Transforming State Capacity in India
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Introduction

Over the past quarter-century, India has undergone four important transformations. Politically, one-party dominance has given way to a highly competitive, multi-party electoral system. As part of this transformation, the social basis of politics has also been dramatically upended as previously disadvantaged castes and communities have experienced a political awakening. In economic terms, India has traded its socialist, autarkic model for a more market-based one that is increasingly integrated into the global trading system. And, finally, when it comes to foreign policy, the country has pivoted from a posture of non-alignment to awarmerembrace of the United States and the West.

While one can debate the merits—not to mentionthe speed and extent—of each of these transformations, one area has remained relatively untouched: India's governance institutions. Unfortunately, India's core governing apparatus has not enjoyed the same kind of rejuvenation that has touched these four other domains. In many ways, India is a twenty-first century economic and diplomatic entity powered by a nineteenth century state.[2]

The frailties associated with governance in India fall largely into one of three categories—what can be thought of as the "3 P's": personnel, paperwork, and process. Despite all of the talk of India's overbearing state, the truth is that it is actually a highly undermanned one. Compared to its Group of 20 (G-20) peers, India has the smallest number of bureaucrats on a per capita basis. When it comes to the state's core sovereign functions—revenue collection, public goods provision, public order, and justice—the Indian story is one of scarcity rather than surplus.[3] The reason the Indian state is often characterized as intrusive has more to do with the other two "P's." While India is highly undermanned in personnel terms, it is over-bureaucratized when it comes to rules and regulations. Those who claim that the License Raj is a thing of the past have not tried to set up a firm in India, navigate the bureaucracy to obtain a license, or adjudicate a legal dispute in the courts. Thanks to this mismatch of personnel and paperwork, it is no surprise that the processes ordinary citizens must endure to interact with the state are nothing short of Kafka-esque. There is a saying in India that what litigants to a dispute fear is not the eventual judgment rendered by a court of law, it is the process of getting to that resolution. In short, the process *is* the punishment.

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[2] For a thorough exploration of the challenges facing India's public institutions, see Devesh Kapur, Pratap Bhanu Mehta, and Milan Vaishnav, eds. *Rethinking Public Institutions in India* (New Delhi: Oxford University Press, 2017).
[3] Milan Vaishnav, "Resizing the State," *Caravan*, October 1, 2012.

The resulting mismatch between the positive transformations India has experienced and the quality of governance has allowed a great many infirmities to flourish.[4] For starters, the system practically invites corruption as state actors easily leverage theirdiscretionary authorities to speed up or slow down the gears of the state, as they so desire. Second, governance suffers from innumerable operational efficiencies as onerous state-citizen interaction lowers productivity, slows innovation, and stifles growth. Perhaps most crucially, the failures of the state can work to undermine the very legitimacy of democracy itself. Indeed, around the world, a new era of democratic "malaise" has set in. This disenchantment is not necessarily linked to democracy's ideational failures as much as its perceived inability in many countries to deliver.[5]

In India, the state capacity agenda is vast. Over the years, numerous expert commissions—from the Second Administrative Reforms Commission to the National Commission to Review the Working of the Constitution (NCRCW) and to the Law Commission of India—have filled thousands of pages with expert analysis on what plagues Indian governance and what should be done to resolve those shortcomings. The modest aimof this chapter is to highlight three areas where the next government of India—irrespective of its political color—must take urgent action to redirect the ship of state. These three areas correspond to the three major branches of government: the executive, the legislature, and the judiciary.

Executive

Of the many issues on which the executive branch might act, reforming the bureaucracy is arguably of signal importance. While the public sector still attracts world-class talent, it must navigate an increasingly complex set of policy dilemmasarmed with bureaucrats who are trained as generalists and recruited through an examination process that does not necessarily select for the right mix of talent that the imperatives of twenty-first century governance entail. Critics who argue that the apex bureaucracy receives outsized attention compared to the lower reaches of the bureaucracy at the state and local levels are most certainly correct. For instance, recent research by Aditya Dasgupta and Devesh Kapurdemonstrates the very real capacity shortfalls that hinder the performance of front-line functionaries who are typically the first points of contact for average citizens.[6]

However, this reality does not absolve the upper echelons of the civil service, who are typically members of the Indian Administrative Service (IAS) and who constitute the nerve center of India's governing apparatus (what was once referred to by the British as the country's"steel frame"). In recent years, members of the elite civil services themselves have warned of several areas of weakness which limit their operational effectiveness. These vulnerabilities include declining levels of human capital, diminished independence from the

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[4] Milan Vaishnav, *When Crime Pays: Money and Muscle in Indian Politics* (New Haven: Yale University Press, 2017).

