal authorisation. Unrestrained powers can impinge on the rights of individuals. In the case of school education, it could create hurdles for new entrants as well as existing school owners. The majority of the seventy laws analysed confer upon the executive either licensing or penal powers.

For the purpose of analysis, the authors further categorise quasi-judicial powers as either related to approval or enforcement. An approval function is defined as one where officials are required to use reason and ascertain facts to determine whether approval is to be granted or not. Our analysis shows that in the majority of the cases, these approval functions pertain to recognition of schools. Other approval functions include grant/funding approvals for aided schools, granting building permits, and approval for the upgradation of schools.

7. Gwalior Rayon Silk Mfg. (Wvg) Co. Ltd. v. Asstt. Commissioners of Sales Tax, AIR 1974 SC 1660 (India). The Supreme Court held that delegation of rule-making powers would be excessive if: it does not lay down any policy; expresses its policy in “vague and general terms”; and lays no guidance for the executive.

8. For instance, the National Food Security Act 2013 mandates the draft of all rules to be placed in the public domain before enactment. In compliance with this provision, the Tamil Nadu food security rules, 2017 were placed in the public domain before being enacted.



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

Enforcement functions are defined as ones where the executive penalises individuals for non-compliance or violation of the provisions of the law. These include actions such as revocation of licences or any other approval granted, derecognition, seizure of property, imposition of a monetary penalty, and imprisonment.

A. Procedural Safeguards

Issuance of Notice or a Pre-Decisional Hearing

Of the forty laws that give powers to the executive to grant approval, only Karnataka Education Act, 1983 mandates the issuance of a notice or a pre-decisional hearing before an application is rejected.⁹ But even in this case, an opportunity to be heard is not provided for all kinds of approval functions.

In cases where an individual is punished with a penalty or sanction, a pre-decisional hearing and notice become even more pertinent to ensure that no individual is wrongfully penalised. However, thirty one laws fail to mandate either a notice or a hearing before such enforcement measures are undertaken.¹⁰

Identification of Decision-Making Authority and Time Limit

In eight laws, there is no clarity on who is the concerned authority for approvals.¹¹ Of the fifty three laws that give enforcement powers to the executive, in twenty nine laws, there is no clarity on the official who is responsible for ensuring enforcement. These laws either do not mention the authority or direct the state government to identify and appoint the

9. See Karnataka Education Act, 1983, § 96, No. 1, Acts of Karnataka State Legislature, 1995.

10. See Karnataka Prohibition Of Admission Of Students To Unrecognized And Unaffiliated Educational Institutions Act, 1992, No. 7, Acts of Karnataka State Legislature, 1993; Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983, No. 5, Acts of Andhra Pradesh State Legislature, 1983 and Delhi School Education Act, 1973, No. 18, Acts of Delhi Legislature, 1973.

11. See Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1983; Maharashtra Self-Financed Schools (Establishment and Regulation) Act, 2012 No. 1, Acts of Maharashtra State Legislature, 2013; and Puducherry School Education Act, 1987, No. 9, Acts of Puducherry Legislature, 1987.



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

concerned authority.¹² Once identified, the state government needs to notify the details of the authority either by way of rules or an order. This information is often scattered and can be difficult to collect.

Only six laws set an upper time limit or deadline for all approval functions.¹³ In Haryana, the law also puts in place a provision for deemed approval.¹⁴

Reasoned Order

Once the executive decides to reject an application, the applicant must at least know the ground for rejection.¹⁵ However, most laws either require the executive to communicate the decision in writing (not necessarily with reasons) or communicate the reasons to the concerned school (not necessarily as a written order). The Karnataka Education Act, 1983 mandates the executive to do both in case an application for approval is denied.¹⁶ For enforcement functions, only three laws mandate the executive to provide a reasoned order when imposing a penalty or sanction.¹⁷ Even in the case of these laws, the mandate for a reasoned order is not imposed for all kinds of enforcement functions.

Recourse to Appeal

Finally, even after the decision has been taken, an individual or entity must have recourse (in the form of appeal) to get the decision reviewed.¹⁸ Only seventeen laws allow for

12. See Karnataka Prohibition Of Admission Of Students to Unrecognized And Unaffiliated Educational Institutions Act, 1992, No. 7, Acts of Karnataka State Legislature, 1993; Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984, No. 37, Acts of Karnataka State Legislature, 1984; and Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983, No. 5, Acts of Andhra Pradesh State Legislature, 1983.

13. See Haryana School Education Act, 1995, No. 12, Acts of Haryana State Legislature, 1999; Rajasthan Non-Government Educational Institutions Act, 1989, No. 19, Acts of Rajasthan State Legislature, 1992; Jharkhand Education Tribunal Act, 2005, No. 6, Acts of Jharkhand State Legislature, 2005; and The Gujarat Educational Institutions (Regulation) Act, 1984, No. 7, Acts of Gujarat State Legislature, 1984.

14. See Haryana School Education Act, 1995, No. 12, Acts of Haryana State Legislature, 1999.

15. Chauhan, *supra* note 14 at 92–104.

16. Karnataka Education Act, 1983, §§ 31 & 36, No. 1, Acts of Karnataka State Legislature, 1995.

17. See Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1983; Karnataka Education Act, 1983, No. 1, Acts of Karnataka State Legislature, 1995; and Telangana Education Act, 1982 No. 1, Acts of Telangana State Legislature, 1982.

18. 1 Halsbury's Laws of India, Administrative Law (Universal LexisNexis 2d ed. 2019).



