

# LEGAL FRAMEWORK FOR THE PARLIAMENTARY OVERSIGHT OF THE EXECUTIVE IN INDIA

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*The need for a strong monitoring mechanism of the Executive in India has been made clearer by recent allegations of corruption against high-ranking officials of the central government. The Indian Parliament is the ideal institution to perform such a monitoring function through oversight of the central executive. The Executive in India is directly accountable to the Parliament. Making oversight by Parliament stronger and more effective would therefore increase the accountability of the executive. Additionally, an increased oversight role would allow for greater policy inputs from Parliament to the executive. It would also increase the general level of expertise within Parliament by making parliamentarians more technocratic and giving them greater avenues for specialization in different aspects of policymaking. This has held true in varying degrees in different countries as examined in this paper. Enacting a law that formalizes mechanisms of oversight within Parliament, especially within the committee system, can create such a framework in India. The central focus of a strong oversight framework is the system of parliamentary committees. Reinvigorating existing committees by giving them greater autonomy, clearer powers and research support are central tenets of the proposals made in this paper. Along with restructuring parliamentary committees, the incentive structure for Indian parliamentarians to conduct oversight is also examined, and proposals are suggested to ensure they perform their oversight function effectively. Such a law should reshape the way Parliamentary business is conducted with a view to holding government accountable, while at the same time allowing the central executive to function independently, and with greater efficiency.*

## I. INTRODUCTION

Allegations of corruption against those holding high political and executive offices have become a prominent feature of the Indian political

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landscape over the last decade. Illustrative of the heightened corruption in recent times are the 2G scam- where a number of allegations were raised regarding the pricing and allocation of spectrum; the alleged irregularities in relation to the Coalgate scam, wherein as per CAG reports, allocation of coal blocks in the absence of competitive bidding had led to a major loss in revenue; and the organization of the Commonwealth Games, 2010. All of these cases involved financial irregularities on a massive scale.<sup>1</sup>

Civil society organizations responded with demands for an independent ombudsman-like (Lokpal) body to be created for checking corruption.<sup>2</sup> The demand for such a body gained widespread support after which a modified version of the Bill was also passed in the Lok Sabha.<sup>3</sup>

The creation of an independent ombudsman may be legitimate in the Indian context, but these alleged incidents of corruption also highlight the lack of monitoring by existing institutions. The alleged irregularities took place over a considerable period of time, yet no investigative or oversight agency took preventive action. This is because the executive does not have effective monitoring mechanisms in place and because existing legal institutions do not perform oversight effectively. In the absence of effective executive action and the failings of the existing oversight mechanisms, this paper argues that with sufficient changes to its existing framework, the Indian Parliament is ideally suited to perform an oversight role.

The Indian Parliament has historically played a limited role in overseeing executive agencies. This paper shows that there is little regular oversight of executive agencies apart from the activities of the three financial committees i.e. the Public Accounts Committee, the Committee on Estimates, and the Committee on Public Undertakings. In the last two decades or so, this lack of regular monitoring has increased.

The Parliament currently largely limits its involvement to an *ex-post* investigation into allegations of wrongdoing. Such investigation by joint parliamentary committees is just one investigation among others being conducted by investigative agencies. Mechanisms for *ex-ante* oversight by

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<sup>1</sup> See *CAG Reports Point to Rs 3 Lakh Crore 'Scam'*, THE FINANCIAL EXPRESS (New Delhi) August 17, 2012, available at <http://www.financialexpress.com/news/cag-reports-point-to-rs-3-lakh-cr-scram/989518> (Last visited on October 8, 2013) (In the case of issuance of spectrum by the Department of Telecommunications, the CAG estimated a presumptive loss of Rupees one lakh seventy six thousand crore (USD 35 Billion at current exchange rates). In the Coalgate scam, the CAG estimated a presumptive loss of Rupees one lakh eighty six thousand crore).

<sup>2</sup> NDTV, *What is the Jan Lokpal Bill, Why it's Important*, August 16, 2011, available at <http://www.ndtv.com/article/india/what-is-the-jan-lokpal-bill-why-its-important-96600> (Last visited on March 21, 2012).

<sup>3</sup> The Bill was not passed in the upper house, and so has not been enacted into law.

Parliament would be much more effective in preventing executive indiscretion. This paper proposes new mechanisms to facilitate such scrutiny.

Accordingly, this paper creates a legal framework to modify the existing structure of parliamentary oversight. The main tenets of this framework are to substantially alter the structure and powers of existing parliamentary committees and to rework the inter-relationship between parliamentary committees and proceedings in the upper house and lower house. The viability of such structural modifications can also be seen in the guidelines for parliamentary reform suggested in the United Kingdom.<sup>4</sup>

The second part of this paper elaborates upon the relationship between the executive and the legislature, and how inter-branch accountability and separation-of-powers need to be balanced to enable higher efficiency in government. It also examines the broader objective of having strong parliamentary oversight.

The third part of this paper provides a short overview of different forms of oversight in India. The fourth part provides a comparative analysis of oversight related mechanisms in legislative bodies in other democracies with special emphasis on the US Congress. While oversight in the US is predicated on a clear separation of powers between the executive and the legislature, it is equally based on the system of checks and balances between the two branches.<sup>5</sup> This is different from the Indian system where a clear separation of powers does not exist. The principle of checks and balances is the basis for examining Congressional mechanisms for oversight over the executive. Along with the US, South Africa and UK are also examined. The UK is important since the Indian Parliamentary system is based largely on the Westminster model. More importantly, the literature on the need for parliamentary reform in the UK is also relevant for any remodeling of the Indian framework.

The last part of this paper lays out an elaborate framework to enhance and invigorate parliamentary oversight in India. It is proposed that the structure of the existing committee system be remodeled to allow for greater expertise and focused scrutiny. A central principle of this and other proposed reforms is to balance the independence of the executive with the need for oversight. The independence of the executive is necessary to allow the democratic majoritarian electoral process to function efficiently by preventing unnecessary obstructionism by the opposition. Strong oversight should inform

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<sup>4</sup> See Report of the Hansard Society Commission on Parliamentary Scrutiny, *The Challenge for Parliament: Making Government Accountable*, 83, 85, available at <http://www.hansardsociety.org.uk/wp-content/uploads/2012/10/The-Challenge-for-Parliament-Making-Government-Accountable-2001.pdf> (Last visited on October 8, 2013).

<sup>5</sup> LOUIS FISHER, *THE POLITICS OF SHARED POWER* 5 (4<sup>th</sup> ed., 1998).

administrative efficiency rather than obstruct it. The proposals outlined in this paper ensure this balance is maintained.

This paper also examines the incentive structure of parliamentarians acting as committee members. This paper proposes to increase incentives for the performance of their oversight role. Any proposal for reform that either fails to rework the existing incentive structure for parliamentarians, or imposes too onerous a burden for oversight may not be effective.

## II. EXECUTIVE-LEGISLATIVE RELATIONS AND THE NECESSITY FOR OVERSIGHT

The principle of parliamentary sovereignty assumes accountability of the elected executive to the legislature, and oversight is an important part of ensuring accountability. J.S. Mill, wrote in 1861:

*“The proper office of a representative assembly is to watch and control the government: to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which anyone considers questionable; to censure them if found condemnable, and, if the men who compose the government abuse their trust, or fulfill it in a manner which conflicts with the deliberate sense of the nation, to expel them from office ...”*<sup>6</sup> (emphasis added).

Woodrow Wilson, in his epochal book *Congressional Government*, reiterated the same with respect to the oversight role of the US Congress:

*“Unless Congress have and use every means of acquainting itself with the acts and dispositions of the administrative agents of government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important it should understand and direct”*<sup>7</sup> (emphasis added).

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<sup>6</sup> MILL, J.S., *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (1861) as quoted in Friedberg and Hazan, *Legislative Oversight: Comparative Assessment of Parliaments Note*, available at [http://www.cid.suny.edu/capnotes1/LegislativeOversight\\_071112.pdf](http://www.cid.suny.edu/capnotes1/LegislativeOversight_071112.pdf) (Last visited on October 25, 2013).

<sup>7</sup> WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* 303 (1885) as quoted in Walter J. Oleszek, *Congressional Oversight: An Overview*, Congressional Research Service, February 22, 2010, available at <http://www.fas.org/sgp/crs/misc/R41079.pdf> (Last visited on October 25, 2013).

As may be seen, oversight is largely assumed to be beneficial to the democratic process,<sup>8</sup> but doesn't the requirement of continuous legislative monitoring of the executive impede the implementation of the majority parties' policy goals? One answer may be that oversight actually aids in such implementation by ensuring bureaucrats comply with the majority's policy goals.<sup>9</sup> Another response could also be that oversight ensures that politically expedient short-term goals of the majority do not sideline more urgent, long-term goals.

Woodrow Wilson said that oversight is at least as important a function of the legislature as legislation. Rick Stapenhurst and Riccardo Pelizzo show interesting correlations between oversight mechanisms and a given form of government.<sup>10</sup> Their research shows that with an increase in the number of oversight mechanisms within a political system, the likelihood of government being potentially subject to control and thus being more democratic, increases. Is greater democratization then, a sufficient end for increasing oversight mechanisms? Democracy arguably also has to be balanced with political stability for ensuring administrative efficiency. Usually constitutions provide the framework for finding such balance. However, it is really political institutions in their discharge of constitutionally mandated functions that determine where this balance is located. The following portion provides a detailed justification for stronger oversight while seeking to balance the need for oversight with other considerations discussed above.

### A. JUSTIFICATION FOR OVERSIGHT

Any argument for oversight must begin with an examination of the nature of the executive-legislature relationship. Anthony King argues for looking beyond the 'Montesquieu formula'.<sup>11</sup> Analyzing the British parliamentary process, he argues that even within the majority, the government, and the backbenchers need to be thought of separately. They are interdependent, and from the government's point of view, their need of backbencher's votes makes them the most important constituent of Parliament.

This analysis does not hold completely true for India because of the existence of the anti-defection law.<sup>12</sup> The law penalizes parliamentarians who

<sup>8</sup> Bert A. Rockman, *Legislative-Executive Relations and Legislative Oversight*, 9 LEGISLATIVE STUDIES QUARTERLY 387, 416 (1984).

<sup>9</sup> Frederick Stapenhurst & Ricardo Pelizzo, *A Bigger Role for Legislatures*, Finance & Development, IMF 39 (2002), available at <http://www.imf.org/external/pubs/ft/fandd/2002/12/stapenhu.htm#author> (Last visited on January 16, 2012).

<sup>10</sup> Ricardo Pelizzo & Rick Stapenhurst, *Democracy and Oversight* in PARLIAMENTARY OVERSIGHT FOR GOVERNMENT ACCOUNTABILITY 6-22 (2006).

<sup>11</sup> Anthony King, *Modes of Executive-Legislative Relations: Great Britain, France, and West Germany*, 1 Legislative Studies Quarterly 11, 11 (1976), available at <http://www.jstor.org/stable/pdfplus/439626.pdf?acceptTC=true> (Last visited on October 25, 2013).

<sup>12</sup> Constitution of India, 1950, Tenth Schedule.

disobey the party whip with disqualification from the Parliament.<sup>13</sup> However, his point that both the executive and the legislature are composed of smaller constituents is well taken. For the basis of our analysis, the legislature includes all parliamentarians except those that constitute the government. The two main constituent groups of parliamentarians then are majority members who are not part of the government, and opposition members. As King notes about the British Parliament, “the dice used in the game are loaded heavily in the Government’s favor. The Opposition lacks all the things that Government backbenchers lack- information, expertise, day-to-day involvement in governing, moral authority—and much else besides”.<sup>14</sup>

The same observation is true about the two groups of parliamentarians in India. In effect, this group forms the main oversight body for the government. This division of the legislature into smaller sub divisions of those who form part of the executive, and those who don’t (including members of the majority party) also helps provide a clearer basis for examining the need for oversight.

