

Setting up the Sentinel

Agency Design of the Law Commission of India



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Introduction

The Law Commission is an advisory body to the Government of India. It is constituted every three years through an executive order to conduct legal research, suggest law reform, and recommend improvements in administration of justice. So far, the Law Commission has submitted 277 reports (Press Information Bureau 2020).

The Commission worked as a statutory body during the British regime under the Charter Act of 1833. This body was also constituted in 1853, 1861, and 1879 (Legislative Department, n.d.). The Government of India revived the practice of appointing Law Commissions in 1951, however, the Commission started as a non-statutory body and remains so. Unlike other commissions in India, the Law Commission has no fixed composition, eligibility criteria, and functions. The Terms of Reference are specified afresh each time it is constituted. Other national commissions like the National Human Rights Commission and the National Commission for Women have a parliamentary charter and are permanent bodies.

News reports document issues Law Commission (Shrivastava 2015). These include:

- limited capacity and dynamism;
- problems in the structure, composition and functional autonomy of the Commission;
- and inadequate funding.

However, there is no systematic study on the challenges with the Commission's institutional design and the bearing this has on its functioning.

This policy brief attempts to address this gap by reviewing the Law Commission's present structure, highlighting areas of improvement, and proposing a way forward to reengineer the institution. The brief follows a two-pronged approach. First, it records the experiences of various stakeholders and experts

to identify key challenges in the working of the Commission. We study its structure, independence, research approach, and resource availability. Second, we present some best practices in agency design by drawing from the structure of independent bodies/commissions in India and other countries. Based on these learnings, we propose recommendations on how to redesign the Law Commission.

Our proposed reform of the Law Commission aims at making it a more robust body capable of reviewing laws and institutionalising quality checks.

Why does the Law Commission need to be reengineered?

The strength and functioning of a body are affected by its institutional capacity and design. While the Commission studies and reviews laws in India to propose reforms (either *suo moto*¹ or based on the government's/ apex court's recommendation), this process is not systematic or methodical. The Law Commission does not review all laws. Further, there is no clarity on how Government of India selects laws for the Law Commission's review. Moreover, the Commission has no systematic rubric or set parameters to review laws. Some of the issues plaguing the Commission are explained in detail below.

No fixed eligibility criteria leads to political favouritism in appointment of members: Ordinarily, a retired judge of the Supreme Court or the High Courts heads the Law Commission. It has four full-time members, including a member-secretary and Chairperson. Ex-officio members of the Commission typically include bureaucrats from the Department of Legal Affairs and the Legislative Department. There are no defined eligibility criteria for the Chairman and its constituent

1. The matters studied by the Commission *suo moto* are within the broad mandate set under the Terms of Reference.

members. Apart from this, the Law Commission also appoints part-time members based on the issues it studies.

A part time member, a researcher and academic, mentioned that the Law Commission was a “parking lot for people who want to be pleased”. Since the appointments are based on political considerations, the government often favours members that it is looking to reward. These include retired judges, and bureaucrats who are near their retirement dates. Per this interviewee, this affected their motivation and incentive to work.

Another part time member, a researcher and academic, highlighted the lack of social and professional diversity in the Commission. The Commission’s members tend to come from similar academic backgrounds and fields. Limited technical expertise, they argue, has a bearing on the way review work is performed.

Upendra Baxi, a renowned legal scholar who undertook a detailed study of the Indian legal system, wrote while commenting on the selection of members,

”In order to avoid the impression of arbitrariness and even crude political patronage, the government needs to make public the general criteria that it considers desirable to pursue in the matter of appointments to the Law Commission of India. The considerable discretion it enjoys in inclusion and exclusion of categories of people from the membership of the Law Commission of India must at least be subject to some minimal informed evaluation” (Sen 2010).

Limited funding Former members of the Law Commission highlighted that the remuneration offered to part-time members is insufficient at INR Fifty Thousand only (Ministry of Law and Justice 2020). Limited funding has a bearing on the incentives of members, nature of reports produced, and the

research that underlies it. Per some sources, the Commission has an outdated library. Lack of resources also affects the stakeholder consultation process (Shrivastava 2015).

A former Additional Law Officer reported that the Commission has the freedom to issue questionnaires, conduct consultations, and give recommendations, but the limited budget puts a constraint. The Commission's dependence on the Ministry for all budgetary allocations and approvals slows the pace of functioning. Some complained that the Ministry often missed clearing stipends of external researchers and interns, creating a disincentive for fresh talent to join the Law Commission.