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

appeal against all approval related decisions of the government,¹⁹ and twelve laws allow an individual to appeal against all kinds of enforcement actions or measures.²⁰ In fact, under laws such as the Karnataka Education Act, 1983²¹ and the Maharashtra Educational Institutions (Management) Act, 1976,²² appeals against some decisions of the Director of Education and the state government are explicitly denied.

Independent Appeal Mechanism

For laws that provide an appeal mechanism, the authors have looked into the constitution of the appellate committee to ascertain if the process is independent. Some states like Gujarat, Jharkhand, Karnataka, and Puducherry establish an independent appeal mechanism by setting up independent tribunals.²³ For instance, the Karnataka Education Act, 1983, requires the state government to constitute Education Appellate Tribunals for adjudicating appeals.²⁴ These tribunals must have a judicial officer who is not below the rank of a district judge. In other cases, appeals against an officer in the education department are heard by a senior officer in the same department.

19. See Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1983; Haryana School Education Act, 1995, No. 12, Acts of Haryana State Legislature, 1999; M.P. Ashaskiya School Viniyaman Adhiniyam, 1975, No. 33, Acts of Madhya Pradesh State Legislature, 1975; and Puducherry School Education Act, 1987, No. 9, Acts of Puducherry Legislature, 1987.

20. Instances include: Gujarat Higher Secondary Schools Services Tribunal Act, 1983, No. 12, Acts of Gujarat State Legislature, 1983; The Gujarat Educational Institutions (Regulation) Act, 1984, No. 7, Acts of Gujarat State Legislature, 1984; Puducherry School Education Act, 1987, No. 9, Acts of Puducherry Legislature, 1987; Rajasthan Non-Government Educational Institutions Act, 1989, No. 19, Acts of Rajasthan State Legislature, 1992; Rajasthan Schools (Regulation of Fee) Act, 2016, No. 14, Acts of Rajasthan State Legislature, 2016; and Telangana Education Act, 1982, No. 1, Acts of Telangana State Legislature, 1982.

21. The Karnataka Education Act, 1983, No. 1, Acts of Karnataka State Legislature, 1995.

22. The Maharashtra Educational Institutions (Management) Act, 1976, No. 13, Acts of Maharashtra State Legislature, 1976.

23. See Gujarat Higher Secondary Schools Services Tribunal Act, 1983, No. 12, Acts of Gujarat State Legislature, 1983; Gujarat Educational Institutions Services Tribunal Act, 2006, No. 20, Acts of Gujarat State Legislature, 2006; Jharkhand Education Tribunal Act, 2005, No. 6, Acts of Jharkhand State Legislature, 2005 and Puducherry School Education Act, 1987, No. 9, Acts of Puducherry Legislature, 1987.

24. The Karnataka Education Act, 1983, § 96, No. 1, Acts of Karnataka State Legislature, 1995.



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

B. Guidance on Executive Discretion

No Criteria for Approval or Breach

Of the forty laws that confer upon the executive the authority to grant approvals, only ten laws define the criteria on the basis of which all such approvals may be granted.²⁵ In twenty laws, the power to define the criteria has been delegated to the executive. Such delegation may give the executive room to introduce conditions that are not consistent²⁶ with the parent legislation or are *ultra-vires*.

For instance, several state rules under the Right to Education Act require schools to be registered as “societies” that are not-for-profit (Singh and Sudhakar 2020). Such a requirement finds no mention in the parent legislation and has considerable ramifications for school owners. It disallows individuals, a group of individuals, or companies registered under the Companies Act, 2013 from setting up schools (Singh and Sudhakar 2020).

Of the laws studied, only twenty three laws lay down the criteria for the imposition of penalties or sanctions. Of these, some laws prescribe very wide criteria for what constitutes a breach. For instance, under the Jammu and Kashmir School Education Act, 2002, the executive can derecognise any school if it is of the opinion that the school has violated provisions of the Act.²⁷ In twenty laws, this power is delegated to the executive. For instance, the Madhya Pradesh Secondary Education Act, 1965 prescribes the board to lay down the criteria for the derecognition of schools.²⁸

Ambiguous, Vague and Unclear Criteria

Although twenty three laws mention the criteria for breach or violation, it is often vague, ambiguous, and unclear. This expands the scope of powers that the executive can exercise. In Andhra Pradesh, recognition can be withdrawn in “*public interest*”. However, it is not clear

25. See Jharkhand Education Tribunal Act, 2005, No. 6, Acts of Jharkhand State Legislature, 2005; Gujarat Self-financed Schools (Regulation of Fees) Act, 2017, No. 12, Acts of Gujarat State Legislature, 2017.

26. See Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982; Bihar High Schools (Control and Regulation Administration) Act, 1960, No. 13, Acts of Bihar State Legislature, 1960 and Puducherry School Education Act, 1987, No. 9, Acts of Puducherry State Legislature, 1987.

27. Jammu & Kashmir School Education Act, 2002, § 16, No. 21, Acts of Jammu & Kashmir State Legislature, 2002.

28. Madhya Pradesh Secondary Education Act, 1965, No. 3, Acts of Madhya Pradesh State Legislature, 1966.



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

what constitutes “public interest”.²⁹ Under other laws, such as the Maharashtra Educational Institutions (Transfer of Management) Act, 1971, ambiguous terms are used in the objective itself:³⁰

“An Act to provide for the transfer of management of the undertaking of certain educational institutions, which are being managed in a manner detrimental to the public interest and to provide for matters connected with the purpose aforesaid”.