Rebecca L. Brown argues for the importance of greater powers of legislatures by challenging assumptions of the purpose of political accountability.<sup>15</sup> Her paper aims to prove the legitimacy of unaccountable judicial review in the face of conventional arguments of the judicial branch being unelected and therefore unaccountable to citizens. She says that this conflict can be resolved if majoritarian rule itself is seen as a mechanism to protect individual liberty, rather than individual rights. Therefore only a politically accountable government could sustain a judiciary committed to the protection of individual rights.<sup>16</sup> According to her, writers in the early part of the twentieth century argued that legislatures are better forums for achieving policy goals than other branches. Their proposition had nothing to do with political accountability.<sup>17</sup> This argument has important implications for the unelected executive as well.

Arguably, stability or efficiency is in fact a value to be balanced against greater democratization. This argument could be given weight in the context of some particular features of the Indian democracy. *First*, unlike the US presidential system of government, India does not have strict separation of powers between the legislature and the executive. The executive is at least formally accountable to the Parliament. *Second*, administrative stability is of

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<sup>13</sup> Anirudh Burman, *The Anti-Defection Law: Intent and Impact*, November 23, 2009, available at <http://www.prsindia.org/administrator/uploads/media/Note%20on%20Anti-Defection.pdf> (Last visited on December 27, 2013).

<sup>14</sup> Anthony King, *Modes of Executive-Legislative Relations: Great Britain, France, and West Germany*, 1 LEGISLATIVE STUDIES QUARTERLY 11, 18 (1976).

<sup>15</sup> Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COL. L. REV. 531, 533-34, (1998).

<sup>16</sup> *Id.*, 534 – 36.

<sup>17</sup> *Id.*, 546-47.

real value to a democracy like India where instability may lead to serious governance crises. Though this fear is not empirically borne out in India, the risk of serious administrative instability crippling economic growth is theoretically possible.

Most important however, is the structural factor. In India, as opposed to systems with strict separation of powers, the Parliament is not the initiator of legislation. Legislation is drafted by the government and then debated and passed by the legislature. Laws are debated, sometimes modified by the Parliament, but rarely initiated within Parliament. Consequently the primary function of the Parliament in India is to hold the government accountable.

Representative governments can both protect and endanger rights. However, the oversight function is designed for more than the protection of explicit legal rights. If used properly, oversight should increase governmental efficiency and thereby indirectly promote greater enjoyment of rights. In this context, it is important to understand that parliamentary oversight is not just an increased democratization of the administrative machinery. It should also lead to an increase in technocratic values among elected representatives. In other words, this notion is not simply a “*preanalytic hostility to the modern administrative state, an anti-bureaucratic pastoralism that feeds on nostalgia for simpler, more integrated times.*” (emphasis added).<sup>18</sup>

Edward Rubin argues that the notion which advocates that legislators, not bureaucrats, should make policy decisions is problematic.<sup>19</sup> One way he does this, is by debunking the purposes of elections. The representative purpose of election serves to elect not the most talented and capable person, but the one that the electorate can identify most with. According to Rubin, this is the opposite of accountability since voters are really choosing someone likely to share their perspective rather than someone who would rely on instructions to do what the superior wants, regardless of his personal views.<sup>20</sup>

This conception seems overly simplistic. Though Rubin concedes that holding a representative accountable is another function of elections, he subordinates it to succession and representation.<sup>21</sup> However, representation and accountability are not as clearly distinguishable from one another as Rubin makes out. Certainly, it would be difficult to impute these two as clearly separable motives to the electorate when voting.<sup>22</sup> It is easier to argue that voters

<sup>18</sup> Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2075 (2005).

<sup>19</sup> *Id.*, 2076.

<sup>20</sup> See Rubin, *supra* note 18, 2078 – 79.

<sup>21</sup> *Id.*

<sup>22</sup> See Laura Seide, Christian Henning & Svetlana Petri, *Voter Behavior, Government Capture and Accountability in African States: A Comparative Analysis based on Cross-Country Estimations of Spatial Voting*, available at <http://www.nai.uu.se/ecas-4/panels/61-80/panel-63/>

choose representatives who offer the best combination of representativeness and accountability. Here the accountability function envisages how well the representative will be able to deliver on his promises, rather than how well he will take instructions. If this is the case, there is a persuasive justification for creating a more technocratic political class that can deliver on its promises better.

The justification for increasing technocratic skills within parliamentarians is also related to the case made out by M. Shamsul Haque.<sup>23</sup> His contention is that while many states have changed the nature of the bureaucracy to become more pro-market, such changes have themselves led to a situation where bureaucratic accountability has eroded. Drawing on a variety of legal systems from Latin America to South Asia, he shows how the bureaucratic role is being reshaped from that of being an economic actor to being a supporter of market-led growth. This transition is also noticeable in India with the creation of a number of regulators with varying degrees of independence from the executive.

Thus the justification for increased parliamentary oversight in India is not merely to hold the executive more accountable to voters. Another important justification is to create a more efficient political class. An increase in the Parliament's oversight functions would ideally incentivize legislators to acquire and display better command over policymaking than members of the executive. This increase in oversight would change due to a role in the nature of parliamentary activities itself. With stronger incentives to conduct oversight, Parliament collectively becomes more technocratic.<sup>24</sup>

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Laura-Seide-Christian-Henning-and-Svetlana-Petri.pdf (Last visited on October 8, 2013) ("In reality elections are no deterministic process and therefore hard to predict. People do not always vote for the party that seems to provide the highest utility... We would expect different groups of people to vote out of diverse reasons").

<sup>23</sup> M. Shamsul Haque, *Bureaucratic Accountability in a Pro-Market State*, 19 INTERNATIONAL POLITICAL SCIENCE REVIEW 357(1998).

<sup>24</sup> David Epstein & Sharyn O'Halloran, *Legislative Organization under Separate Powers*, 17 JOURNAL OF LAW, ECONOMICS AND ORGANIZATION 371, 374 (2001) (Talking about the advantage of strong committees in the US Congress).

Many have commented on the incentives for elected representatives to engage in parliamentary work in India.<sup>25</sup> The anti-defection law<sup>26</sup> plays a significant part in reducing incentives for individual initiative in Parliament, but members utilize whatever opportunities they have to speak independently. The debate on the Educational Tribunals Bill, 2010 was an example where members of the ruling party strongly criticized the government's position.<sup>27</sup> Committees also usually function on a bipartisan basis. Committee reports indicate a willingness to question government policies and motives irrespective of party associations.

The discussion above allows for the statement of some concrete reasons for conducting oversight in India. Morton Rosenberg states many reasons for the US Congress oversight.<sup>28</sup> Some of these are relevant for India and are mentioned below:

- Ensure that the executive complies with legislative intent;
- Improve the efficiency and effectiveness of governmental performance;
- Evaluate program performance;

<sup>25</sup> See Devesh Kapur & Pratap Bhanu Mehta, *The Indian Parliament as an Institute of Accountability*, available at <http://casi.sas.upenn.edu/system/files/Indian+Parliament+-+DK,+PBM.pdf> (Last visited on September 26, 2013) (For more information on the status of incentives existing to engage in parliamentary work); see Philip Keefer & Stuti Khemani, *Democracy Public Expenditures and the Poor*, available at <http://siteresources.worldbank.org/EXTGOVANTICORR/Resources/3035863-1286395629347/WBRO.pdf> (Last visited September 26, 2013) (Illustrating how incentives to elected officials serve as a determining factor in policy making through a comparative study involving the States of Kerala and Uttar Pradesh); see Devesh Tiwari, *Do Cleaner MPs Lead To a Cleaner Parliament*, available at <http://policyblog.oxfordindiasociety.org.uk/2013/05/20/do-cleaner-mps-lead-to-a-cleaner-parliament/> (Last visited September 26, 2013) (“Indeed the underlying problem in India might be that MPs lack the incentives to vigorously pursue their duties...”); see Tarunabh Khaitan, *The Real Price of Parliamentary Obstruction*, available at [http://india-seminar.com/2013/642/642\\_tarunabh\\_khaitan.htm](http://india-seminar.com/2013/642/642_tarunabh_khaitan.htm) (Last visited September 26, 2013) (Khaitan, while throwing light on how legislative agendas are operationalized in the Parliament, opines:

“There is thus little incentive for the government to trade with the principal opposition party because its initiative is likely to be frustrated by other players irrespective of the concessions it makes in any deal with the principal opposition. Similarly, there is very little incentive for the chief opposition party to make politically expensive compromises when it knows that other players will frustrate the motion in any case (and reap political dividends for doing so”).

<sup>26</sup> Constitution of India, 1950, Tenth Schedule.

<sup>27</sup> Dr. K. Keshava Rao, *Member of the Ruling Indian National Congress Party during the Debate in the Rajya Sabha on The Educational Tribunals Bill, 2010*, 23 – 28, available at [http://rsdebate.nic.in/bitstream/123456789/403416/2/PD\\_220\\_31082010\\_p16\\_p32\\_22.pdf#search="educational%20tribunal"](http://rsdebate.nic.in/bitstream/123456789/403416/2/PD_220_31082010_p16_p32_22.pdf#search=) (Last visited on December 27, 2013).

<sup>28</sup> MORTON ROSENBERG, *THE CONSTITUTION PROJECT, WHEN CONGRESS COMES CALLING: A PRIMER ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 1* (2009).

- Investigation of instances of poor administration, abuse, waste, fraud and dishonesty;
- Protect individual rights and liberties.

Any legal framework for oversight should enable the Indian Parliament to meet these objectives.

### III. OVERVIEW OF OVERSIGHT MECHANISMS IN INDIA

Parliamentary sovereignty usually implies the presence of a strong executive that is accountable to Parliament. While the executive is conventionally held accountable by Parliament in a number of ways, this section demonstrates that clinging to conventional notions of parliamentary sovereignty in India has come at the cost of real accountability.

#### A. THE EXECUTIVE IN INDIA

The Indian Constitution makes the Council of Ministers with the Prime Minister at its head, the functional head of the federal executive.<sup>29</sup> A minister has to be a member of one of the houses of Parliament,<sup>30</sup> and the Council is collectively responsible to the House of the People.<sup>31</sup> This constitutes the primary means of legislative control over the executive, since a motion of 'no-confidence' in the Lok Sabha against the government forces the ruling party/ coalition to prove its majority in the House.

Although in a parliamentary democracy, accountability is arguably ensured indirectly through ministerial responsibility to Parliament; mechanisms of direct accountability do not seem to be working as intended.<sup>32</sup> For example, provisions in statutes enacted by Parliament dictate that regulatory agencies place regulations framed by them before Parliament. Although they comply with this requirement, Parliament hardly, if ever examines these rules in the houses.<sup>33</sup>

<sup>29</sup> Constitution of India, 1950, Art.74.

<sup>30</sup> Constitution of India, 1950, Art.75(5).

<sup>31</sup> *Id.*, Art.75(4).

<sup>32</sup> See generally Joy Marie Moncrieffe, *Reconceptualizing Political Accountability*, 19 INTERNATIONAL POLITICAL SCIENCE REVIEW 387 (1998).

<sup>33</sup> *Bulletin I of Lok Sabha*, available at <http://164.100.47.132/LssNew/Business/BulletnICurrent.aspx> (Last visited on December 27, 2013)( I collected data on the laying of regulations in Parliament between February 2008 and December 2010. I also examined reports of the Committees on Subordinate Legislation of both, the Lok Sabha (lower house) and the Rajya Sabha (upper house) between April 2008 and December 2010, available at [http://164.100.47.134/committee/committee\\_informations.aspx](http://164.100.47.134/committee/committee_informations.aspx) (Last visited on February 13, 2014). None of the reports during this period pertained to regulations framed by independent regulators).

I argue that correcting the ‘faulty design’ issue and creating more effective mechanisms of direct accountability of regulatory agencies are both essential components of a good framework of legislative oversight.

## 1. Role in passing legislation

Though any Member of Parliament can introduce their own bill (referred to as Private Member Bills), they almost never get passed (the last Private Member Bill was passed in Parliament in 1970).<sup>34</sup> The executive drafts all legislation to be introduced in the Parliament. External input or consultation is not mandated at the drafting stage.

Legislative scrutiny begins only once the bill has been completely drafted. Once in Parliament, the Speaker/ Chairman usually assigns the bill to the relevant Departmentally Related Standing Committee. The Committee may recommend changes/modifications/ additions to the bill. The executive may or may not agree to these recommendations before the bill is put to vote.

