

Rule of Law



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There is a quote from Publius Tacitus (Gaius Cornelius Tactitus), author of several texts, including "Annals". As commonly cited in English, the quote goes, "The more corrupt a State, the more numerous the laws". That's not quite correct. Tacitus wrote, "Corruptissima re publica plurimae leges". We indeed

have a clause about a corrupt State and another clause about plurality of laws. But there was no obvious causation in Tacitus. One could equally well translate this as, "The more numerous the laws, the more corrupt a State". However, the correlation is not in doubt.

"Rule of law" isn't an easy expression to define, quantify and measure, though attempts have been made. Across various organizations that have sought to measure it, indicators like speediness of the judicial process, intellectual property right protection, fairness of the judicial process, protection of private property, judicial independence, police efficiency, incidence of crime, enforcement of court orders, conviction rates, contract enforcement and trafficking have been used. The World Bank's Doing Business indicators seeks to measure some aspects of the legal regime, such as dealing with construction permits, registering property, enforcing contracts, resolving insolvency and labour market regulation. In 2006, the United Nations set up a Commission on Legal Empowerment for the Poor (CLEP) and this submitted a report in 2008, with a focus on access to justice, property rights, labour rights and business rights. Describing "rule of law" in general terms is easy. Quantifying it is much more difficult, especially since data on something that is difficult to measure are not easy to obtain. Some data can only be perception-based, drawn from subjective responses to questionnaires. They are not hard data. A word of caution is also required about cross-country comparisons across different types of legal regimes. After all, all the indicators involve some value judgements. For instance, is it better to have swift dispute resolution, regardless of whether principles of natural justice have been followed? That is inherently a value judgement.

Governments are elected to pass laws and all laws involve curbs on individual freedom. As a collective body, aggregated from individuals, those curbs are accepted by society because they result in the greater "common good", however defined. Behaviour, so to speak, is modified and incentivized to conform to a

certain standard. How many "laws" are there in India? For several reasons, that is not a very easy question to answer. First, law is not always statutory in nature. Traditionally, legal regimes are divided into common and civil law jurisdictions. In the former, and India belongs to this category, law is not always codified. Though difference between the two kinds of jurisdictions is getting blurred, with codification in common law countries, there are common law strands in India and case law sometimes determines "law". Second, there is the category of administrative law, executive in nature. This is not statutory law, though it often obtains its sanction from some statutory law. Rules and orders belong to this category. Third, both Union government and State governments can legislate. Note that following common law traditions, India doesn't have a system of desuetude. Therefore, statutes are open-ended. They continue to remain on statute books, unless they are specifically identified for repeal.

All too often, the importance of the legal system as a constraint on economic growth and development isn't recognized and appreciated. Despite law and economics initiatives and emphasis on institutional economics, economists rarely talk about legal form. Since 1991, there have been isolated instances, such as when legal changes were necessary because of WTO or plurilateral/bilateral agreements, or when infrastructure and financial sectors were being liberalized. But those apart, as a test case, go through all the Economic Surveys. In how many of these does legal reform feature? Everyone acknowledges that India went through a heavy dose of government intervention between mid-1960s and mid-1970s. In how many economic treatises that discuss this period, is there a specific reference to legal changes? The tightening up of Foreign Exchange Regulation Act (FERA) in 1973, Monopolies and Restrictive Trade Practices Act of 1970, Urban Land Ceiling and Regulation Act of 1976, tightening of Industrial Disputes Act in 1977/78 and change in the Preamble to the Constitution in 1976 are instances. Sure, we know about these individually. But is the importance of law, as part of infrastructure for economic policy, appreciated as part of the big picture? There is a back-of-the-envelope kind of number, suggested about 10 years ago by the World Bank. If India can fix the legal system, there will be 1 per cent increment to GDP growth. This is no more than a back-of-the-envelope figure and has no great sanctity. However, it is illustrative.

What does fixing the legal system mean? There are several dimensions. First, there is the simple matter of old laws. Second, revamping old laws isn't always that simple. Rare is the case when one can repeal a statute in its entirety. More often, there is an old section in the statute. That needs to be scrapped or amended, while retaining the main statute. This requires a scrutiny of the

statute, section by section and is much more time-consuming. Third, and this is related a bit to the second issue, in the same area, statutes may not have been enacted at the same point in time. Therefore, definitions may not be uniform. Since the case law has also evolved separately, that too varies, causing further confusion. These statutes need to be harmonized and unified. In passing, laws haven't always been drafted well. There are problems with language. Bad drafting leads to disputes and interpretation by courts. In other parts of the world, there has been a plain English movement, so that laws are written in simple language. This has still left India relatively untouched. Fourth, India has been described as a country that is over-legislated and under-governed, reminiscent of Tacitus. Both in Parliament and Legislative Assemblies, there is an attempt to solve every problem under the sun through legislation, even though that legislation can't be enforced. Hence, there is excessive government intervention through statutes. This is sometimes perceived as taking ideological positions on degree of government intervention, but there is a better way of looking at the issue. Before passing any legislation, one should ask the following questions. Why is this statute needed? What are the costs if it is not enacted? What are the benefits and

costs from enacting it? This is ostensibly meant to be addressed in "Statement of Objects and Reasons" that accompany any piece of legislation, but this is undertaken very perfunctorily. If done properly, as some other countries have, we will have fewer laws and better laws, especially when we combine this with desuetude principles. Fifth, one should mention speed of dispute resolution. There are generic issues and general solutions connected with reducing backlog, both on the supply-side and the demand-side. There is also the matter of police reform, which bears some mention, since that is linked to criminal justice reforms. Two-thirds of the backlog is of criminal cases.

Even without 1991 and post-1991 reforms, India's legal system should have been changed. However, liberalization provides an additional impetus. The government has spoken about minimum government and maximum governance. This requires fewer and better laws, with focus shifting from licensing, control and government intervention to regulation. But one must also remember the flip side. All too often, excessive legislative and legal intervention becomes necessary because society is not amenable to self-enforcement. Had that consciousness existed on the part of citizens and enterprise, we would have truly required fewer laws.