The term “detrimental to public interest” is broad and all-encompassing. The Act does not define what actions would be considered detrimental to public interest. Similarly, under the Maharashtra Self-Financed Schools (Establishment and Regulation) Act, 2012, permission for upgradation can be withdrawn if the school is found to be engaging in activities that are “prejudicial [to] the interests of the students”.³¹ The issue with such overarching phraseology is that almost any action on the part of the school can be misconstrued to be prejudicial to the interests of the students.

Expanding the Executive’s Scope of Powers

Some laws expand the sphere of powers that the executive can exercise. However, they fail to provide sufficient guidance to the executive for exercising these powers. For instance, the Telangana Education Act, 1982 grants power to the executive to exempt any school from the provisions of the law.³² This could potentially open room for favouritism.

29. The Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982.

30. The Maharashtra Educational Institutions (Transfer of Management) Act, 1971, No. 49, Acts of Maharashtra State Legislature, 1971.

31. Maharashtra Self-Financed Schools (Establishment and Regulation) Act, 2012, No. 1, Acts of Maharashtra State Legislature, 2013.

32. Telangana Education Act, 1982, § 100, No. 1, Acts of Telangana State Legislature, 1982.



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

C. Principles of Proportionality and Nexus

Unclear Objective of the Law

Twenty three laws do not mention the issue that they intend to tackle in their objective.

³³Furthermore, eighteen laws use ambiguous and unclear terms in their objectives, such as “*integrated development*” of children, “*better organisation*” and “*National integration*”.³⁴ In such cases, an assessment of whether the law is meeting its objectives or not becomes difficult.

Arbitrary and Excessive Conditions/Provisions

Four laws introduce conditions that are either arbitrary or excessive.³⁵ The Andhra Pradesh Education Act, 1982 aims to “*reform, organise and develop*” the education system and ensure the “*integrated development*” of children.³⁶ This objective does not clarify the specific challenge that warrants the attention of the government. One of the conditions that it introduces for those who wish to establish a school is to prove the “*need*” for such a school in the first place.³⁷ It is not clear how this condition has any nexus with the objective of the statute.

A criterion that is excessive creates an unnecessary compliance burden for school owners to meet their objectives. For instance, the Karnataka Education Act, 1983 aims to improve the quality of education and ensure “*harmonious development of the mental and physical faculties of students*”.³⁸ To meet this end, one of its provisions prohibits employees of a recognised school from giving private tuition to *any* individual.³⁹ While many argue that private tuition

33. See for instance, Gujarat Educational Institutions (Regulation) Act, 1984, No. 7, Acts of Gujarat State Legislature, 1984; Haryana School Teachers Selection Board Act, 2011, No. 21, Acts of Haryana State Legislature, 2011; and Telangana Private Educational Institutions Grant-In-Aid (Regulation) Act, 1988, No. 22, Acts of Telangana State Legislature, 1988.

34. See Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982; Delhi School Education Act, 1973, No. 18, Acts of Delhi Legislature, 1973; and the U.P. Educational Institutions (Taking-Over of Management) Act, 1976, No. 18, Acts of Uttar Pradesh State Legislature, 1976.

35. See Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982; Karnataka Education Act, 1983, Acts of Karnataka State Legislature, 1995; Telangana Education Act, 1982, No. 1, Acts of Telangana State Legislature, 1982; and Maharashtra Educational Institutions (Management) Act, 1976, No. 13, Acts of Maharashtra State Legislature, 1976.

36. The Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982.

37. The Andhra Pradesh Education Act, 1982, § 20(3), No. 1, Acts of Andhra Pradesh State Legislature, 1982.

38. Preamble of the Karnataka Education Act, 1983, No. 1, Acts of Karnataka State Legislature, 1995.

39. Karnataka Education Act, 1983, § 4, No. 1, Acts of State Karnataka Legislature, 1995.



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

to some students of the school can compromise the performance of other students, it is not clear why private tuition to students outside the school is prohibited (Dang and Rogers 2008). This criterion for breach is excessive and prevents an individual from having an alternative source of livelihood.

In other cases, the penalty sanctioned exceeds what the violation may merit. The Madhya Pradesh Ashaskiya School Viniyaman Adhiniyam, 1975 mentions that the breach of “*any rule*” formulated under this Act could attract an imprisonment of up to six months.⁴⁰ Under the Andhra Pradesh Education Act, 1982 the government can take over the management of a school if it is of the opinion that such a takeover is in “*public interest*” and will help ensure “*proper management*” of the school.⁴¹ Furthermore, if the government deems any contract that the erstwhile management engaged in to be “*bad faith*” or “*detrimental to the interests of the educational institution*”, these contracts can be varied or even cancelled.⁴²

The Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983 prohibits capitation fees, regulates school fees, regulates the admission of students, and lays down norms for the collection of donations.⁴³ If, according to the government, an educational institution is found to violate *any* provisions of the Act, it can take over the management of the school. Another section of the Act prescribes imprisonment (that can go up to a term of seven years) for contravention of the provisions of the Act.⁴⁴ However, the provision to punish those in violation with jail time serves no additional purpose that mere removal of the guilty parties would not do.

Some rules also elaborate on enforcement measures to be taken for students (not just school owners). For instance, under the Delhi School Education Rules, 1973 a student below fourteen years of age can be shifted by an administrator to a “*special school*”, if (among other things) they do not spit in a spittoon.⁴⁵ Shifting schools for not meeting these disciplinary requirements is an excessive measure.