This aspect of executive power is crucial to the argument presented in this paper. Unlike presidential systems, on account of the disproportionate role the executive in India has in preparing legislation, bills usually tend to reflect the policy preferences of the ruling party and more importantly, the bureaucrats who draft it. This in itself reduces the incentive to create legislation with strong mechanisms to monitor the executive.

Scholars have also commented on the general derogation of legislative monitoring of executive functions since the early years of our independence, particularly since the emergency imposed in 1975.<sup>35</sup> This historical advantage over the legislative branch has been arguably consolidated since the Emergency. Both in 1965, and in 1978, reports of two committees of inquiry acknowledged corruption within the bureaucracy, and observed that this is due to the “sudden growth in administrative power and discretion”.<sup>36</sup>

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<sup>34</sup> The legislation was titled “The Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Bill, 1968”. It was passed on August 9, 1970. See *Shocker: Not a Single Private Member Bill Passed Since 1970*, February 14, 2010, available at <http://www.prsindia.org/media/articles-citing-prs/shocker-not-a-single-private-members-bill-passed-since-1970-1020/> (Last visited on February 13, 2014); Rohit Kumar, *Vital Stats: Private Member Bills in the Lok Sabha*, 2010, available at <http://www.prsindia.org/parliamenttrack/vital-stats/private-members-bills-in-lok-sabha-2010-1011/>. (Last visited on December 27, 2013) (In the period between 2004 and 2009, only 14 out of 328 Private Member Bills in the Lok Sabha were discussed).

<sup>35</sup> Arthur G. Rubinoff, *The Decline of India's Parliament*, 4 THE JOURNAL OF LEGISLATIVE STUDIES 13, 24 (1998).

<sup>36</sup> O. P. Dwivedi & R. B. Jain, *Bureaucratic Morality in India*, 9 INTERNATIONAL POLITICAL SCIENCE REVIEW 205, 206 (1988). Authors cite the Santhanam Committee of Inquiry Report of 1965, and the Shah Committee of Inquiry Report of 1978.

This erosion in standards and increase in corruption has been attributed to the political heads in-charge of the executive.<sup>37</sup> However, political heads of government departments also remain protected because of lack of effective oversight mechanisms. This strengthens the argument that existing mechanisms of ministerial responsibility to Parliament are not enough. While governments have faced no-confidence motions in Parliament,<sup>38</sup> a government's defeat in a no-confidence motion is also a perceived indicator of political instability. This arguably decreases faith in political processes rather than restoring faith in mechanisms of political accountability.

## 2. Parliament and the Parliamentary system

Unlike the US Constitution,<sup>39</sup> the Indian Constitution does not explicitly assign legislative power to Parliament.<sup>40</sup> It details the procedure regarding the passage of legislation<sup>41</sup> and the transaction of financial business.<sup>42</sup>

Parliament convenes at the pleasure of the President (read ruling government) thrice a year. Though the number of sessions in a year has remained mostly consistent, the number of days Parliament works every year has gone down considerably.<sup>43</sup> Though this has also been complemented by the growth of departmentally related committees, as the subsequent pages illustrate, their effectiveness has not been great enough to offset this reduction of working days.

Additionally, there is no substantive mechanism to incentivize the executive's accountability *ex ante*. While the Business Advisory Committee consists of parliamentarians from most parties, the main task of the committee is to allot the amount of time for different business, rather than negotiate what business should be conducted.<sup>44</sup> Negotiations over what business should be transacted usually take place in informal settings, or on the floor of either House, with the opposition disrupting proceedings to demand discussion on

<sup>37</sup> See Rubinoff, *supra* note 35. Also see Kapur & Mehta *infra* note 53.

<sup>38</sup> Governments have also faced no-confidence motions because it was alleged that they had lost the support of the majority, and also because they were required to prove their majority on particular policy issues (for example the no-confidence vote that the ruling UPA government had to face on the issue of entering into a nuclear trade agreement with the US).

<sup>39</sup> U.S. Constitution, Art.1.

<sup>40</sup> List I of the Seventh Schedule contains an exhaustive list of subjects which the Parliament may legislate on.

<sup>41</sup> Constitution of India, 1950, Arts.107-111.

<sup>42</sup> *Id.*, Art. 111-118.

<sup>43</sup> CV Madhukar, *The Indian Parliament: Frozen in Time?*, March 28, 2011, available at <http://casi.sas.upenn.edu/iit/madhukar> (Last visited on 1/14/12) ("The number of sitting days has come down from about 140 days a year in the 1950s to an average of sixty-five days over the past five years").

<sup>44</sup> The government also has a majority of the members within the Business Advisory Committee.

a particular issue. Either of the alternatives is an ineffective way to promote accountability.

In the first case, while the ruling government and the principal opposition party have sufficient power to settle on a common list of issues, Kapur and Mehta<sup>45</sup> argue that “in the practice of parliamentary opposition in India, the opposition uses Parliament more to impugn the credibility of governments than to exercise accountability for the sake of good governance.”

They point out that due to structural reasons,<sup>46</sup> opposition parties do not have sufficient incentives for oversight and monitoring. Therefore, they concentrate more on reacting to incidents and scandals rather than focus on systemic changes. Another author takes a more extreme view and states that Parliament as an institution has served more “as a public forum for the ventilation of grievances”.<sup>47</sup>

Rubinoff states that because of the suppression of the majority Congress party in the 1980s, opposition members increasingly resorted to disruptive tactics.<sup>48</sup> It is debatable to what extent majority suppression, rather than undermining of structural systems, led to increased disruption. We have noted earlier the decrease in the number of working days of Parliament every year. With such decrease, the priority for government business would obviously increase, also decreasing the time available for parliamentarians to raise other issues of national importance. With scarce time available for raising their own issues, the incentive for parliamentarians to indulge in disruptive behavior also increases.

In this latter scenario where the business of either House is disrupted, the business of the House is left unfinished, undermining whatever limited accountability a working Parliament would impose. Importantly, it affects the legitimacy of the political class and the value of the Parliamentary process in the public sphere.

### 3. The committee system and its problems

While scholars have noted that the Indian government accepts a large proportion of committee recommendations,<sup>49</sup> this paper would like to argue against the overall effectiveness of the committee system at present.<sup>50</sup> *First*,

<sup>45</sup> Kapur & Mehta, *infra* note 53, 10.

<sup>46</sup> *Id.*

<sup>47</sup> See Rubinoff, *supra* note 35.

<sup>48</sup> *Id.*

<sup>49</sup> Arthur G. Rubinoff, *India's New Subject Based Parliamentary Committees*, 36 *ASIAN SURVEY* 723, 735, (1996).

<sup>50</sup> Data collated by me also indicates that the number of recommendations for budgetary demands accepted over a five-year period between 2004-08 ranged from 46 – 50%. Anirudh

a mere study of the number of recommendations accepted is not always an accurate barometer of effectiveness. Committee reports contain both important policy recommendations, as well as minor recommendations concerning usage of particular words. It is therefore difficult to accurately state that the recommendations accepted were critical to government policy on a particular issue.

*Second*, Departmentally Related Standing Committees ('DRSCs') do not pay sufficient attention to a broad range of government policies in the first place. Most DRSCs look primarily at budget documents, bills referred to them, and other policy issues under their jurisdiction. A perusal of the list of reports prepared by most DRSCs show an alarmingly low proportion of reports on policy issues. To be fair, the Committee on Estimates looks at policy issues related to financial allocations made by the government,<sup>51</sup> and the PAC looks at reports of the Comptroller and Auditor General (a constitutional auditor of the finances of the central government) on government expenditure.<sup>52</sup> However, additional factors limit the effectiveness of their work as well as the DRSCs.

One such factor is the problem that hardly any of these reports prepared by parliamentary committees is ever discussed on the floor of either house.<sup>53</sup> Other scholars have also highlighted this as a major issue limiting Parliament's ability in holding the executive accountable. For example, Kapur and Mehta note that committee reports have limited effect since:

*"Most committee reports are not tabled for deliberation and discussion in Parliament at all. The dilemma is that if the committee reports are at variance with the government, the majority has no interest in having them tabled; however, if they broadly uphold the government's position, they are considered superfluous".*<sup>54</sup> (emphasis added).

*Third*, a bare perusal of certain committees of the US House of Representatives indicates a much higher number of non-legislative activity over

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Burman, *Financial Oversight by Parliament: Background Note for Conference on Effective Legislatures*, November 15, 2010, available at <http://www.prsindia.org/administrator/uploads/media/Conference%20note/Conference%20note%20on%20financial%20oversight.pdf> (Last visited on December 27, 2013). I would like to acknowledge the contribution of Ms. Esha Singh Alagh towards the collation of this data.

<sup>51</sup> COMMITTEE ON ESTIMATES, Lok Sabha, *Introduction*, available at [http://164.100.47.134/committee/committee\\_informations.aspx](http://164.100.47.134/committee/committee_informations.aspx) (Last visited on December 27, 2013).

<sup>52</sup> COMMITTEE ON PUBLIC ACCOUNTS, Lok Sabha, *Introduction*, available at [http://164.100.47.134/committee/committee\\_informations.aspx](http://164.100.47.134/committee/committee_informations.aspx) (Last visited December 27, 2013).

<sup>53</sup> Devesh Kapur & Pratab Bhanu Mehta, *The Indian Parliament as an Institution of Accountability in DEMOCRACY, GOVERNANCE AND HUMAN RIGHTS*, available at <http://casi.ssc.upenn.edu/system/files/Indian+Parliament+-+DK,+PBM.pdf> (Last visited December 27, 2013).

<sup>54</sup> *Id.*

a period of twelve months.<sup>55</sup> While such data is hardly exhaustive, the amount of non-legislative work done by Indian DRSCs in the Lok Sabha is considerably less. For example in 2011, the Committee on Agriculture<sup>56</sup> examined just two new subjects<sup>57</sup> compared to twenty-eight<sup>58</sup> by its counterpart in the US House of Representatives.

*Fourth*, there is a considerable time lag in the response provided by the government. Action Taken Reports on the annual budget take between 6 – 10 months to be presented in the houses of Parliament.<sup>59</sup> This is even though the annual budget of the central government is passed in the same session in which the budget is tabled in Parliament. The rules of the Lok Sabha mandate that the House consider the “Demand for Grants” (budgetary allocations demanded by ministries) in light of the reports of the committees.<sup>60</sup> In practice, the House does not discuss most of the Demands. Most of the Demands not discussed are ‘guillotined’ (passed without discussion with the consent of the House) by the Speaker.<sup>61</sup>

*Fifth*, the process of preparing an Action Taken Report is therefore redundant. By the time of its publication, the financial year is almost over. Moreover, any demand for getting a Minister to depose before a committee has to be approved by the Speaker in addition to the fact that the ministers are not part of committees. Senior bureaucrats usually depose before committees on behalf of their department.<sup>62</sup> Kapur and Mehta point out that a high turnover of bureaucrats often oblige one bureaucrat to defend the actions of his

<sup>55</sup> In 2011, the Committee on Financial Services (sub-committees included) held and reported 86 non-legislative hearings. The Committee on Agriculture managed 28, while the Committee on Armed Services and the Committee on Budget managed 93 and 17 respectively (H.R. Rep. No. 112-355, at 271-73 (2011), H.R. Rep. No. 112-340 (2011), and H.R. Rep. No. 112-359 (2011) respectively).

<sup>56</sup> DEPARTMENTALLY RELATED STANDING COMMITTEE ON AGRICULTURE, *Reports Presented*, available at [http://164.100.47.134/committee/committee\\_informations.aspx](http://164.100.47.134/committee/committee_informations.aspx) (Last visited on December 27, 2013).

<sup>57</sup> I have not considered reports titled ‘Action Taken Reports’. These are reports based on the response of the government department to an earlier report. Adding these, the number goes up to 15.

<sup>58</sup> FREDERICK M. KAISER, WALTER J. OLESZEK, TJ HALSTEAD, MORTON ROSENBERG & T.B. TATELMAN, CONGRESSIONAL OVERSIGHT MANUAL, CONGRESS OF THE UNITED STATES: OVERSIGHT, PROCESSES AND PROCEDURES 2 (Carol S. Plessner ed., 2007).

<sup>59</sup> See Burman, *supra* note 50.