[5] Devesh Kapur and Milan Vaishnav, "Introduction," in Devesh Kapur and Milan Vaishnav, eds. *Costs of Democracy: Political Finance in India* (New Delhi: Oxford University Press, 2018).

[6] Aditya Dasgupta and Devesh Kapur, "The Political Economy of Bureaucratic Effectiveness: Evidence from Local Rural Development Officials in India," October 24, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3057602.

political executive, growing worriesabout malfeasance and corruption, a lack of specialization, and weak incentives for professional advancement.[7]

While the Narendra Modi government has refrained from enacting deep-seated administrative reform, it has initiated a few changes to modernize India's bureaucratic apparatus as it relates to the IAS. First, it has initiated a modest experiment to recruit experts for key bureaucratic positions via lateral entry. In June 2018, the Union government opened up ten senior posts at the joint secretary (JS) level to individuals working outside the government. The announcement sought experts for a range of positions stretching from civil aviation to farmers' welfare.[8] In August, the government announced that over 6,000 people had applied for the posts, which would entail a three-year contract (extendable up to five years based on performance).[9]

Second, the Modi government has instituted a new, 360-degree performance assessment tool for senior members of the civil services (who are due for promotion as either additional secretary orsecretary) as a supplement to existing evaluation methods. Prior to the new system, officers received annual performance reports prepared by their superior officers. These reports—writtenon the basis of consultations with peers and subordinates—are screened by an expert panel, a Civil Services Board, and then finally approved by the Appointments Committee of the Cabinet. The new 360-degree assessment introduces a new layer of scrutiny which can in theory override the standard annual performance assessment.[10]

Going forward, the next Uniongovernment must evaluate the lessons of the new drive to usher in new talent into government from the private sector. If the new experiment is successful, it should be expanded to new domains. Lateral entry is a sensitive subject that often raises the hackles of career civil servants. But, if implemented smartly, it can also benefit the civil service in at least two ways. First, lateral entry should be the first step toward engendering open competition among civil servants for positions at the JS-level and above. For instance, there is no reason why a securities expert who is below the JS-level should not be able to submit her application for a relevant position in the finance ministry solely because of her lack of seniority. The goal of increasing competition within the talent pool is to ensure the most qualified officer with specialized expertise is placed in a suitable post. But lateral entry mightalso help civil servants ina second way: it can be used to break the monopoly the IAS enjoys on coveted posts. Thereis no reason why qualified officers in other services (such as the Indian Economic Service

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[7]K.P. Krishnan and T.V. Somanathan, "The Civil Service," in Devesh Kapur, Pratap Bhanu Mehta, and Milan Vaishnav, eds. *Rethinking Public Institutions in India* (New Delhi: Oxford University Press, 2017).

[8] "Centre invites lateral entry and joint-secretary level posts: Here are 10 things to know about it," *Indian Express*, June 12, 2018.

[9] Press Trust of India, "Lateral entry: Over 6,000 private sector specialists apply for 10 joint secretary posts in govt.," August 19, 2018.

[10]Nileema M.S., "Why India's Civil Servants Are Disaffected with the 360-Degree Empanelment Process for Top Central Government Posts," *Caravan*, August 12, 2018.

or Indian Revenue Service) should not have a shot at high-level positions if they have the talent and expertise required.[11]

With regards to evaluation, there are undoubtedly ways of improving on the status quo. The concern about the new 360-degree evaluation is the lack of publicly available details. Any evaluation system will have its detractors; the key is to institutionalize principles of transparency, accountability, and the rule of law so that the system enjoyswide, institutional buy-in. One of the concerns about the new system, voiced by a key parliamentary committee, is its opacity and the absenceof a robust appeals process.[12] In addition, the advent of big data, especially on measurable outcomes that can be traced to a specific officer's tenure, paves the way for innovative mechanisms of performance-based evaluation and promotion.[13] Seniority, which guides civil service promotions, is an inferior instrument for deciding who advances and who does not, especially when fine-grained data are now readily available.[14] To be clear: data need not be the only criterion on which officers are judged. However, data could be one critical component.