Low acceptance rate of Law Commission reports: In the absence of a legislative framework making the Law Commission accountable to the Parliament, there is no serious review and proper consideration of its recommendations.

Approximately 36% of the recommendations made by the Commission until 2015 have been implemented (Ministry of Law and Justice, n.d.). In contrast, according to the United Kingdom (UK) implementation status data (1966-2021), approximately 61% of the UK Law Commission's recommendations are either accepted or implemented (Government of the United Kingdom, n.d.). The implementation rate is as high as 87% for recommendations made by Australia's Law Reform Commission (Australian Law Reform Commission 2018). Both countries have established their Law Commission as a statutory body and laid down the procedure for tabling the reports before the Parliament. (Sumanth, Narang, and Agarwal, "Forthcoming").

There is no set procedure for assessing reports submitted by the Law Commission to the Ministry of Law and Justice. The reasons for non-implementation or delays in implementation are not recorded in writing or communicated to the Commission. This practice is common even with reports prepared at the government's request.

A former Member Secretary attributed this delay to the limited bandwidth of the Ministry of Law and Justice to coordinate between the Commission and other relevant Ministries. They suggest stronger communication channels between the Ministry and the Commission and a time-bound process for examining the reports.

Creating a feedback loop between the Ministry and the Commission would incentivise better research and assist in timely implementation. One of the part-time members (researcher and academic) mentioned, *“If you don’t accept the report, and don’t reject them either, and it just remains on the shelf of the government department - that is not a healthy practice.”*

A former Chairman of the Law Commission has attributed the limited implementation of their reports to their subpar quality and ambiguity (Shrivastava 2015).

Delays in constitution of the Law Commission and vacancies: The Law Commission is constituted every three years by Central government order. However, this process is inconsistent. For instance, the 21st Law Commission, under the chairmanship of Justice B.S. Chauhan, completed its tenure on August 31 2018. However, the government notified the constitution of the 22nd Law Commission after a gap of seventeen months in February 2020 (The Hindu 2021). The Commission is, however, not active since the government is yet to appoint the Chairperson and Members of the Commission (Imranullah 2021). A former Additional Law Officer informed us that the gap between the Commission’s constitution and the members’ appointment was standard practice. They described this period as the “honeymoon period”, indicating that the Law Commission is often dormant during this phase.

Past attempts at reforming the Law Commission: Observations made by Standing Committees

On 26 August 2004, the Second Report of the Department related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice noted the inordinate delay in implementation of the Reports of the Law Commission. It recommended an annual apprising of the status of various Law Commission Reports before the Parliament (Department Related Parliamentary Standing Committee On Personnel, Public Grievances, Law And Justice 2004).

On 20 April 2005, the 6th Report of the Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice highlighted the importance of making the Law Commission into a statutory body to empower the Law Commission and make it work more effectively (Department Related Parliamentary Standing Committee On Personnel, Public Grievances, Law And Justice 2005).

More recently, in 2020, a PIL was filed by Ashwini Kumar Upadhyay [*Ashwini Kumar Upadhyay v. Union of India 2020*] which sought direction from the Centre to declare the Law Commission a “statutory body” (The Times of India 2020). It pointed out that the national-level law reforming body, structure, and function of the Law Commission was inappropriately oriented. It also highlighted the issues with the composition and functional autonomy of the Commission.

Efforts made by the past governments: In 2010, the government prepared a draft cabinet note to grant statutory status to the Law Commission. This move aimed to bring continuity to the functioning of the Commission, but the idea never came to fruition (The New Indian Express 2012). In 2015, P.K Malhotra (Former Secretary at the Ministry of Law and Justice), made this proposal before a Parliamentary Standing Committee.

Following this, the Committee recommended,

”...since the Law Commission of India is being regularly reconstituted since 1959 and its reports are considered seriously both inside and outside the government, its relevance would never be relegated to the background. The government may explore the possibility of making it a permanent body” (The Economic Times 2015).

However, this recommendation was also put on hold as the government was in favour of the existing system.

Recently, the High Court of Madras, pointing at the vacancies in the 22nd Law Commission, pushed the Union Government to make the Law Commission a statutory body (Imranullah 2021). Government of India, in its response, made it clear that it does not plan to make the Commission a statutory body.

How do we propose reengineering the Law Commission?