<sup>60</sup> Rules and Procedures and Conduct of Business in Lok Sabha, Rule 331G (14<sup>th</sup> ed. Lok Sabha Secretariat), 2010, available at <http://164.100.47.132/LssNew/rules/rules.aspx> (Last visited on December 27, 2013).

<sup>61</sup> Nearly 90% of the demands were guillotined every year between 2004-05 and 2009-10. See Burman, *supra* note 50, 1-2. See also Rubinoff, *supra* note 35, 25.

<sup>62</sup> Directions by the Speaker under the rules of procedure and conduct of business in Lok Sabha, Rule 59(1) (7<sup>th</sup> ed. Lok Sabha Secretariat) (2010), available at <http://164.100.47.132/LssNew/direction/direction.aspx> (Last visited on December 27, 2013).

predecessor.<sup>63</sup> They point out that by not requiring a minister to appear before a committee, “Parliament appears to be defending one of its own”.<sup>64</sup>

*Sixth*, committees are usually reconstituted every year. This prevents expertise from developing within the membership of the committee. The frequent turnover leads to fluidity in terms of seriousness, expertise, and focus. Committees are often unable to finish their stated agenda by the time their term is over.

*Seventh*, most DRSCs do not have adequate research or support personnel in comparison to the manpower at the disposal of individual Congressmen and Congressional committees in the U.S. The existence of adequate research staff is even more crucial to a committee system with a high turnover. Individual parliamentarians also do not get any personnel, or allowance for personnel for conducting research. Consequently there is a huge asymmetry of information between the executive and Members of Parliament.

Lastly, the organization and administration of the committees leave much to be desired. For one, there is no concept of creating sub-committees like in the US Congress. Even though the rules clearly permit it,<sup>65</sup> they are extremely rare, and certainly no permanent subcommittees exist under the DRSCs. Most committees in the US House of Representatives at least, have a specific oversight subcommittee as well.<sup>66</sup> In the US Congress, sub-committees do a sizeable amount of work compared to the main committee.<sup>67</sup> Additionally, while a vote by a majority of the quorum is required for conducting the actual business, only a few parliamentarians interested in the issue usually work within the committee.<sup>68</sup> The present committee system in India is therefore far from ideal.

#### 4. Current monitoring of delegated legislation

Delegated legislation deserves discussion because it is the chief mechanism by which executive power is exercised. McCubbins, Noll and Weingast point out the problem elected representatives face in ensuring that

<sup>63</sup> See Kapur & Mehta, *supra* note 53, 12.

<sup>64</sup> *Id.*

<sup>65</sup> See Directions by the Speaker under the rules of procedure and conduct of business in Lok Sabha, Rule 263, (7<sup>th</sup> ed. Lok Sabha Secretariat) (2010), available at <http://164.100.47.132/LssNew/direction/direction.aspx> (Last visited on December 27, 2013).

<sup>66</sup> See, for example, Second Semi-Annual Reports on activities during the 112<sup>th</sup> Congress of the House Committees on Financial Services, on Agriculture, Armed Services, and Budget.

<sup>67</sup> H.R. Rep. No. 112-355, at 271-73 (2011), available at <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt355/pdf/CRPT-112hrpt355.pdf> (Last visited on December 27, 2013) (For example, in the House Committee on Financial Services, the sub-committees published eighty out of a total of eighty-six reports between January and December 2011).

<sup>68</sup> See Rubinoff, *supra* note 35, 27.

bureaucrats comply with their policy preferences.<sup>69</sup> Parliamentarians generally lack the enabling framework to monitor bureaucratic performance. Effective monitoring of regulations framed by bureaucrats is thus an essential part of an effective oversight framework.

Parent statutes in India circumscribe powers that have been delegated to the executive.<sup>70</sup> They also state the manner in which Parliament will exercise a check on the rule-framing power of the government.<sup>71</sup> Parliamentarians may agree to modify the rule by voting on it before the end of the next session (that is the session after the one in which the thirty days expire). This has rarely, if ever happened. However, both Houses have a Committee on Subordinate Legislation that examines regulations tabled in Parliament.

Data collated earlier indicates that the number of regulations “examined by the Lok Sabha Committee from February 2008 to December 2010 is around three percent of the total number of subordinate legislation laid before the Lok Sabha in the same period”.<sup>72</sup> The government often agrees to modify the regulations after meeting with the Committees. For the 14<sup>th</sup> Lok Sabha (2004-09), the government accepted 83% of the recommendations made by the Lok Sabha committee. However, there is also a huge time lag between the initial report of the Committees and the response of the government. As a result, by the time the Action Taken Report is published an average time of six years has passed from the promulgation of the rule.<sup>73</sup> Sadly, the Committee on Subordinate Legislation of the Lok Sabha was itself forced to recently observe that: “*One disquieting feature observed by the Committee in regard to the issue of statutory orders by the Government was the enormous delay in laying them on the table of the House thereby depriving the House of timely scrutiny of such Rules.* (emphasis added)”.<sup>74</sup>

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<sup>69</sup> Mathew D McCubbins, Roger G Noll & Barry R Weingast, *Administrative Procedures as Instruments of Political Control*, 247, 3 JOURNAL OF LAW ECONOMICS AND ORGANIZATION 243, 243, (1987) (They state that politicians delegate policymaking authority to bureaucrats as a matter of course. The problem is that politicians often lack the resources to monitor the performance of bureaucrats in compliance with their own policy goals. They argue that resultantly bureaucrats depart from the policy choices in the absence of effective oversight. This is because of “personal preferences, derived from some combination of private political values, personal career objectives, and, all else equal, an aversion to effort, especially effort that does not serve personal interests”).

<sup>70</sup> Bills are also required to contain a Memorandum on delegated legislation explaining the clauses delegating rule-making powers, and certifying that such delegation is of a normal character.

<sup>71</sup> For example, see Civil Liability for Nuclear Damage Act, §§ 48(2) and 48(3). § 48(3) is illustrative of a standard clause present in most laws, stating that any rules under a statute shall be laid before the Parliament for a total period of thirty days of sittings of the Parliament.

<sup>72</sup> Anirudh Burman, Subordinate Legislation in Parliament, PRS Legislative Research (February 25, 2010) (unpublished).

<sup>73</sup> *Id.*

<sup>74</sup> COMMITTEE ON SUBORDINATE LEGISLATION, Fifteenth Lok Sabha, *Non Implementation of Oft-Repeated Recommendations of Committee on Subordinate Legislation, Lok Sabha by Various*

This lack of effective monitoring is of critical importance especially because over time bureaucrats tend to gain greater experience over their domain.<sup>75</sup> The information asymmetry between the executive and the legislature only gets exacerbated over time.

#### IV. OVERVIEW OF OVERSIGHT MECHANISMS IN OTHER COUNTRIES

This section provides a comparative study of oversight mechanisms to take into account institutions common across various jurisdictions as well as unique features that may be of interest for an Indian framework. Most analysis seem to emphasize some common features.<sup>76</sup>

##### A. US CONGRESS

A report of the Congressional Research Service lists various goals of Congressional oversight of the executive.<sup>77</sup> I have already discussed many of them in the earlier sections of the paper. Of the remaining, some significant purposes are that of preventing “encroachment on legislative powers and prerogatives”, to assess whether the officials who have been delegated a particular role are capable of carrying out such role, to review the rule making process of government departments, and to investigate complaints and media critiques.

##### 1. Constitutional provisions and statutes

No financial appropriation may be made without the authority of law. Additionally, the Congress can establish or abolish executive agencies and departments, and their functions.<sup>78</sup> The US Constitution also gives Congress the power to confirm appointments to executive posts and impeach certain officers<sup>79</sup> serving in the executive. The Indian Constitution vests these powers

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*Ministries*, Twenty-First Report, 2011, available at <http://www.prsindia.org/administrator/uploads/media/Subordinate%20Legislation/Report%20on%20Subordinate%20Legislation.pdf> (Last visited on December 27, 2013).

<sup>75</sup> See McCubbins et al, *supra* note 69, 247.

<sup>76</sup> See FREDERICK M. KAISER, WALTER J OLESZEK, TJ HALSTEAD, MORTON ROSENBERG & TODD B TATELMAN, CONGRESSIONAL OVERSIGHT MANUAL, CONGRESS OF THE UNITED STATES: OVERSIGHT, PROCESSES AND PROCEDURES 1-133 (Carol S. Plessner ed., 2007); Also see Dr. Ronald Holzhaecker, *National Parliamentary Scrutiny in the EU: Comparing Rules, Institutions, and Party Behavior*, paper presented at the annual meeting of the American Political Science Association (August 28, 2002), available at [http://citation.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/0/6/5/7/5/pages65757/p65757-1.php](http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/6/5/7/5/pages65757/p65757-1.php) (Last visited on December 27, 2013).

<sup>77</sup> Frederick M. Kaiser, Walter J. Olsezek & Todd B. Tatelman, *Congressional Oversight Manual*, 1-3 (2011), available at <http://www.fas.org/spp/crs/misc/RL30240.pdf> (Last visited on December 27, 2013).

<sup>78</sup> *Id.*

<sup>79</sup> The President of the United States, federal judges including those of the Supreme Court.

(except confirmation powers) with Parliament as well.<sup>80</sup> A number of laws grant general and specific authority to Congress and congressional committees to conduct oversight.<sup>81</sup>

Specific statutes also mandate the committees to exercise oversight functions over the executive.<sup>82</sup> The 1946 Legislative Reorganization Act is cited as one of the landmark legislation designed to ‘modernize’ the Senate and the House of Representatives.<sup>83</sup> It mandates “continuous watchfulness” over the executive.<sup>84</sup> Probably one of its biggest successes was to establish permanent staff for congressional committees.<sup>85</sup> It also established the now named Congressional Research Service<sup>86</sup> for assisting congressional committees. One of the Act’s foremost objectives was the reorganization of the committee structure.<sup>87</sup> Davidson argues that though reorganization had very limited success, the Act was important since it stated committee jurisdiction in writing for the first time.<sup>88</sup>

The 1970 Legislative Reorganization Act clarified oversight duties of congressional committees, and also required them to submit biannual reports on the oversight work undertaken by them. It strengthened the policy analysis role of the Congressional Research Service and expanded the duties of the Government Accountability Office. It also required that committees conduct a financial analysis of programs under their jurisdiction.<sup>89</sup>

Lastly, the Government Performance and Results Act of 1993 requires “agencies to consult with Congress on their strategic plans, goals and results”.<sup>90</sup>

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<sup>80</sup> Constitution of India, 1950, Arts. 61, 112-117, 124.

<sup>81</sup> See KAISER et al, *supra* note 76, 5-6. (The 1912 Anti-Gag Legislation and whistleblower protection laws give protection to those employed in the civil services who wish to petition Congress or contact congressional committees. Special provisions are also mandated for the intelligence community).

<sup>82</sup> *Id.* The Act gave increased oversight powers to committees by allowing them to evaluate government programs either by themselves or to contract it out, or to require a government agency to do so. See KAISER et al, *supra* note 76, 8.

<sup>83</sup> Roger H. Davidson, *The Legislative Reorganization Act of 1946*, 15 LEGISLATIVE STUDIES QUARTERLY 357, 357, (1990).

<sup>84</sup> See KAISER et al, *supra* note 76, 7.

<sup>85</sup> *Id.*

<sup>86</sup> Renamed by the Legislative Reorganization Act of 1970. See KAISER et al, *supra* note 76.

<sup>87</sup> See Davidson, *supra* note 83, 365.

<sup>88</sup> See *id.*, 367.

<sup>89</sup> See *id.*, 7-8.

<sup>90</sup> The Government Performance Results Act of 1993, §3.