Legislative

When one encounters images of the proceedings in India's parliament of late, dramatic oratory and spirited debate have too often given way to disruption and obstructionism. A cursory look at the data on parliamentary performance demonstrates that there is a real decline in the ability of India's legislature to function as the framers of the Constitution had imagined. Data from PRS Legislative Research demonstrates that parliamentary efficiency—measured by the number of sitting days in the Lok Sabha and bills passed by the Lok Sabha and Rajya Sabha—is on a clear downward trend. There are multiple reasons behind the waning performance of Parliament. For starters, the number of parties represented in Parliament has increased significantly over time. This diversity of opinion makes consensus difficult to achieve. Some commentators have argued that the introduction of televised coverage of parliamentary proceedings has increased the benefits which accrue to grandstanding lawmakers.[15] Still others lament the declining quality of representatives, manifest by the growing number of parliamentarians who boast criminal records.[16]

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[11] Milan Vaishnav and Saksham Khosla, "The Indian Administrative Service Meets Big Data," Carnegie Endowment for International Peace, September 1, 2016.

[12] Moushumi Das Gupta, "Bureaucrats wary of lateral entry in govt. service as deadline for application looms," *Hindustan Times*, June 30, 2018.

[13] Vaishnav and Khosla, "The Indian Administrative Service Meets Big Data."

[14] Data-driven performance metrics could not only be used for promotions, but they also could help guide salary and remuneration decisions.

[15] Saugato Datta, "Television Coverage And Political Voice: Evidence from Parliamentary Question Hour in India," July 10, 2008, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1281627&download=yes.

[16] Mahendra Prasad Singh, "The Decline of Indian Parliament," *India Review*, 14, no.3 (2015): 352-376.

While all of these factors undoubtedly play a role, there is little that can be done to reverse these trends in the short run. Transparency of parliamentary proceedings is here to stay, and the trend is likely toward even greater openness (perhaps by allowing cameras into committee rooms, which are thus far off limits). Political fragmentation is a fact of life and although the BJP has emerged as a hegemonic force of late, there are myriad opposition parties arrayed against it.[17] And the election of MPs suspected of criminal involvement is ultimately a question for the voters. But there are two structural constraints inhibiting parliament's performance which can be remedied through government action.

The first has to do with increasing the agency of individual legislators. In 1985, the Constitution was amended to incorporate a new Anti-Defection Law. The law, which was enacted in the wake of tremendous political fragmentation and allegations of horse-trading, stipulates that any MP can be expelled from his party and disqualified from Parliament if he does not follow the party whip. Parties in India are largely top-down affairs in which party bosses reign supreme, and the Anti-Defection Law has only served to strengthen their iron grip on their party subordinates. The consequence of the amendment is to strip MPs of their agency; there is little incentive to meaningfully participate in the lawmaking process when, at the end of the day, one hasno choice other than to vote in accordance with the party whip or risk grave consequences.[18]

A second structural impediment to smooth parliamentary functioning is the limited agenda control grantedto the opposition. As Jessica Seddon has persuasively argued, India's opposition has little procedural headway to do anything other than disrupt proceedings when its demands fall on deaf ears.[19] Unlike in other parliamentary systems, in India the opposition has no say over the agenda, and it has only limited ability to move amendments on legislation. To compound matters, the aforementioned Anti-Defection law limits the potential for cross-party cooperation among individual legislators if opposition party leaders issue a whip to vote against the government's motion.

The next government should move to repeal the Anti-Defection Law. The law, as it stands, reduces the individual agency of MPs, disincentivizes serious legislative scrutiny, and breaks the accountability link between voters and their elected representatives. If a full-scale repeal of the law is untenable, one possibility suggestedby Congress MP Manish Tewari is to limit the application of the law to highly select instances (such as votes of confidence or adjournment motions).[20] In the event the Anti-Defection Law is repealed or substantially modified, a complimentary reform suggested by M.R. Madhavan is to require that each vote taken in Parliament (or at least, each vote on pending legislation) be a recorded vote.[21] At

[17]SuhasPalshikar, "BJP beyond Electoral Dominance: Towards Hegemony," *Economic and Political Weekly*, 53, no. 23 (August 18, 2018): 36-42.

[18] M.R. Madhavan, "The Anti-Defection Law needs a relook," May 24, 2013, Pragati (blog), http://pragati.nationalinterest.in/2013/05/the-anti-defection-law-needs-a-relook/.

[19] Jessica Seddon, "The limits of control in Parliament," *Mint*, December 17, 2015.