The composition of an agency has a bearing on three aspects—autonomy, independence, and expertise. Clearly defined objectives and scope of powers allow for better assessment of performance. Finally, accountability mechanisms establish checks against abuse of power by individuals and institutions. This section elaborates on the good practices to consider for all three while revamping the Law Commission.

In most countries, Law Commissions are statutory bodies under an Act of Parliament. These bodies are subject to varying degrees of Ministerial control, identified in the enabling legislation. These laws also elaborate on the Commission’s powers, its constitution, and the procedure for preparing and laying reports before the Parliament. Statutory bodies are

typically answerable to the Parliament, with little interference from the executive.

A crucial institutional reform is to grant the Law Commission statutory recognition by enacting a legislative framework supporting its existence. This reform would ensure the strength and independence of the body. The Act that creates the Law Commission helps define the relationship between the government department (representing the Parliament) and Law Commission. It should govern the Commission's actions by clearly outlining its objective, placing constraints on the actions of its members, instilling accountability through the composition of its board, and creating incentive structures for performance (Roy et al. 2018).

The crucial elements of agency design described in this section must feature in the law that defines the Commission.

1. Clarify the purpose and objectives of the Commission

A well-performing institution “serves clearly identified policy goals, and is effective in achieving those goals”. Clarity of purpose creates effective coordination mechanisms, fosters coherence across major objectives, elucidates responsibilities for ensuring performance quality, and improves capacity to respond to a changing environment (OECD 2008). Well-defined objectives help hold the institution and its individual members accountable (Roy et al. 2018). It also articulates goals, strategies, and benefits of an agency clearly to the public.

Best practices from other countries

The Australian Law Reform Commission (ALRC) is an independent statutory authority set up by the Australian Law Reform Commission Act 1996 (Cth) (ALRC Act) (Australian Law Reform Commission

2010). Per the ALRC Act, the ALRC is required to review laws referred to it by the Attorney-General keeping in mind the following objectives:

- Bringing the law into line with current conditions and ensuring that it meets current needs;
- removing defects in the law;
- simplifying the law;
- adopting new or more effective methods for administering the law and dispensing justice;
- providing improved access to justice;
- repealing obsolete or unnecessary laws;
- and ensuring uniformity between state and territory laws.

Section 24 of the ALRC Act, lays down the overarching principles that need to be upheld by the ALRC. It is required to ensure that relevant laws, proposals and recommendations:

- do not trespass unduly on personal rights and liberties;
- do not make the rights and liberties of citizens unduly dependent on administrative, rather than judicial, decisions;
- and are, as far as practicable, consistent with the International Covenant on Civil and Political Rights.

Even though Australia has other law-reform (or ex-post law review) bodies, clarity of purpose of the ALRC prevents conflicting, multiple, and overlapping objectives.

How to design clear objectives for the Law Commission of India? The Law Commission must have limited and clear objectives. A broad or contradictory mandate should be avoided. Based on the role it has performed thus far and its legacy globally, the Commission must act as a quality-keeper for laws.

The existing critique of India's regulatory framework points at the following issues: lack of transparency in the law-making process (Galhotra 2019), no consideration of the costs imposed (Anand, Shah, and Bedi 2017), complicated language of the law, and the expanding powers of unelected officials (Narang and Bedi 2022). Consequently, the Law Commission's review process must aim to bridge information asymmetry between lawmakers and affected stakeholders and check against poorly drafted laws. In particular, the Commission must check whether a law:

- is fit for purpose and reflects the will of the public;
- incorporates checks on the executive's exercise of powers;
- and improves incentives of the regulated entities and reduces administrative and compliance costs.

As a body specialising in law review, the Commission must be open to and take suggestions from all concerned Ministries while selecting its project. Further, as is the practice now, courts may also direct issues of concern to the Commission for detailed examination.

2. Rethink the composition of the Commission

The composition of a body has a bearing on three things: the ability to take decisions, the influence it exercises, and the soundness of the decisions taken. Presently, considerable power is vested in the Chairman of the Law Commission. In addition, the presence of the bureaucrats from the Legislative Department and the Department of Legal Affairs (who act as ex-officio members of the Commission) grants substantial representation of executive interests, which is not balanced

by a healthy number of non-executive and non-government experts.

Further, the Commission benefits only from legal expertise in the law review process because members of the legal profession dominate it. This lack of diversity affects the lens the Commission adopts to study issues, its methodological approach, and its recommendations.