## 2. Internal rules and mechanisms

Both the House of Representatives and the Senate have their own rules on oversight to be conducted by committees and members. Members usually conduct investigations on their own initiative, sometimes in the form of response to the grievances of constituents.<sup>91</sup> Oversight is primarily the work of congressional committees.<sup>92</sup> Most committees of the House of Representatives have general oversight functions.<sup>93</sup> They have to assist the House in its evaluation and appraisal of the application of federal laws, and also the conditions that may necessitate the enactment of new legislation, or in making changes to existing legislation.<sup>94</sup> Each committee has to review the laws and programs within its jurisdiction on a continuing basis. It also has to review the “organization and operation of Federal agencies” in-charge of executing laws and programs within the committee’s jurisdiction.<sup>95</sup>

The rules require that every committee with more than twenty members shall have to establish a sub committee on oversight.<sup>96</sup> Alternatively, each committee will require each of its sub committee to carry on oversight within its respective jurisdiction. There is a specific mandate for each sub committee to review the impact or probable impact of tax policies on the subjects within its jurisdiction on a continuing basis.<sup>97</sup> All committees are required to prepare a plan on oversight in the beginning of the year.<sup>98</sup> The plan is then submitted to the Committee on Government Oversight and Reform as well as the Committee on House Administration. The rules spell out in detail, considerations the committee should have while making their plan.<sup>99</sup>

Each house committee can appoint up to thirty professional staff members. Staff members are assigned to the chairperson and the ranking minority member in the committee.<sup>100</sup> The chairperson of the committee fixes the pay for staff members.<sup>101</sup> There is also a standing committee on Oversight and Government Reform that performs additional oversight duties.<sup>102</sup> The Senate also has its own procedure governing oversight. Specific oversight powers are given to some committees such as those on nutrition and agriculture. Most

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<sup>91</sup> See KAISER et al, *supra* note 76, 13.

<sup>92</sup> *Id.*

<sup>93</sup> Rules of the House of Representatives, 112<sup>th</sup> Congress, (Prepared by Karen L. Haas), Rule X Clause 2, January 5, 2011. See also KAISER et al, *supra* note 76, 13.

<sup>94</sup> Rules of the House of Representatives, Rule X Clause 2(a)(1), 13.

<sup>95</sup> *Id.*, Rule X, Clause 2(b)(1).

<sup>96</sup> *Id.*, Rule X, Clause 2(b)(2).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*, Rule X Clause 2(2)(d).

<sup>99</sup> *Id.*

<sup>100</sup> *Infra* note 142, Rule X, Clause 9.

<sup>101</sup> *Id.* (The pay has to be uniform for all staff members).

<sup>102</sup> See KAISER et al, *supra* note 76, 10.

committees are generally required to prepare an evaluation of the regulatory impact of every bill or resolution on which it prepares a report.<sup>103</sup>

The budgetary process allows Congress to assess budgetary policy as a whole. Congress can also assess whether the proposed revenue generation and spending decisions are in line with the budgetary policy. The authorization process and the appropriations process are two other important oversight related processes. The authorization process is a financial power that allows but does not guarantee federal agencies to make appropriations. The appropriations process actually sanctions money for a particular agency.<sup>104</sup>

Both members and congressional committees conduct investigative oversight. While there is no explicit constitutional provision granting this power, it has been read in to the powers of Congress. Supreme Court decisions have also held this power to be inherent in the legislative process.<sup>105</sup> The Court has however stated that the investigative power can only be used in aid of Congress's legislative function and not for the sake of exposure alone.

### 3. Power of Contempt

Congress codified this inherent power in 1857, enabling itself to punish for criminal contempt. Any person failing to produce documents before either the chamber or a committee when asked to do so, or any person refusing to answer questions, is punishable by fine and imprisonment for up to one year.<sup>106</sup> Since 1975, twelve cabinet-level or senior executive officials have been held for contempt.

Congress also has the power of civil contempt. A complaint can be lodged in a federal district court against any person who refuses to respond to a subpoena. If the individual still does not comply, a trial is initiated. This remedy is available against government officials only, if the basis of the refusal is not an official reason or an official authorization.<sup>107</sup>

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<sup>103</sup> Rules of the Senate, Rule 26(11), available at <http://rules.senate.gov/public/index.cfm?p=RuleXXV> (Last visited on December 27, 2013).

<sup>104</sup> See KAISER et al, *supra* note 76, 16-22.

<sup>105</sup> *Id.* See also *Eastland v. United States Servicemen's Fund*, 421 US 491 (1975); *Watkins v. United States*, 354 US 178 (1957).

<sup>106</sup> See KAISER et al, *supra* note 76, 33-34.

<sup>107</sup> 2 USC § 192, available at <http://www.law.cornell.edu/uscode/text/2/192> (Last visited on October 8, 2013); See *House Practice: A Guide to the Rules, Precedents and Procedures of the House*, 444-445, available at <http://www.gpo.gov/fdsys/pkg/GPO-HPRACTICE-108/html/GPO-HPRACTICE-108-18.htm> (Last visited on October 8, 2013) ("In the 97th Congress the House adopted such a resolution following the failure of an official of the executive branch (EPA Administrator Anne M. Gorsuch) to submit executive branch documents to a House subcommittee pursuant to a subpoena. This was the first occasion on which the House cited a cabinet-level executive branch official for contempt of Congress...In the same Congress,

## B. UK PARLIAMENT

The Indian parliamentary system is based heavily on the Westminster model. Many institutional functions are therefore similar. In view of this similarity, it may be useful to understand the theoretical underpinnings of the parliamentary system under the Westminster model. As in India, it is the government in the UK that controls Parliament.<sup>108</sup> Members of Parliament are elected on party platforms, and it is in their self-interest to vote with their party.<sup>109</sup> Therefore, if a government has a real majority, it is reasonably sure of securing the passage of its agenda in Parliament. In Sir Jennings's estimation Parliament thus serves the purpose of reflecting the sentiment of the people at a given point of time. This, according to him is the main function of Parliament: to hold the government accountable to the electorate. In his highly regarded work however, Sir Jennings does not look beyond this formal measure of accountability.

Historically, Parliament's resistance to reform has also exacerbated concentration of power in favor of the British executive.<sup>110</sup> This has arguably been due to strong commitment to ministerial responsibility: "Parliament severely underestimated the subsequent effect that the evolving state and mass parties would have on the convention and so it became the political rationale and procedural logic around which an expanding system of government was structured".<sup>111</sup>

The UK Parliament has three distinct types of committees: general committees, select committees, and joint committees. In addition, Grand Committees allow parliamentarians to debate issues affecting their region or constituency.<sup>112</sup> Select committees in the House of Commons perform the administrative oversight of government departments. All committees examine issues related to the spending, policies and administration of departments under their jurisdiction.<sup>113</sup> General committees are usually formed to discuss legislation.<sup>114</sup>

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Secretary of the Interior James G. Watt was cited for contempt for withholding from a committee subpoenaed documents and for failure to answer its questions").

<sup>108</sup> SIR IVOR JENNINGS, *CABINET GOVERNMENT* 473 (1969).

<sup>109</sup> *Id.*, 474.

<sup>110</sup> Matthew Flinders, *Shifting the Balance? Parliament, the Executive and the British Constitution*, 50 *POLITICAL STUDIES* 23 (2002).

<sup>111</sup> *Id.*, 25.

<sup>112</sup> *Grand Committees, How Parliament Works*, available at <http://www.parliament.uk/about/how/committees/grandcommittees/> (Last visited on December 27, 2013).

<sup>113</sup> *Select Committees, How Parliament Works*, available at <http://www.parliament.uk/about/how/committees/select/> (Last visited on December 27, 2013); also see House of Commons, *Select Committees: Brief Guide*, House of Commons Information Office (2011): There are currently 19 select committees. The number may change if the departmental organization changes.

<sup>114</sup> *General Committees (including Public Bill Committees), How Parliament Works*, available at <http://www.parliament.uk/about/how/committees/general/> (Last visited on December 27,

In India as in the UK, committees were therefore conceptualized as an avenue where investigations about policy alternatives could be carried out for debate in either House. This would enable Parliament to put forward alternatives to government policies and inform public opinion while testing the government as well.<sup>115</sup>

The main difference between the US Congress and UK Parliament (and the Indian Parliament) is in the use of the committee system as a tool of oversight.<sup>116</sup> Due to various institutional and structural constraints, committees cannot “challenge the authority of the parliamentary executives”.<sup>117</sup> Garrison Nelson cites scholarship stating that the contrast between committee strength is related to the contrast between the strength of political parties.<sup>118</sup> In UK political parties are strong and the committee system is weak. In the US, the inverse is true. He challenges this notion on empirical grounds and states that the analysis is limited by a study of only two legislatures.<sup>119</sup> His argument based on empirical studies of legislatures cited by him shows the viability of a strong role for committees in countries with strong party systems.<sup>120</sup>

Other criticisms regarding the functioning of the UK Parliament have also been made more recently. A commission set up by the Hansard Society published its report in 2001.<sup>121</sup> It stated that parliamentary scrutiny over the government is “neither systematic or rigorous”.<sup>122</sup> It further observed that Parliament has generally been unable to hold the executive accountable, and to ensure executive compliance with recommendations it makes, on account of expansion in the range of governmental activities undertaken by modern government.<sup>123</sup> To mitigate this problem, the report suggests providing the parliamentary workforce with the needed reinforcement through the twofold methods of- reforming select committees through greater systemization,<sup>124</sup> and increasing the work required of parliamentarians so as to lead to a demand of better staffing resources.

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<sup>115</sup> *Id.*

<sup>116</sup> Garrison Nelson, *Assessing the Congressional Committee System: Contributions from a Comparative Perspective*, 411 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 120, 123 (1974).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> He also cites the work of other scholars to provide examples for his argument. Italy and Japan are cited as examples of countries possessing both strong leaders and strong committees within their legislatures. Nelson, *supra* note 116, 127.

<sup>120</sup> *Id.*, 129.

<sup>121</sup> Greg Power, *Making Government Accountable – The Report of the Hansard Society Commission on Parliamentary Scrutiny*, 7 THE JOURNAL OF LEGISLATIVE STUDIES 1 (2001).

<sup>122</sup> *Id.*, 1.

<sup>123</sup> Power, *supra* note 121, 2.

<sup>124</sup> *See Id.*, 5-6 (One important recommendation in this regard was to give committees a set of core duties).

Non-committee mechanisms of oversight include the question time, debates, and early day motions.<sup>125</sup> The Prime Minister as well as other ministers answer oral questions about once every sitting month. The UK Parliament also has a Comptroller and Auditor General which aids the Parliament's Public Accounts Committee in *ex-post facto* financial oversight of government.<sup>126</sup>

### C. SOUTH AFRICA

South Africa's constitutional framework is interesting from a comparative perspective as an example of a parliamentary democracy constitutionally mandating the legislature to perform oversight of the executive. South Africa is a parliamentary democracy where the President is both the head of the executive and the head of the state. However, he is elected from the lower house and appoints the cabinet.<sup>127</sup> South Africa also has a bicameral Parliament.

Article 55 of the South African Constitution explicitly provides that the National Assembly (lower house) should ensure that all departments of the executive are accountable to it, and that it should maintain oversight of both departments of the executive, and any exercise of power by it.<sup>128</sup> The Constitution also specifies the powers of the National Assembly and its committees to summon witnesses, conduct hearings and take evidence.<sup>129</sup> It also allows cabinet ministers and officials to attend a meeting of the National Council of Provinces (upper house).<sup>130</sup>

Apart from these, the legal framework of the country also provides for Parliament's role in appointing senior government officials, representation of parliamentarians on government commissions, and the appointment of a Public Protector (ombudsman) who is appointed by the President on the recommendation of the National Assembly. The committee system also functions in a manner similar to India and the U.K., and specific portfolio committees oversee the implementation of existing laws.<sup>131</sup>

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<sup>125</sup> HILAIRE BARNETT, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 385-91 (7<sup>th</sup> ed., 2009).

<sup>126</sup> Inter-Parliamentary Union, *Parliamentary Oversight: United Kingdom House of Commons*, available at [http://www.ipu.org/parline-e/reports/CtrlParlementaire/2335\\_F.htm](http://www.ipu.org/parline-e/reports/CtrlParlementaire/2335_F.htm) (Last visited on December 27, 2013).

<sup>127</sup> Central Intelligence Agency, South Africa, *The World Factbook*, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html> (Last visited on December 27, 2013).

<sup>128</sup> Parliament of the Constitution of the Republic of South Africa, 1996, Ch. 4, available at <http://www.info.gov.za/documents/constitution/1996/96cons4.htm> (Last visited on December 27, 2013).

<sup>129</sup> Constitution of South Africa, Art. 56.

<sup>130</sup> Constitution of South Africa, Art. 66.