40. The Madhya Pradesh Ashaskiya School Viniyaman Adhiniyam, 1975, § 21(e), No. 33, Acts of Madhya Pradesh State Legislature, 1975.

41. The Andhra Pradesh Education Act, 1982, § 60, No. 1, Acts of Andhra Pradesh State Legislature, 1982.

42. The Andhra Pradesh Education Act, 1982, § 62, No. 1, Acts of Andhra Pradesh State Legislature, 1982.

43. Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983, No. 5, Acts of Andhra Pradesh State Legislature, 1983.

44. Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983, § 9, No. 5, Acts of Andhra Pradesh State Legislature, 1983.

45. The Delhi School Education Rules 1973, R. 36, Gazette of Delhi, pt. IV (Dec. 12, 1973).



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

Archaic and Outdated Provisions

Many state school education laws were introduced before the year 2000. While, in most cases, the provisions of these laws have been revisited and revised in the form of amendments, some laws continue to have archaic and outdated provisions. For instance, under the Karnataka Education Act 1983, penalties for contravention range from Rs. 2 to Rs. 100.⁴⁶

D. Checks on the Executive's Rule-Making Powers

Limiting the Breadth and Depth of the Executive's Rule-Making Powers

Of the seventy laws studied, sixty two laws delegate rule-making powers to the executive. However, only 31 laws enumerate distinct rule heads that the executive can cover in the rules. Other laws leave the subject matter open to the executive.⁴⁷

Of the laws that enumerate rule heads, 26 laws also contain a “*residual clause*”.⁴⁸ This clause gives the executive the powers to make rules on “*any other matter*” they may deem necessary. Our analysis reveals that eleven rules have introduced provisions that fall under the residual clause. For instance, Rules 34-37 of the Delhi School Education Rules, 1973 mandate an enforceable code of conduct for students in educational institutions.⁴⁹ This does not fall under any of the rule-heads of the Delhi School Education Act, 1973 (except the residual clause).⁵⁰

Apart from limits in the range, there must also be limits in the depth of rule-making powers exercised by the executive (King 2020; Byrne 1976). Rules must largely cover administrative details rather than questions of substantive rights and duties of individuals. However, we

46. The Karnataka Education Act, 1983, § 113, No. 1, Acts of Karnataka State Legislature, 1995.

47. See, for instance, the Gujarat Educational Institutions Services Tribunal Act, 2006, No. 20, Acts of Gujarat State Legislature, 2006; Bihar Non-Government Elementary Schools (Taking Over of Control) Act, 1976, No. 30, Acts of Bihar State Legislature, 1976; Maharashtra Educational Institutions (Regulation of Fee) Act, 2011, No. 7, Acts of Maharashtra State Legislature, 2011; and Puducherry Compulsory Elementary Education Act, 2000, No. 8, Acts of Puducherry Legislature, 2001.

48. See, for instance, Andhra Pradesh Education Act, 1982, Acts of Andhra Pradesh State Legislature, 1982; Delhi Primary Education Act, 1960, No. 39, Acts of Delhi Legislature, 1960; Gujarat Secondary and Higher Secondary Education Act, 1972, No. 18, Acts of Gujarat State Legislature, 1972; and Haryana School Education Act, 1995, No. 12, Acts of Haryana State Legislature, 1999.

49. The Delhi School Education Rules, 1973, Gazette of Delhi, pt. IV (Dec. 12, 1973).

50. The Delhi School Education Act, 1973, No. 18, Acts of Delhi Legislature, 1973.



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

noted in the sections above that the parent legislation often delegates the power to frame criteria for approval or breach to the executive. For instance, Section 43 of the Rajasthan Non-Government Educational Institutions Act, 1989 requires the state government to prescribe the terms, conditions, and standards on the basis of which educational institutions will be recognised.⁵¹

Laying Before the Parliament and Consulting Relevant Stakeholders

Of the sixty two laws that delegate rule-making powers, twenty laws do not put in place any mandate for rules to be laid before the Parliament.⁵² Of the sixty two laws that delegate rule-making powers, no law directs the executive to consult stakeholders while drafting rules.⁵³

Other Challenges with the Delegation of Rule-Making Powers

The authors observed three other issues in the delegation of rule-making powers. *First*, laws in Delhi and Gujarat allow the designated authority or official to sub-delegate their rule-making powers.⁵⁴ Such sub-delegation could make control over subordinate legislation more difficult. *Second*, five laws (across Andhra Pradesh, Jharkhand, Maharashtra, and Karnataka) allow the executive to give retrospective effect to rules.⁵⁵ Allowing retrospective enactment of rules increases uncertainty and unpredictability (Sampford 2012). In the case of school

51. The Rajasthan Non-Government Educational Institutions Act, 1989, § 43, No. 19, Acts of Rajasthan State Legislature, 1992.

52. See, for instance, Jharkhand Academic Council Act, 2002, No. 2, Acts of Jharkhand State Legislature, 2003; Gujarat Secondary and Higher Secondary Education Act, 1972, No. 18, Acts of Gujarat State Legislature, 1972 and Puducherry Board of Secondary and Higher Secondary Education Act, 2003, No. 8, Acts of Puducherry Legislature, 2004.

53. See, Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982; Delhi School Education Act, 1973, No. 18, Acts of Delhi Legislature, 1973; Haryana School Education Act, 1995, No. 12, Acts of Haryana State Legislature, 1999; and Kerala Education Act, 1958, No. 6, Acts of Kerala State Legislature, 1959.