How should the Law Commission of India be composed? The Law Commission's composition, tenure, and functions must be laid down in the governing legislation. The legislation must clearly outline the eligibility criteria of all the full-time and part-time members. Presently bureaucrats from the Legislative Department and the Department of Legal Affairs are members of the Law Commission. We propose to involve ex-officio members in the Commission only as observers.

Currently, the Chair and most other full-time members have a legal background. Given the interdisciplinary nature of law review, the Commission's composition must be reenvisioned. The Commission must include full-time members who are experts in allied fields such as economics, sociology, and political science.

Apart from full-time members, the Commission should create project or issue-specific sub-committees with part-time members. This could take the form of a partnership with different government and private research institutions. The Chairperson of the Commission, in consultation with other members, must have the discretion to allocate issues to different sub-committees. Such an arrangement will allow inputs from a diverse pool of experts for law reform.

In the UK, the Ministries often collaborate with the Law Commission and provide them with staff and experts based on the issue being reviewed. Similarly, in Rwanda, the Law Commission has three councils (or three sub-committees) consisting of several social scientists to work on the issues

assigned to it. Rwanda also follows a performance-based model for the remuneration of members to incentivise better performance.

3. Strengthen the Commission as an independent body

Operational and political independence is key for establishing a strong and effective institution (Financial Sector Legislative Reforms Commission 2013). The legislation to establish the Commission must enshrine this independence. The Commission must function without regard for political considerations. The appointment of members, review process, and nature of recommendations should be free from favour and biases. Finally, while the Commission must account for stakeholder opinion, the outcome of its research must not be influenced by external pressure from special interest groups, political actors and individual interests.

How to make the Law Commission Independent? Non-executive persons must dominate the Commission to ensure it works independently of the executive influence. Such a composition will allow the Law Commission to be distanced from political considerations and establish fidelity only to the objectives laid out in the law.

By acting as an independent review body, the Commission will help separate the law-maker from the quality keeper of laws. The key to preserving the independence and autonomy of the Commission is establishing a transparent mechanism for appointments. We recommend setting up a five-member selection committee for the appointment of full-time members of the Commission. The committee must consist of two members nominated by the Minister of Law and Justice (one of which may head the committee), two nominated by the Chief Justice of India, and one nominated by the Leader of Opposition in the Lok Sabha. This structure is similar to the one established for appointing the Central Information

Commission and helps provide the Commission with a degree of autonomy.

Further, the committee's internal management, including matters of procedural details such as frequency of meetings, agenda, and selection of part-time members, should be left to the Commission. It must only be subject to guidance in the law. Laying down procedural details will make the law prescriptive, complicated, and limit the flexibility of the Commission.

In addition, to preserve the Commission's independence, it must receive funds from various sources. First, the law must require Government of India to reserve funding for the Law Commission under its annual budget. This fund allocation must be separate from the funds allocated to the Ministry of Law and Justice. The Commission should prepare a yearly report which, among other things, must list the past expenses and anticipated expenses for the upcoming year. This set up will help bring the Commission's requirements in line with the actual allocation of funds. In case the allocated fund departs from the figures shared by the Commission, the government must provide written reasons for the same.

Second, any Ministry or government agency that refers an issue to the Commission for detailed review may grant additional funds. Third, the Commission should be permitted to receive donations from private individuals and organisations (subject to public disclosures).

4. Establish accountability mechanisms for the Commission

An effective institution (especially one that comprises unelected officials) requires autonomy and independence to be accompanied with accountability (Financial Sector Legislative Reforms Commission 2013). A statute plays a key role in making a body accountable to the Parliament. It helps establish reporting mechanisms and introduce checks

and balances in appointment, termination, procedures, fund utilisation, and scope of powers.

The Law Commission must be required to prepare an Annual report which includes details on:

- the issues it has examined or is currently examining;
- the number of reports produced and their status;
- details on expenditure and donations;
- and pending issues (if any).

This report must be tabled before Parliament for scrutiny. Such a process will allow the legislature to hold the Commission accountable and ensure its effective and efficient functioning.

Further, the Comptroller and Auditor General of India must audit the Commission's finances annually.

Conclusion

India has no systematic law review mechanism, either ex-ante or ex-post. A Law Commission that functions successfully as an independent law review body will help push the Ministries to account for the costs and benefits of each legislation and the burden it is likely to impose.

This brief highlighted the various issues that plague the Law Commission of India. It relied on best practices in agency design in India and across the globe to suggest how the Commission must be restructured. In particular, the brief focused on the four critical aspects of agency design: Clarity of purpose, composition, independence, and accountability.

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