<sup>131</sup> Inter-Parliamentary Union, *Parliamentary Oversight: South Africa National Assembly*, available at [http://www.ipu.org/parline-e/reports/CtrlParlementaire/2291\\_F.htm](http://www.ipu.org/parline-e/reports/CtrlParlementaire/2291_F.htm) (Last visited on December 27, 2013).

In March 2008, a Task Team on Oversight and Accountability comprising members of both houses of Parliament submitted its final report.<sup>132</sup> It stated that contrary to the conventional adversarial definition of oversight under the Westminster model, the South African understanding would be a more institutional one. It understood oversight to mean, “the informal and formal, watchful, strategic and structured scrutiny exercised by legislatures in respect of the implementation of laws, the application of the budget, and the strict observance of statutes and the Constitution”.<sup>133</sup>

The main oversight mechanisms within the Parliament include committees, questions, budget votes, and general motions. However, the report also lists out departmental reports, strategic plans, department’s record of compliance with these plans and applicable legislation, committee reports on oversight and legislation as important tools of oversight.<sup>134</sup>

One of the important recommendations the report makes is regarding the manner of reporting by committees to the houses of Parliament. Currently, the Speaker refers annual reports from all departments to the relevant committee. Public hearings should also be conducted to gain inputs regarding the areas covered in the annual reports. The report recommends that when a response on an annual report is required from a minister, the same should be given on the floor of the House and addressed to the Speaker.<sup>135</sup>

The three countries studied above differ vastly in the nature of their constitutions, and the nature of their national legislative institutions. However, all of them seem to depend in varying degrees on the strength of the committee system, and the ability of individual legislators to question the government on the floor of the house. The next part of this paper examines components of an oversight framework for India’s parliamentary system.

This portion proposes a specific and in-depth reworking of the oversight framework within the Indian Parliament. It is thus necessary to establish what specific objectives of such an effort should be.

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<sup>132</sup> Parliament Monitoring Group, *Oversight and Accountability Model: Assisting Parliament’s Oversight Role in Enhancing Democracy*, Parliament of South Africa, available at <http://www.pmg.org.za/report/20080319-final-report-task-team-oversight-and-accountability> (Last visited on December 27, 2013).

<sup>133</sup> *Id.*

<sup>134</sup> *See id.*, Chapter 3.

<sup>135</sup> *See id.*, Chapter 4.

## V. APPROACH TO STRUCTURING OVERSIGHT MECHANISMS

Scholars have defined oversight mechanisms in varying forms. Rockman categorizes these definitions on the basis of “how many legislative activities it is seen to encompass; it also depends on the types of controls and supervision placed on the executive, the instruments employed, and the stages of legislative intervention”.<sup>136</sup>

At its broadest possible level, any parliamentary activity could be oversight related.<sup>137</sup> In this paper, the emphasis is to look at oversight mechanisms over and above those available to members on the floor of either House. However, most oversight mechanisms have linkages with one another. A strong committee system with effective monitoring of the bureaucracy may change the tenor of the question hour as it exists. These linkages need to be taken account of.

McCubbins and Schwartz highlight two contrasting approaches of police patrols and fire alarms.<sup>138</sup> The former refers to the method of legislators continuously monitoring the performance of executive departments. They argue that very little of such monitoring actually happens in practice. Therefore, a system of fire alarms is much more effective. Legislatures can design a system that encourages the electorate to sound a fire alarm every time the executive acts improperly. This implies a much smaller cost of monitoring since the electorate will be conducting most of the oversight. Moreover, bureaucrats, deterred by the sounding of such fire alarms, will stay faithful to legislative intent.

While fire alarms lower costs of monitoring, the political and penal consequences of sounding off fire alarms in India remain mixed, at best. It may thus be better to invest in a ‘police patrol’ formulation of *ex-ante* oversight that allows continuous monitoring of the executive. This would hopefully obviate the need for sounding off fire alarms. The other issue to be considered is the balance between strong oversight mechanisms and ensuring adequate executive insulation. The ability of the executive to implement policy objectives is important for representative democracy to succeed. Oversight mechanisms should not become politically expedient tools to defeat this process.

This issue is central to the design of an oversight framework for India. The success of oversight mechanisms also depends on what structural context political institutions are located in. The *first* step is to drastically

<sup>136</sup> See Rockman, *supra* note 8, 416-17. Also see Stapenhurst & Pelizzo, *supra* note 9, 3.

<sup>137</sup> *Id.*, Rockman, 417.

<sup>138</sup> Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SC. 165 (1984).

increase legislative input into the creation of legislation and policy-making. While it would not be politically or structurally feasible to make incorporation of such inputs mandatory, structural mechanisms can ensure that the executive is forced to give greater consideration to inputs from Parliament. This would enable Parliament to fulfill one of its least contentious roles i.e. creating legislation and policy by providing for *ex-ante* scrutiny. The *second* step is to ensure compliance with relevant laws. This function is a derivative of the first, since passing laws gives the power to ensure compliance with the same.

As a *third* step, the legal framework for improving oversight should begin with a definition of oversight balancing the issues raised above. The House Rules of the US House of Congress clearly define the oversight functions of Congressional committees. These are to assist the House in the application of federal laws, to examine conditions that may necessitate the drafting of new legislation, and to analyze required changes in federal laws.<sup>139</sup>

A framework for improving parliamentary oversight in India should therefore look at the following issues:

- A. Defining oversight
- B. Review of the functioning of the committee system.
- C. Oversight mechanisms in both Houses.
- D. Manner of oversight over subordinate legislation.
- E. Incentive structures for Members of Parliament to conduct oversight.

## A. *DEFINING OVERSIGHT*

Though there is no fixed definition of ‘oversight’ at its broadest, it means the following: “Legislative oversight is behavior by legislators and their staffs, individually or collectively, which results in an impact, intended or not, on bureaucratic behavior”.<sup>140</sup>

It is important to note that this definition of oversight is value neutral with regard to the type of impact on bureaucratic behaviour. Good oversight may result in increased efficiency and responsiveness within the bureaucracy, and at the same time, bad oversight may cripple the ability of the executive to

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<sup>139</sup> House Rules of the House of Representatives, Rule X(2)(a) and (b).

<sup>140</sup> MORRIS S. OGUL, CONGRESS OVERSEES THE BUREAUCRACY: STUDIES IN LEGISLATIVE SUPERVISION 11 (1976) as quoted in Congressional Research Service, *Congressional Oversight: An Overview*, February 22, 2010, available at <http://www.fas.org/sgp/crs/misc/R41079.pdf> (Last visited on October 25, 2013).

perform its functions. The framework given below tries to ensure that institutional incentives are structured in a manner so as to promote good oversight, without in any way limiting the subject-matter jurisdiction of the Parliament.

## 1. The committee system

The departmentally related parliamentary standing committees should play a central role in the oversight function of Parliament. In India, committees function in a largely bipartisan manner, but numerous issues related to their functioning have been highlighted in Part I. These issues need to be addressed by understanding how to modify structural elements to increase the capacity for conducting oversight:

### *a. Committee structure*

The capacity for oversight is obviously a primary issue while trying to reorganize the institutional framework for oversight. It is questionable whether committees at present are adequate in number to exercise oversight over the large number of government departments. However, it is equally important to consider the fact that most Members of Parliament are members of at least one parliamentary committee. It therefore makes more sense to retain the existing number of committees and improve capacity for oversight around them.

### *b. Sub-committees*

Sub-committees in the US Congress perform a major portion of the total work conducted by Congressional committees.<sup>141</sup> Of particular interest is the existence of *oversight* sub-committees within most Congressional committees.<sup>142</sup> Though standing committees in India also have the power to create *ad-hoc* subcommittees,<sup>143</sup> there are no existing permanent sub-committees. The present system creates significant pressure on committee members. Every meeting of the committee on a particular issue requires the presence of every member, which arguably impedes both their ability to specialize, and also their constituency work. The creation of sub-committees would also promote closer interaction of a smaller group of committee members with members of the executive, which could arguably lead to greater deliberation on issues. Importantly, sub-committees would be able to develop a better institutional

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<sup>141</sup> See for example the report of the Committee on Agriculture of the US House of Representatives titled "Second Semiannual report on activities during the 112<sup>th</sup> Congress". The sub-committees held thirty out of forty-seven hearings during the period covered in the report. *Also see* similar reports of the committees on Armed Services and Financial Services.

<sup>142</sup> House Rules of the House of Representatives, Rule X (5).

<sup>143</sup> Rules of procedure and the conduct of business in the Lok Sabha, Rule 263, available at <http://164.100.47.132/LssNew/rules/rules.aspx> (Last visited on December 27, 2013).

memory of government departments that the committee sitting as a whole may be able to. Importantly, committees may be able to divide functional responsibilities between the standing committee and its sub-committees. The sub-committees would be able to conduct more focused scrutiny over their respective subject areas.

In the US, the Legislative Reorganization Act of 1970 and consequent developments significantly altered the interrelationship between the standing committee's chairperson and the sub-committees. One significant development was the mandatory referral of all bills to the relevant sub-committees.<sup>144</sup> While it is appropriate that sub-committees with jurisdiction over the relevant department study legislation referred to the standing committee, a legislative framework should not curb the flexibility available to the chairperson of the committee. There may be situations where more than one sub-committee may be required to study the bill, or where detailed analysis by a sub-committee is not possible. Supplementary demands for finances are one such example. In such cases, the chairperson should have the flexibility to find the most efficient allocation of committee resources. The framework on oversight proposed here is not intended to upend the role of the committee chairperson and make sub-committees the main drivers of oversight.

A legislative framework should also mandatorily provide for the creation of sub-committees covering every department of the government under the committee's jurisdiction. Committees should be free to decide the number of sub-committees to create, and the distribution of departments within different sub-committees. The emphasis is on the provision for scrutiny of all government departments by sub-committees. Giving discretion to the committees on this issue helps them retain the flexibility to re-organize sub-committees with corresponding changes to government departments. Broadly, changes in the executive should be paralleled by changes in sub-committee organization and jurisdiction.

Based on the structure of Congressional committees, one may argue for having one sub-committee dedicated to oversight in all committees. However, such a structure may be superfluous in the Indian context for multiple reasons. Primarily, committees in India do not frame legislation. The committee as a whole, and any proposed sub-committees would be engaged in scrutinizing the administration anyway. A separate oversight sub-committee would in most likelihood lead to jurisdictional overlaps. If at all, there is a case for creating a separate sub-committee on financial oversight in all committees. Beyond facilitating oversight of departmental finances, it would free for other sub-committees to focus on a greater range of issues.

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<sup>144</sup> Baughman, John, *The Role of Subcommittees after the Republican Revolution*, 34 AMERICAN POLITICS RESEARCH 243, 247 (2006).

Another reason for having a financial oversight sub-committee is the diversity of methods by which the government spends its annual budgetary allocations. The central government distributes money collected through revenues to the states through a variety of mechanisms.<sup>145</sup> It also undertakes a number of infrastructural or welfare related projects directly.<sup>146</sup> A sub-committee on financial oversight would enable greater parliamentary understanding of these allocations, and also their scrutiny.

It is important to note that sub-committees would not be able to adopt reports or motions on their own. The adoption of any report, finding or recommendation of a sub-committee would have to be voted on by the entire standing committee. This is essential since the sub-committee is essentially designed to perform a delegated function as an agent of the whole committee. While it may have functional autonomy, it should not be vested with powers that are to be exercised by the whole committee. The three financial committees in Parliament have specific oversight duties that are not specific to particular ministries. The general changes being proposed in the following portions that are applicable to standing committees should also be applicable to them.

Some scholarship in the US has expressed concern over the sub-committee system. The chief concern is whether, "...subsets of members, nominally equal in decision-making authority, will dominate the outcomes of their parent body".<sup>147</sup> This concern is pertinent in the US because of the passage of structural changes since the 1970s that empowered subcommittee chairpersons and ranking minority members at the cost of the standing committee chairperson. However, the same framework is not being considered for the Indian Parliament. As will be noted, committee chairs will continue to exercise significant powers over subcommittees that have devolved to subcommittees within the US system.<sup>148</sup>

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<sup>145</sup> See the reports of the Finance Commission of India. The Thirteenth Finance Commission report mentions various methods of distribution of revenues. These include direct apportionment of revenue collected based on a variety of factors, grants-in-aid to states in need of assistance, as well as direct financial allocation to local bodies, available at <http://fincomindia.nic.in/ShowContentOne.aspx?id=28&Section=1> (Last visited on December 27, 2013).