54. See, Delhi Primary Education Act, 1960, No. 39, Acts of Delhi Legislature, 1960; and Gujarat Compulsory Primary Education Act, 1961, No. 41, Acts of Gujarat State Legislature, 1961.

55. See, Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982; Jharkhand Education Tribunal Act, 2005, No. 6, Acts of Jharkhand State Legislature, 2005; Karnataka Education Act, 1983, No. 1, Acts of Karnataka State Legislature, 1995; Karnataka Compulsory Primary Education Act, 1961, No. 9, Acts of Karnataka State Legislature, 1961 and Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, No. 3, Acts of Karnataka State Legislature, 1978.



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

education, this has a bearing on the decisions that school owners take to improve quality and expand access to education.

Third, twenty six laws give the executive the “*power to remove difficulties*”.⁵⁶ This provision, also known as the Henry clause, allows the executive to modify or alter the law itself in case challenges emerge during implementation (Deshpande 1973). Since such changes typically do not go through the legislative process, this power must be subject to certain restrictions. These include limits to the nature of amendments that may be made and limits to the time frame within which such amendments may be made.⁵⁷ The former takes the form of guidance that the amendments must not be “*inconsistent with the Act*”. The latter typically involves setting a time frame beyond which the executive ceases to have powers to amend the law. Of the laws that grant this power to the executive, eleven laws fail to set both limits to the executive’s exercise of this power.⁵⁸ The Karnataka Secondary Education Examination Board Act, 1966 and Telangana Private Aided Educational Institutions Employees (Regulation of Pay) Act, 2005 are the only two laws that require such orders to be laid before the Parliament after it is published.⁵⁹

Along with reviewing the parent legislations, we also studied sixty one rules governing K-12 education to review how the executive exercises its power under the parent statute.

No Clarity on where Rules Derive their Power From

The government is required to mention the section and subsection of the parent act from which they derive their powers in the preamble of the rules. However, four rules (across Gujarat, Madhya Pradesh, Rajasthan and Uttar Pradesh) do not mention the section or

56. See, for instance, Andhra Pradesh Education Act, 1982, No. 1, Acts of Andhra Pradesh State Legislature, 1982; Delhi School Education Act, 1973, and Kerala Education Act, 1958.

57. Id.

58. For instance, see Gujarat Secondary and Higher Secondary Education Act, 1972, No. 18, Acts of Gujarat State Legislature, 1972; Madhya Pradesh Secondary Education Act, 1965, No. 3, Acts of Madhya Pradesh State Legislature, 1966; Bihar Non-Government Elementary Schools (Taking Over of Control) Act, 1976, No. 30, Acts of Bihar State Legislature, 1976 and Telangana Education Act, 1982, No. 1, Acts of Telangana State Legislature, 1982.

59. See Karnataka Secondary Education Examination Board Act, 1966, No. 16, Acts of Karnataka State Legislature, 1966 and Telangana Private Aided Educational Institutions Employees (Regulation of Pay) Act, 2005, No. 37, Acts of Telangana State Legislature, 2005.



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

subsection of the parent act from which they derive their power.⁶⁰ Without a clear mention of the relevant provisions of the parent act, it becomes difficult to adjudge whether rules are *ultra vires*.

Rules Go Beyond the Mandate of the Act

Even in cases where the relevant sections and subsections have been mentioned, we observed that provisions introduced under three rules (across Andhra Pradesh, Delhi, and Goa) go beyond the rule heads mentioned in the parent act.⁶¹ For instance, the Delhi School Education Rules, 1973 requires schools to ensure that they do not affect enrolment levels in nearby schools if they are to obtain recognition.⁶² Such a condition finds no mention in the parent act. One example of best practices is the Haryana School Education Rules, 2003. For each rule, the subordinate legislation has a header that refers to the section of the parent legislation under which it has been drafted (or from which it derives its powers).⁶³

Rules Introduce Criteria that are Arbitrary

Three rules introduce criteria for decision-making that are inconsistent with the provisions of the parent act.⁶⁴ Rules under the Madhya Pradesh Secondary Education Act, 1965 require schools to have at least one acre of land to be recognised. It also requires schools to deposit a security fund on the basis of the number of students (rather than a standard deposit amount).⁶⁵ The deposit becomes a costly affair for schools that have a high number of

60. See Assistant Education Inspector and Assistant Teacher, Class III (Departmental Examination) Rules, 2012, Gazette of India (Dec. 21, 2012); The Rajasthan Education Department (Primary and Secondary Teachers) Benevolent Fund Rules, 1975, Gazette of Rajasthan, pt. IV(I) (Feb. 10, 1975); Rules of the U.P. School and College Teachers Gratuity Fund (1964), Gazette of Uttar Pradesh, pt. VIII (Apr. 1, 1964) and The M.P. Date of Birth (Entries in the School Register) Rules, 1973, Gazette of Madhya Pradesh, pt. IV (Nov. 16, 1973).

61. See Andhra Pradesh Educational Institutions (Establishment, Recognition, Administration and Control of Institutions of Higher Education) Rules, 1987, Gazette of Andhra Pradesh, pt. I (Jan. 1, 1994); Delhi School Education Rules, 1973, Gazette of Delhi, pt. IV (Dec. 12, 1973); and Goa, Daman and Diu School Education Rules, 1986, Gazette of Goa and Daman and Diu, § 29 (Dec. 22, 1988).