[20] M.R. Madhavan, "Parliament," in Devesh Kapur, Pratap Bhanu Mehta, and Milan Vaishnav, eds. *Rethinking Public Institutions in India* (New Delhi: Oxford University Press, 2017).

[21]*Ibid*.

present, most Parliamentary motions are only subject to a voice vote (unless an MP specifically requests a formal vote, also called a "division"). The advantage of a recorded vote is that it establishes a paper trail of how an individual legislator has voted, which is pertinent information for voters to consider. So moving toward a recorded vote would both increase transparency as well as efficiency.[22]

The next governmentshould also consider providing the opposition with some degree of parliamentary powers that would reduce the perceived benefits of disruption. Analysts have suggested, for instance, that India could follow the examples of the United Kingdom and Canada wherethe opposition is given a fixed number of days during which it can determine the agenda.[23] In addition, Parliament could introduce rules that would require open discussion on a topic if a significant section of MPs supports doing so.[24] Neither of these reforms on their own will rectify what ails Parliament, but they would substantially improve the body's functioning over the long run.

Judicial

As Parliament's authority has waned in recent years, the judiciary's role has concomitantly increased. The rise in "judicial sovereignty" is somewhat ironic given that the judiciary itself suffers from a great many maladies.[25] For starters, the court faces a massive backlog of cases. According to data collected by the Supreme Court, at the end of 2017 there were nearly 33 million pending cases across the justice system.[26] Second, the courts are plagued by endemic personnel shortfalls at every level. Of the Supreme Court's 31 seats, six were lying vacant at the start of 2018. As many as 37 percent and 25 percent of high court and district court positions, respectively, were unfilled. The vacancy rate in the district and subordinate judiciary is even more concerning, given that this is where the vast majority of cases get their first hearing: 87 percent of pending cases reside at this lowest tier of the judiciary.[27] Last but not least is the crucial question of procedural delays. These delays have myriadcauses: poor infrastructure, personnel shortcomings, constant adjournment requests, and inadequate judicial planning. According to data compiled by the National Judicial Data Grid, nearly one in every four cases below the high court level has been pending for five years of more. The vast majority of pending cases are criminal, rather than civil, matters by a greater than 2:1 margin.[28]

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[22] Devendra Damle, Shefali Malhotra, and Shubho Roy, "Replace voice votes," The LEAP Blog (blog), April 11, 2017, https://blog.theleapjournal.org/2017/04/replace-voice-votes.html

[23] M.R. Madhavan, "Parliament."

[24] Jay Panda, "India's parliament is paralysed by 19th century rules," December 16, 2015, *Quartz*, https://qz.com/india/574143/jay-panda-indias-parliament-is-paralysed-by-19th-century-rules/.

[25] Pratap Bhanu Mehta, "The Rise of Judicial Sovereignty," *Journal of Democracy*, 18, no. 2 (April 2007): 70-83.

[26] Supreme Court of India, *Court News*, 12, no. 4 (October-December 2017), https://www.sci.gov.in/pdf/CourtNews/COURT_NEWS_OCTOBER-DECEMBER_2017.pdf.

[27]*Ibid*.

[28] See the website of the Government of India's National Judicial Data Grid, accessed September 26, 2018, http://njdg.ecourts.gov.in/njdg_public/index.php.

There are no shortcuts to cure what ails the judiciary. But recent tensions between the executive and the judiciary have exacerbated the situation. Thanks to an evolution in the process of judicial appointments, at present judges are nominated to the Supreme Court and the various High Courts by a body known as the "collegium," consisting of the Chief Justice of India and the four senior-most justices on the court. This body has been heavily criticized for its opacity and delay in making appointments. In 2014, Parliament moved to scrap this system and replace it with a National Judicial Appointments Commission (NJAC), which required amending the Constitution. The NJAC was tobe chaired by the chief justice of the Supreme Court but would alsoinclude representatives of the government, other justices, and a panel of eminent persons. Shortly after the NJAC came into force, the Supreme Court ruled that it was unconstitutional because it violated the "basic structure" doctrine.[29]

The ruling set off a protracted struggle between the executive and the judicial branches of the government. While both sides agreed that the status quo was no longer tenable, they furiously disagreed about the proposed remedy. In March 2017, the collegium delivered a Memorandum of Procedure (MoP) that outlined a set of guidelines that would govern judicial appointments. While the collegium accepted that the government could object to a candidate on national security or public interest grounds, it refused to allow the government definitive veto authority.[30] The judiciary, not the executive, would have the final say. The two sides remain deadlocked on the issue and the mandated changes have not yet taken full effect. The rift grew public in recent months when the two sides battled over the elevation of a high court justice to the apex court and four Supreme Court justices aired their public disappointment with alleged interference on the part of government, among other issues.[31]