<sup>146</sup> Generically termed "Centrally Sponsored Schemes", the expenditure on these may be made entirely by the central government or in conjunction with state governments. Examples include the National Rural Health Mission and the Pradhan Mantri Gram Vikas Yojana, available at [http://mohfw.nic.in/NRHM/Documents/Mission\\_Document.pdf](http://mohfw.nic.in/NRHM/Documents/Mission_Document.pdf) (Last visited on December 27, 2013).

<sup>147</sup> Richard L. Hall & C. Lawrence Evans, *The Power of Subcommittees*, 52 THE JOURNAL OF POLITICS 335, 336 (1990).

<sup>148</sup> These include the power to choose the number and composition of subcommittees. See *id.*, 336, 350 (With regard to the generalisations about "government by subcommittee", Hall and Evans note that the influence of subcommittees on the eventual decision varies from case to case and committee to committee).

c. *Subject-specific sub-committee on regulation*

Parliamentary scrutiny of subordinate legislation is essential for many reasons. One of the most well-known explanations provided by McCubbins, Noll and Weingast<sup>149</sup> is the moral hazard problem i.e. administrative agencies can often subvert legislative intent by choosing a policy option different from the ones behind the parent legislation. Since politicians devolve considerable policymaking power to bureaucrats, ensuring that legislative intent is met requires serious consideration. This is especially so since politicians have limited resources to monitor bureaucrats.<sup>150</sup> Moreover, as Kathleen Bawn argues, analyses of Congressional control over the bureaucracy have also underestimated the control exerted through statutory control.<sup>151</sup> Additionally, fire alarm systems may be created in legislation itself,<sup>152</sup> allowing parliamentary committees to focus on police patrolling in the routine course of business.

As has been noted earlier, Parliament is unable to pay sufficient attention to subordinate legislation and independent regulators. The resolution of this issue requires such oversight to be located within the committee system because focused, deliberative discussion on either subject is not feasible on the floor of the Houses. Additionally, the Parliament meets for very short periods of time during the year, thereby further constraining the list of subjects that may be discussed.<sup>153</sup>

As aforementioned, the US Congress has enacted laws governing the process of rule framing by administrative agencies.<sup>154</sup> These govern the manner of Congressional oversight over subordinate legislation. The federal agency promulgating a regulation must submit it to each house of Congress,

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<sup>149</sup> McCubbins, Noll & Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VIRGINIA LAW REVIEW 431, (1989); McCubbins, Noll & Weingast, *Administrative Procedures as Instruments of Political Control*, 3 JOURNAL OF LAW, ECONOMICS AND ORGANIZATION 243 (1987).

<sup>150</sup> *Id.*

<sup>151</sup> Kathleen Bawn, *Choosing Strategies to Control the Bureaucracy: Statutory Constraints, Oversight, and the Committee System*, 13 JOURNAL OF LAW, ECONOMICS AND ORGANIZATION 101, 102 (1997).

<sup>152</sup> *Id.*, 104.

<sup>153</sup> Rohit Kumar, *Vital Stats: Parliament in India: 2009*, December, 2009, available at <http://www.prsindia.org/administrator/uploads/general/1262663823~parliament%20in%202009.pdf> (Last visited on December 27, 2013); See also Rohit Kumar, *Vital Stats: Parliament in Budget Session 2011*, available at [http://www.prsindia.org/administrator/uploads/general/1301056573\\_Vital%20Stats%20-%20Parliament%20in%20Budget%20Session%202011%20-%20to%20send%20out.pdf](http://www.prsindia.org/administrator/uploads/general/1301056573_Vital%20Stats%20-%20Parliament%20in%20Budget%20Session%202011%20-%20to%20send%20out.pdf) (Last visited on December 27, 2013) (Stating that the budget session “recorded the lowest number of sittings in a non-election year in the past two decades”).

<sup>154</sup> Congressional Review Act 5 U.S.C. §§ 801-808, S. 801 (Supp. III 1994); See generally Jack M. Beerman, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 103-106 (2006).

along with a cost-benefit analysis of the regulation. Additionally, the regulations are enforced after they are placed before Congress.<sup>155</sup>

In India, all subordinate legislation is laid in Parliament and is enforced on the date they are notified by the executive. Any modifications made based on the recommendations of the Committees on Subordinate Legislation apply prospectively. Additionally, the Committees on Subordinate Legislation examine only a select few of the total number of subordinate legislation tabled in Parliament.<sup>156</sup> It is important to note that in the US Congress, all subordinate legislation is automatically referred to the standing committee with jurisdiction on the subject.<sup>157</sup> It would be more feasible to abolish the Committees on Subordinate Legislation and mandate the creation of sub-committees on regulatory matters in every committee. Subject specific parliamentary committees do undertake oversight of regulations in other countries as well. There are three major advantages of such reorganization.

*First*, institutional memory would facilitate scrutiny. The standing committee examining the subordinate legislation also examined the parent law. This would provide a degree of expertise on the subject matter that an independent committee on subordinate legislation does not possess. *Second*, the development of institutional expertise over time would lead to greater efficiencies in scrutiny of subordinate legislation. Sub-committee members would gain greater specialized experience in scrutinizing sector-specific regulations. Lastly, a much greater number of committees would be examining subordinate legislation, leading to a quantitative increase in scrutiny of subordinate legislation.

Giving a sub-committee the power to oversee independent regulators may be trickier. For one, it is debatable whether the legislature should have a say in the functioning of regulators. A government elected by a majority should ideally set policy objectives of a regulator in a parliamentary democracy. However, legislatures also have the right to ensure compliance with the law enacted. Conflict may arise in cases where the parent law does not mention any clear regulatory objectives, and the government's policy objectives differ from the opinion of a parliamentary sub-committee. Under the present statutory framework, this conflict would arise in almost every case the sub-committee does not agree with governmental policies.

At the same time, the oversight objective of ensuring that regulators comply with the law is equally important. Therefore, powers vested in the sub-committee for overseeing regulators need to be clearly defined. Functionally, the legislature should be empowered to oversee whether the

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<sup>155</sup> *Id.*

<sup>156</sup> See Burman *supra* note 72.

<sup>157</sup> Congressional Review Act, § 801.

regulatory body complies with laws enacted by Parliament. From a separation of powers perspective, it should not be able to second-guess policy-making unless the implementation of such policy is clearly in violation of an existing law. This delineation should be clearly defined in the proposed legislation.

Vesting the sub-committee with specific oversight powers with limited jurisdiction to subjects covered by the enacting statute is one feasible solution. Under most existing laws this would cover issues such as the composition of the regulatory body, the qualifications of regulators, framing of subordinate legislation establishing the regulatory body (but not regulations framed by the regulator), and the regulator's compliance with statutory provisions and applicable laws.<sup>158</sup>

Important limitations must apply even to these provisions. *First*, the appointment and qualifications of regulators should not be challenged after the lapse of a given period of time since their appointment. Allowing an indefinite period for such a challenge could potentially cripple regulatory independence. *Second*, most enacting statutes confer powers on the government department responsible for establishing the regulator by listing subjects on which subordinate legislation may be framed.<sup>159</sup> While these should be within the sub-committee's jurisdiction, jurisdiction over regulations framed by the regulators should be limited only to examining illegality. Sub-committees should be expressly prohibited from examining any other ground.

Finally, financial oversight of the administrative expenses of a regulator should be limited to allegations of financial impropriety, except in the course of annual examination of the Union Budget. Even then, any allegations of financial impropriety by regulators should be scrutinized only after two thirds of the entire standing committee has agreed that there is a *prima facie* case for such scrutiny. The sub-committee may then conduct the scrutiny only on the grounds that the entire committee has approved.

The inter-relationship between an independent regulator and the relevant ministry or department deserves consideration. While most enacting statutes empower the concerned ministry to establish the regulator, they do not comprehensively detail the functional relationship between a regulator and the ministry.<sup>160</sup> They do not for example provide guidelines on when ministerial or departmental decisions can overturn decisions made by a regulator. In the alternative they vest an absolute right with the central government to supersede the regulator.

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<sup>158</sup> For example, refer to the Competition Act, 2002, §§ 7, 8, 53D, 53E and 63.

<sup>159</sup> *Id.*, § 63; Telecom Regulatory Authority of India Act, 1997, § 35.

<sup>160</sup> *Id.*

Parliament undoubtedly has the power to frame legislation to clearly spell out the relationship between the executive and the regulator in detail. It is however debatable whether parliamentary committees should enjoy the power to scrutinize individual instances where issues regarding the relationship between independent regulators and the executive arise. Such power would not be exercised in pursuance of any legal provision. However, nothing prevents a sub-committee from proposing general standards that may be voluntarily accepted by regulators and government departments, or from recommending the need to legislate on such standards.

*d. Term-limits on committee membership*

Most standing committees have twenty-one members from the Lok Sabha and ten members from the Rajya Sabha.<sup>161</sup> All standing committees as well as some others<sup>162</sup> are presently re-constituted every year.<sup>163</sup> The agenda of many committees is often not finished before the expiry of their term. Institutionally, an annual turnover also restricts sector specific expertise developing within committees.

It would be better to make the term of a committee co-existent with the term of the executive. That is, all committees would ordinarily be constituted only after a general election. In the case of the Rajya Sabha, this rule would have to be modified since one-third of the members retire every two years. This can be achieved by providing that only new members of the Rajya Sabha shall be accommodated within committees with existing vacancies. Existing procedures of Parliament provide that no member shall be appointed to a committee if he/ she does not want to be a part of it.<sup>164</sup> In such a case appointments should be made only if there are vacancies.

This proposal would ensure that a committee is ordinarily reconstituted every five years. Within this framework, the sub-committees should have tenures of two years each. This structure is envisioned to balance the need for expertise within sub-committees, as well as creating a knowledge base of different sectors within the standing committee. This would ensure that members have adequate time to understand their specific sub-committee work. Additionally, it would ensure that a wide pool of members within the standing committee have knowledge of a particular sector. The purpose of this design

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<sup>161</sup> *Parliamentary Committees, Parliamentary Procedure Abstract Series*, 2009, available at <http://164.100.47.132/LssNew/abstract/index.aspx> (Last visited on December 27, 2013).

<sup>162</sup> *Public Accounts Committee*, available at [http://164.100.47.134/committee/committee\\_informations.aspx](http://164.100.47.134/committee/committee_informations.aspx) (Last visited on December 27, 2013).

<sup>163</sup> See Abstract No. 15 titled "Parliamentary Committees", *supra* note 161.

<sup>164</sup> Rules of procedure and conduct of business in the Lok Sabha, Rule 254, available at <http://164.100.47.132/LssNew/rules/rules.aspx> (Last visited on December 27, 2013).

is to promote technocratic discussion both within the sub-committees and the standing committees.

Similarly, chairpersons of sub-committees should have a tenure co-existent with the tenure of the sub-committee. However, it is desirable that the chairperson of the standing committee changes at least once during its tenure. This would aid the infusion of new ideas in the running of the committee, and also aid political parties in rewarding greater number of their members.

#### *e. General oversight powers*

The nature of oversight which parliamentary committees perform is central to a discussion on oversight powers. Broadly, committee oversight activities can include continuous ongoing scrutiny of executive functions, or specific *ad hoc* investigations. The US Congress performs both these functions.<sup>165</sup> A discussion of oversight powers must therefore first debate the efficacy of the pre-existing oversight powers of parliamentary committees, and then examine whether and in what form investigative oversight as understood in the US should be incorporated within the Indian framework.

Standing committees presently enjoy limited powers to call for documents and witnesses. For example, the government may deny them access to documents covered under the Official Secrets Act.<sup>166</sup> As regards witnesses, committees can ask any person to testify before them.<sup>167</sup> However, committees themselves enjoy no contempt powers to ensure such testimony. Such power has to be exercised by reference to the Speaker/ Chairman of the House.

Significantly perhaps, the onus is on the committee to request access to documents and other relevant evidence. This often impedes effective scrutiny since members do not have adequate information on what documents to request access to. One of the first changes required is therefore to mandate that the government undertakes maximum disclosure on its own, rather than wait for the committee to request for additional information.