62. Delhi School Education Rules, 1973, R. 50, Gazette of Delhi, pt. IV (Dec. 12, 1973).

63. Haryana School Education Rules, 2003, R. 24, Gazette of Haryana (Apr. 30, 2003).

64. See Andhra Pradesh Educational Institutions (Establishment, Recognition, Administration and Control of Schools under Private Managements) Rules, 1993; Delhi School Education Rules, 1973; and Madhya Pradesh Recognition of Secondary and Higher Secondary School Rules, Secondary School Rules, 2017.

65. Madhya Pradesh Recognition of Secondary and Higher Secondary School Rules, 2017, R. 5, Gazette of Madhya Pradesh (Mar. 09, 2017).



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

students. Furthermore, this amount is over and above the recognition fees that the school needs to pay. Such criteria have not been mentioned in the parent statute. There is no clarity on how these criteria relate to the objective of the Act.

Similarly, Rule 50 of the Delhi School Education Rules, 1973⁶⁶ requires a private school to be run by a society registered under the Societies Registration Act, 1860 or a Trust.⁶⁷ The parent act does not introduce any such condition. Another example is that of the Andhra Pradesh Educational Institutions (Establishment, Recognition, Administration and Control of Schools under Private Managements) Rules, 1993. The rules create a limitation that finds no mention in the parent legislation. It allows schools to be upgraded to class ten only after three years have passed since the commencement of class eight.

WHAT DO WE FIND ACROSS STATES?

This paper reviewed the quality of the laws and rules governing K-12 education across sixteen states. We found that several school education laws and rules fare poorly on the four integral administrative safeguards: due process and principles of natural justice, legislative guidance on discretion, proportionality and nexus, and checks on the executive's rule-making powers. The absence of these safeguards provides the executive with considerable discretionary powers to derecognise or shut schools, regulate their fees, and take over their management. Such regulatory hurdles may discourage the establishment of new schools, limit innovation, and affect access to quality education. Together this can impinge on the rights and liberties of children, school owners, and the employees working in schools.

On the one hand laws continue to grant tremendous discretionary powers to the executive in the regulation of schools, on the other hand they fail to provide procedural safeguards which guide or limit this discretion. Furthermore, some laws have also introduced provisions that are excessive or arbitrary in nature.

Wide discretionary powers often run the risk of abuse in the form of rent-seeking and corruption. Past analyses show the numerous ways in which the departments of school education commit excesses while exercising its discretionary powers (Centre for Civil Society 2019). Given that the executive draws its powers from the legislations studied, it is imperative that education laws encode the safeguards highlighted in this paper.

66. The Delhi School Education Rules, 1973, R. 50, Gazette of Delhi, pt. IV (Dec. 12, 1973).

67. Societies Registration Act, 1860, No. 21, Acts of Parliament, 1860.

Part 3

RegData India

*A quantitative analysis of
national laws in India*





Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

INTRODUCTION

RegData, an initiative of the Mercatus Center, is an effort to quantify various aspects of regulation. The Mercatus Center created RegData with an aim to “introduce an objective, replicable, and transparent methodology for measuring regulation.” It uses custom-made text analysis and a machine-learning algorithm to measure the different features of law. These features include volume, restrictiveness, and linguistic complexity. Together, these metrics indicate the regulatory burden a law, department or ministry imposes. Some variables, like the restrictive terms or ‘binding words’, demonstrate associations with economic growth and productivity (Mercatus Center 2019).

In collaboration with the Mercatus Center, we obtained quantitative metrics for all 876 national laws of India. For this purpose, we used the list of laws made available on the official portal of the Government of India.⁶⁸ This empirical analysis, along with our categorisation of laws by the Ministry and Department, will help open way for further research on the burden imposed by laws.

METHODOLOGY

Below we give an overview of the three metrics studied. A detailed methodology for each of these metrics and the algorithms used, can be found on the QuantGov website.

I. Volume

Word count per law: This metric quantifies the number of words in a law.

Word count per year: This metric documents the average number of words per law, in a particular year (from 1857-2019). It helps document the change in the volume of laws over the years.

Word count per Ministry: This metric quantifies the average number of words per law in each Ministry in India. The total number of words in legislations introduced by a Ministry, helps indicate the extent to which the sector is regulated and the effort it would require on part of the regulatees, to acquaint themselves with the law.

68. This list was last updated in October 2020.



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

II. Binding words

Number of binding words per law: RegData uses a text analysis program to count the number of binding words or “restrictions” in a law, that create an obligation to comply or limit choice sets for private actors. These include phrases such as: ‘shall’, ‘must’, ‘may not’, ‘required’, and ‘prohibited’.

Normalised binding words: Binding words are likely to be higher in laws that are lengthy. To get an estimate of the density of restrictiveness, we also calculate the ‘normalised binding words’ for each law. This metric refers to the average number of words after which a binding word appears. For instance, if the normalised binding words for a law is 300, it means that on average a binding term appears after every 300 words in the law. Lower normalised binding words would imply that a law is more restrictive.

HOW DID WE COLLATE BINDING WORDS FOR NATIONAL LAWS?

To identify terms that bind actions of individual actors in Indian laws, we adopted the following 5 step approach:

Step-I: Database used. We used the official list of laws available on the Ministry of Law and Justice website. The website lists all national level laws enacted up till March 2020, in chronological order.