The new government must move quickly to resolve this impasse between the two branches of government. Letting the issue fester will not only exacerbate the problem of judicial vacancies but will also further erode the functioning of the judicial branch, which already faceschallenges on multiple fronts. The Court itself acknowledges that the collegium system is flawed and cannot "remain static or unconcerned even when problems are patent."[32] The government must prioritize finding an adequate resolution that balances its desire to protect national security and public integrity with judicial independence.

For its part, the judiciary would be on a stronger footing in this dispute if it rededicated itself to getting its own house in order. The agony most citizensface when interacting with the courts not only threatensto delegitimize the rule of law, but might also force citizens into seeking out questionable alternative dispute mechanisms (such as embracing strongmen or criminal

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[29] Madhav Khosla and Ananth Padmanabhan, "The Supreme Court," in Devesh Kapur, Pratap Bhanu Mehta, and Milan Vaishnav, eds. *Rethinking Public Institutions in India* (New Delhi: Oxford University Press, 2017).

[30]Krishnadas Rajagopal, "Final Memorandum of Procedure handed over to govt.," *Hindu*, March 18, 2017.

[31] Ravish Tiwari, "Deadlock to end, Govt. clears Supreme Court Collegium's move to elevate Justice KM Joseph," *Indian Express*, August 3, 2018.

[32] "Flawed collegium system cannot remain static: SC," *Times of India*, March 29, 2018.

figures who promise to swiftly adjudicate disputes and enforce contracts).[33] On this score, there are at least two reforms the judiciary must consider. The first is to adopt digital alternatives to inefficient, time-consuming procedures.[34] Thanks to the smartphone revolution and the arrival of innovations such as IndiaStack (a set of open application interfaces), it is now feasible for India to digitize the most basic elements of the judicial process—such as the issuance of summons and notices, the filing and management of new cases, the submission of basic court documents, and even perfunctory hearings. Obviously, technology introduces its own complications, as the recent debate over the constitutional validity of the Aadhaar biometric identification scheme demonstrates.[35] But the judiciary must seek out creative ways to pilot new digital programs that could reimagine routine judicial procedures.

Second, there are certain tasks which the judiciary currently performs which could be usefully outsourced to others. Right now, judges are tasked with carrying out both judicial and administrative functions. Given the complex logistics of operating a court, especially one which is besieged by a growing docket, every hour a justice spends on administrative matters has a clear opportunity cost in terms of his or her judicial function. In India, justices can be involved with a range of matters, from real estate to payroll to technological support. A novel proposal advanced by Pratik Datta, aimed at improving the performance of tribunals in India, would be for India to create a new tribunal administrative services agency—akin to the backend judicial support offices which prevail in the United States, United Kingdom, and elsewhere.[36] This new tribunal services agency could provide backend support, in the first instance, for tribunals. This new agency would handle all financial, human resource, and information technology needs of tribunals, freeing up more of the court's time for judicial work. If successful, such an agency could be scaled beyond specialized tribunals to work with the broader justice system.

Conclusion

This chapter reviews some of the core administrative issues plaguing the functioning of three critical branches of government. A comprehensive review would require multiple volumes, so the ideas contained here admittedly only scratch the surface. However, they have the virtue of being under the purview of the Union Government to kick-start, if not fully implement. Revamping India's public administration is a multi-generational task. But a new government committed to pursuing institutional reform has plenty of low-hanging fruit it could pluck.

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[33] Vaishnav, *When Crime Pays: Money and Muscle in Indian Politics*.

[34] This section draws on Ananth Padmanabhan and Milan Vaishnav, "Let Justice Flow," *Indian Express*, February 16, 2017.

[35] Madhav Khosla and Ananth Padmanabhan, "The Aadhaar challenge: 3 features that put constitutional rights at risk," *ThePrint*, June 27, 2018, https://theprint.in/opinion/the-aadhaar-challenge-3-features-that-put-constitutional-rights-at-risk/75576/.

[36] Pratik Datta, "Towards a Tribunal Services Agency," *NUJS Law* Review, 8, no. 3-4 (July-December 2015): 181-204.