Step-II: Sampling process. We used the chronological list of laws to select a sample of 40 laws by using a two-stage systematic random sampling process (without replacement). In the first round, we selected every 43rd law in the list. In the second round, we selected every 41st law in the list. This produced a sample of 40 laws (4.5% of the total laws listed).⁶⁹

Step-III: Collate the universe of binding words. All 40 laws selected in the sample were studied in detail to identify terms that were used, at least once, in the ‘restrictive’ sense, i.e. to restrict the actions of individuals, companies or any non-government entity. All such terms were listed down, irrespective of their frequency. For instance, use of the term ‘cancel’ in Section 22(4) of the Banking Regulation Act 1949 is restrictive. The provision mentions that if any company fails to comply with the conditions mentioned in the Act, then the Reserve Bank of India will ‘cancel’ their licence.

69. Our aim in the first round was to collate a sample of 20 laws. For this purpose, we divided the 876 laws into 20 parts (i.e. picked every 43rd law). To ensure that our sample is representative, we later expanded the sample size to 40 laws and picked another 20 laws in the second round (i.e. every 41st law).



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

Step-IV: Prepare a restriction counter for the sample. Once the universe of binding words was collated, we prepared a restriction counter for all 40 laws. Against each law, we recorded the number of times a particular binding word appeared. This aggregate number was broken down into two categories: restrictive and nonrestrictive. Under the ‘restrictive’ category, we recorded the number of occurrences of term in a context where it bound the actions of private actors. All other appearances of the term were recorded as non-restrictive (including ones that restrict the actions of the public officials, limit their scope of power and instill accountability).

For instance, the term ‘ought to’ appears to be a binding word. However, the majority of its appearances are in the non-restrictive context. Under the Air (Prevention and Control of Pollution) Act 1981, ‘ought to’ is used in Section 5 in a non-restrictive context. The section prescribes the constitution of a State Board and requires the State Government to ascertain which interests ‘ought to’ be represented in the board. The term does not restrict actions of individuals/ private players.

Step-V: Threshold to pick the final set of terms. After recording the number of binding words for each law, we prepared aggregates of their usage in the restrictive and nonrestrictive context. That is, the total number of times a term appeared as a restriction (across the 40 laws) and the total number of times it appeared in the non-restrictive context. Words that appeared in a restrictive context in more than 80 per cent instances were chosen as binding words. Words that appeared in restrictive context in less than 80 percent instances and words that appeared only once across all 40 laws were removed from the final list of words chosen.

We chose the following 12 binding words: “prohibited”, “prohibition”, “prohibit”, “shall be punishable”, “shall be punished”, “imprisonment”, “fine”, “restrictions”, “shall be liable”, “cancel”, “impose”, and “guilty of”.

III. Linguistic Complexity

This metric measures the complexity of a given law. Complexity is understood by how a law fares on the following four sub-categories:

(i) *Shannon entropy* refers to the “likelihood of encountering new words and concepts in a given body of text” (Mercatus Center 2020). Although, higher Shannon entropy implies higher complexity of a given text it is difficult to make inferences from an entropy score in absolute terms. The entropy scores cannot be meaningfully aggregated. These scores are best understood in relative terms. See here for more information.



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

(ii) *Sentence length* measures the average or mean length of sentences in a law. A higher mean length may result in greater difficulty in reading and understanding a legislation.

(iii) *Conditional count* calculates the frequency of branching words in a legislation. This includes terms like “if”, “but”, and “provided” that represent logical branches in a law. As the conditional count increases, the difficulty of comprehending a law may also increase.

(iv) *Flesch Reading Ease score*: This metric measures the readability of a given piece of text based on the average length of sentences and the average number of syllables per word. Each law is assigned a score on a scale of 0-100 with 0 being the most difficult read and 100 being the easiest to read. The higher the Flesch score of a law, the easier it is to read a law. A Flesch reading score can also be negative.

These four metrics help provide an understanding of how easy or difficult it is to comprehend a law. A law that is tough to comprehend may also increase the compliance costs for regulated entities (in terms of effort, time and money) (Mercatus Center 2020).

SUMMARY OF FINDINGS

Our interactive dashboards provide details of all three quantitative metrics across all national laws. Below we present a summary of the key findings.

Word count

The average number of words in a national law is 9602.3 words. Table 1 lists the top 10 national laws with the highest number of words.

The shortest law is the Supreme Court (Number of Judges) Act, 1956, with 117 words.

Ministry analysis: The top 5 Ministries with the most voluminous laws are: Ministry of Corporate Affairs (29,686 words on average); Ministry of Finance (15,069 words on average); Ministry of Shipping (13,694 words on average); Ministry of Environment, Forest and Climate Change (12,137 words on average) and Ministry of Commerce and Industry (11,787 words on average).



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

Table 1: Top 10 national laws with the highest number of words

Name of Law	Number of words
The Income-tax Act, 1961	5,30,288
Companies Act, 2013	1,77,733
Code of Civil Procedure, 1908	1,76,971
The Code of Criminal Procedure Act, 1973	1,30,630
The Merchant Shipping Act, 1958	1,26,670
The Delhi Municipal Corporation Act, 1957	98,462
The New Delhi Municipal Council Act, 1994	83,695
The Indian Penal Code, 1860	79,684
The Customs Act, 1962	73,976
Cantonments Act, 2006	69,943
On average these laws have 1,05,004 words.	

The Ministry of Culture has the least voluminous laws, with an average of 4229 words per law.

Temporal analysis: The average words per law have increased in the post-independence era from 16,264 to 18,537 words. Post-independence, the year 1973 reached a peak with an average of 1,30,630 words per law. This is India's highest average across the pre and post-independence era.



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

In the last decade (2010-2020), the year 2013 had the highest average number of words per law (55,527 words). The year 2011 saw the lowest average number of words per law (3,608 words). Between 1947 and 2010, the lowest average number of words was seen in the year 1993 (4,279 words).

Binding words

The average number of binding words per law is 19.3. The most commonly used term is “fine” with 4.66 uses per law, followed by “imprisonment” at 4.39 uses per law (on average). Apart from the Code of Criminal Procedure Act 1973 and the Indian Penal Code 1860, the two civil laws that have the highest occurrences of the term ‘fine’ and ‘imprisonment’ are: the Merchant Shipping Act, 1958 and Companies Act 2013.

The words “prohibition” and “prohibited” are used 1.97 times per law. The term “cancel” is the least commonly used binding word, at 0.45 uses per law.

To identify the most restrictive laws, we also calculated the normalised binding words for all laws⁷⁰. Table 2 lists the top 10 laws with the highest density of binding words.

70. This is measured as the total number of words/number of binding words.



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

Table 2: Top 10 laws with the highest density of binding words

Name of Law	Normalised Binding words
White Phosphorus Matches Prohibition Act, 1913	38
The Indian Penal Code, 1860	47
Explosive Substances Act, 1908	66
Prevention of Damage to Public Property Act, 1984	71
Prohibition of Child Marriage Act, 2007	71
Weapons of Mass Destruction and Their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005	77
The Calcutta Metro Railway (Operation and Maintenance) Act, 1985	80
Lotteries (Regulation) Act 1998	83
Legal Metrology Act, 2010	84
State Emblems of India (Prohibition of Improper Use) Act, 2005	88
<i>On average, binding words occur after every 70.5 words in these laws.</i>	



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

Interestingly, laws like the Legal Metrology Act 2010 have a greater density of restrictive terms as compared to the Code of Criminal Procedure Act 1973.

Temporal analysis: While the density of restrictive terms in laws have reduced post-independence, the change is marginal. In the pre-independence era, on average, a restrictive term appeared after 265 words. Post-independence, on average, a restrictive term appears after 383 words.

In the post-independence era, the year 1973 was the most restrictive. In this year, a restrictive term appeared after every 109 words (on average). The least restrictive year post-independence was 1961. In this year, a restrictive term appeared after every 1891 terms, on average.

Complexity

Shannon Entropy

The average Shannon score of all national laws studied is 8.13. The Easements (Extending Act 5 of 1882) 1891 has the lowest score of 5.32. The Andhra Pradesh Reorganisation Act 2014, has the highest score of 10.14. The average Shannon Entropy score (at the part level) in the Code of Federal Regulations (CFR) for 2019 is 7.86. Compositions by Shakespeare tend to have an entropy score between 9.3 and 9.7 (Mercatus Center 2020).

Ministry analysis: The Ministry of Labour and Employment records the highest average Shannon entropy score of 9.162. The Ministry of Personnel, Public Grievances and Pensions records the lowest average entropy score of 8.005. This is still higher than the average in CFR.

Conditional Count

On average, a national law has 57.07 conditionals. Table 3 lists the top 10 laws with the highest number of conditionals.



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

Table 3: Top 10 laws with the highest number of conditionals

Name of Law	Conditional Counts
The Income-tax Act, 1961	38
Code of Civil Procedure, 1908	47
Companies Act, 2013	66
The Code of Criminal Procedure Act, 1973	71
The Merchant Shipping Act, 1958	71
Indian Succession Act, 1925	77
The Delhi Municipal Corporation Act, 1957	80
The Indian Penal Code, 1860	83
Central Goods and Services Act, 2017	84
The New Delhi Municipal Council Act, 1994	88
<i>On average, these laws have 1184.4 conditionals</i>	

Flesch reading ease score

In sum, 608 laws fall in the 'fairly difficult', 'difficult' or 'very difficult' category. Only 60 laws are 'easy' or "fairly easy" to read. 211 laws are rated as 'standard'. The Supreme Court (Number of Judges) Act, 1956 has the highest score of 88, and is ranked as the easiest to read.



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

Table 4: Top 10 most difficult to read laws

Name of Law	Flesch Reading Ease
Sick Industrial Companies (Special Provisions) Repeal Act, 2004	-1
Calcutta High Court (Jurisdictional Limits) Act, 1919	2
The Parel Investments And Trading Private Limited And Domestic Gas Private Limited (Taking Over Of Management) Repeal Act, 2005	4
National Capital Territory of Delhi Laws (Special Provisions) Second Act 2009	5
Right to Information Act, 2005	10
National Capital Territory of Delhi Laws (Special Provision) Act_2011	18
Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharti) Act_2007	19
National Medical Commission Act 2019	21
Mussalman Wakf Act 1923	23
Provisions of the Panchayats (Extension to the Scheduled Areas) Act_1996	23
<i>On average, these laws have a flesch reading score of 9.7</i>	

Conclusion



Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

Conclusion

Several issues plague law-making in India. New laws are passed without a consultation process, assessing costs and benefits, and reviewing administrative safeguards.

This compendium provides law-makers and policy researchers with a framework for reviewing laws. First, it elaborated on a Toolkit that helps examine whether laws are participatory, protect the rights of individuals, and minimise regulatory burden. Second, it exemplified how to apply the Toolkit by analysing state school education laws on the 'Rights Safeguards'. Finally, it provided a quantitative methodology to assess laws and applied it to all national laws in India.

Together a qualitative and quantitative approach to law review can help improve the quality of laws in India.



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Improving the Quality of Laws in India: A Qualitative and Quantitative Approach

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