The scope of such 'maximum disclosure' is obviously contentious. There are parallels to the debate concerning disclosure required under the Right to Information Act.<sup>168</sup> Government officials are wary of disclosing certain kinds of information such as notes made on files, claiming they can

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<sup>165</sup> See generally ROSENBERG, *supra* note 28.

<sup>166</sup> The statute is available at [http://orissasoochanacommission.nic.in/Official%20Secret%20Act\\_1923.PDF](http://orissasoochanacommission.nic.in/Official%20Secret%20Act_1923.PDF) (Last visited on December 27, 2013); see also The Rules of Procedure and Conduct of Business in the Lok Sabha, Rule 270.

<sup>167</sup> See Rules of Procedure, Lok Sabha, Rule 202.

<sup>168</sup> The Act enables citizens to claim access to any piece of information that is not otherwise classified as secret under other applicable laws.

be misused to harass officials, therefore impeding discretionary decision-making.<sup>169</sup> Thus, officials would be much more comfortable providing information only as demanded. However, if the government is compelled to provide maximum disclosure defined in broad and general terms without the risk of a disproportionate penalty, then there should not be serious impediment to governmental decision-making.

The argument in favor of making such disclosure from a separation of powers perspective is evident in the literature on the subject in the US.<sup>170</sup> The reasons for doing so may be attributed to the constitutional delineation of executive and legislative powers.<sup>171</sup> The US Congress is presupposed to have a right to access all information necessary to carry out its functions properly. Certainly, the same argument is also applicable to the Indian Parliament.

One important tool for ensuring access to information from the executive is the subpoena power. The US Congress vests committees with the power to issue subpoenas.<sup>172</sup> The subpoena power is an important tool of investigative oversight.<sup>173</sup> US courts have generally construed the subpoena power of Congress broadly.<sup>174</sup> The limitations on such power are that the subpoena should be necessary for Congress to carry out its lawful functions, the committee issuing the subpoena is authorized to conduct the investigation, and the materials sought by the subpoena are essential for carrying out the enquiry.<sup>175</sup> The importance of subpoenas as an instrument for ensuring access to evidence from the executive may vary depending on whether evidence is required for specific investigations, or for a routine exercise of oversight powers. Therefore, at this juncture it is important to discuss the viability of investigative oversight in the Indian context.

The Indian Parliament does conduct investigative oversight by establishing Joint Parliamentary Committees on specific issues.<sup>176</sup> These committees are conferred subject matter jurisdiction and investigative powers through resolutions passed on the floors of both Houses. Such powers are however,

<sup>169</sup> *No Right to Know File Notings*, INDIAN EXPRESS July 21, 2006, available at <http://www.indian-express.com/news/no-right-to-know-file-notings/8943/0> (Last visited on December 27, 2013).

<sup>170</sup> Vicki Divoli, *The "Full Access Doctrine": Congress' Constitutional Entitlement to National Security Information from the Executive*, 34 HARV. J.L. & PUB. POL'Y 493, 498 (2011).

<sup>171</sup> US Const., Art. I & II.

<sup>172</sup> Rule XXVI(1) of the Senate Rules and Rule XI(2)(m)(1) of the House Rules, as mentioned in ROSENBERG, *supra* note 28, 8.

<sup>173</sup> *Id.*

<sup>174</sup> Christopher F. Corr, & Gregory J. Spak, *The Congressional Subpoena: Power, Limitations and Witness Protection*, 6 BYU J. PUB. L. 37, 41 (1992).

<sup>175</sup> *Bernard Bergman v. Special Committee on Aging*, 389 F Supp 1127 (1975).

<sup>176</sup> *Joint Parliamentary Committees and What they have Achieved*, BUSINESS STANDARD November 17, 2010, available at <http://www.business-standard.com/india/news/joint-parliamentary-committeeswhat-they-achieved/415198/> (Last visited on December 27, 2013).

largely similar to powers ordinarily enjoyed by standing committees.<sup>177</sup> A more significant consideration however rests on the difference between the parliamentary and presidential systems of government. In the US, lack of ministerial responsibility arguably creates a clearer justification for investigative oversight. Such a power would be required to ensure laws passed by the Congress are implemented properly.<sup>178</sup>

This argument has less credence in a parliamentary system since the government is directly responsible to the Parliament. Since there is no divided government, investigative oversight on a pattern similar to the US Congress may dilute the principle of ministerial responsibility.

Apart from the dilution of the formal principle of ministerial responsibility, sound reasons emerge once we examine the process after a committee has determined that a member of the executive has acted illegally. Once a committee finds a minister or a government official guilty of wrongdoing, appropriate action would have to be taken by the government or Parliament, or both. If the Parliament does not consider the government's response to be adequate, it may try and act on its own. In extreme cases, opposition members may bring a motion of no-confidence against the government. The result, regardless of the factual circumstances, depends on whether the government commands or can negotiate a majority in the House. Consequently, the outcome is predicated on political negotiations rather than factual circumstances. The question is whether it is desirable to alter this structure.

It may be better to design an outcome where a finding of wrongdoing by a committee mandates investigation into such actions by government investigative agencies. Structurally, this would be least disruptive of the separation of powers currently existing within the Indian parliamentary system. Since action by investigative agencies is mandated, there would be no opportunity for government officials to prevent the initiation of such investigation.

It is important to note here that while a sub-committee may reach a finding of wrongdoing, the finding would have to be adopted by the whole committee. Additionally, all reporting by the government would have to be done to the committee, which may then delegate further action on such reports to the relevant sub-committee. The conferment of these powers to the committee as a whole also has potential for misuse. However, larger number of

<sup>177</sup> See for example the resolution establishing the Joint Parliamentary Committee on the Offices of Profit on July 27, 2009 in the Lok Sabha, available at <http://164.100.47.132/LssNew/psearch/Result15.aspx?dbsl=404> (Last visited on December 27, 2013).

<sup>178</sup> See *McGrain v. Daugherty*, 273 US 135 (1927) and *Sinclair v. United States*, 279 US 263 (1929) (Where the US Supreme Court upheld the investigative powers of Congress as necessary to obtain information for legislating effectively. In *Watkins v. United States*, 354 US 178 (1957), the Supreme Court also declared Congress' broad power to include the administration of existing laws as well as to check alleged acts of corruption and mismanagement).

members, as well as wider representation of political parties would act as a more effective check compared to sub-committees.

The power to issue subpoenas is therefore required for a far more limited set of circumstances compared to that in the US. Defining the set of circumstances in which subpoenas may be issued can set limitations on this power.<sup>179</sup> Committees should be expressly prohibited from issuing subpoenas for enquiring into active investigations being conducted by investigative agencies. They should also be prohibited from issuing subpoenas regarding departmental inquiries against officials while they are still being conducted. The essence of imposing these and other limitations is to guard from parliamentary interference on subjects that are inherently administrative functions. Limitations should not be imposed on subpoena power related to subjects that may also be acted upon by the legislature i.e. policy-making.

Moreover, the issuance of a subpoena by a subcommittee must be confirmed by a majority of the standing committee. This is necessary to prevent this power from being used to pressurize government officials. The power to issue subpoenas and to call for contempt is co-existent with that of calling for evidence and testimony.<sup>180</sup> The Indian Parliament enjoys an inherent right to call for contempt, independent of a statutory framework. Without the power to impose penalty, the powers of committees will be ineffective at best, and disregarded at worst. Currently, disciplinary powers are vested with the Houses or with the Speaker/ Chairperson. This centralization of power prevents committees from being effective institutions on their own. Additionally, the Speaker is chosen from the majority party.<sup>181</sup> This creates a formal sense of neutrality without adequately decentralizing responsibilities. The design of an effective institutional framework should ensure neutrality in institutions requiring the same.

Contempt powers should therefore be delegated to committees, to be implemented through a two-thirds majority vote of the committee. Penalties should range from fines on individuals and entities found in contempt (including government departments) to civil imprisonment for a moderate term.<sup>182</sup> In addition courts and enforcement agencies should be mandated to aid the exercise of this contempt power.

This does not imply that the power to hold in contempt should be used lightly. It should be used only after a committee has held a contempt proceeding (or a sub-committee delegated to hold the proceeding) and the person

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<sup>179</sup> See Rosenberg *supra* note 28.

<sup>180</sup> *Id.*, 14.

<sup>181</sup> Office of the Speaker, Lok Sabha, *Election of Speaker*, available at <http://speakerloksabha.nic.in/roleofthespeaker.asp> (Last visited on December 27, 2013).

<sup>182</sup> Find examples of punishment for contempt in other countries.

accused has a chance to respond to the charge against him/ her. The committee should then vote based on the result of the contempt proceeding. The mandate of the Committee on Ethics<sup>183</sup> should be enlarged to make them review the committee's decision and confirm or revise a decision to hold a person in contempt.<sup>184</sup> In doing so, the Ethics Committee would only look at the documents prepared by the sub-committee, and the grounds on which the committee voted in favor of imposing a penalty. The Ethics Committee would not have to conduct its own investigation on the issue. Additionally, judicial review should be available against a contempt order passed by a committee.

The power to issue subpoenas along with mandatory disclosure requirements as well as the power to impose penalties create far greater incentives for the executive to report to committees in a comprehensive manner. Coupled with defined limitations on such powers they should also prevent unnecessary intrusion into the work of the government.

#### *f. Reporting requirements*

Parliamentary committees should be able to ensure that the government provides all documents and evidence required by it in a timely manner. It should also be able to ensure that if the executive's feedback on its findings or reports is solicited, such feedback should be given in a timely manner. Delays by the executive in responding to Parliamentary committees greatly reduce the ability of Parliament to conduct oversight. The Public Accounts Committee as well as the Committee on Subordinate Legislation have noted the delay, lack of response by government departments to matters under its jurisdiction.<sup>185</sup>

An even more disturbing example of such delay is the delay in reporting on the annual budget. The budget is introduced in Parliament in March. Parliamentary committees deliberate on the budget and prepare its reports and the budget is passed in April. The Action Taken Report based on the executive's feedback on the committee's recommendations is presented almost near the end

<sup>183</sup> The Committee on Ethics is an *ad-hoc* committee, not a permanent one. It was constituted in October, 2009. Its function is to oversee the ethical code of parliamentarians and look at complaints of unethical conduct, available at [http://164.100.47.134/committee/committee\\_information.aspx](http://164.100.47.134/committee/committee_information.aspx) (Last visited on December 27, 2013).

<sup>184</sup> The Committee on Ethics should also be made a permanent committee.

<sup>185</sup> Eleventh Report of the PAC, *Non-Compliance by the Ministries/Departments in Timely Submission of Action Taken Notes on Non-Selected Audit Paragraphs*, April 29, 2010, 12-13, available at <http://164.100.47.134/lssccommittee/Public%20Accounts/11th%20Report%20English.pdf> (Last visited on December 27, 2013); see also LOK SABHA COMMITTEE ON SUBORDINATE LEGISLATION, *Non Implementation of Oft-Repeated Recommendations of Committees on Subordinate Legislation, Lok Sabha, by Various Ministries*, Twenty-first Report, December 16, 2011, available at <http://164.100.47.134/lssccommittee/Subordinate%20Legislation/Twenty-First.pdf> (Last visited on December 27, 2013).

of the year.<sup>186</sup> The value of a committee's scrutiny on the budget is thus limited to the points it can get the relevant ministry to agree on during its deliberation with ministry officials. The Action Taken Report detailing the executive's response to a committee's recommendations on the annual budget is therefore of no practical significance for that year's financial expenditure.

There should be detailed, and specific reporting requirements imposed on the executive for different sorts of functions which the committees are to perform. *First*, all documentation or records asked from the government should be submitted within sixty working days. This requirement may be relaxed by a period of thirty days by the chairman of the committee based on a request from the concerned government department. Further extensions should be granted by a majority vote of the committee, only if the head of the department appears in person before the committee to explain the reasons for seeking such a relaxation. In any case, such an extension should not be for more than a period of ninety days. This gives the executive a maximum period of six months to respond to documents or other material sought by the committee.

*Second*, it is preferable to ensure a smaller time limit for reporting back to committees when the executive seeks financial appropriations. This would apply for committee work related to the annual budget as well as any supplementary or emergency appropriations. The standard time limit for such reporting should be seven working days, which may be extended by a further period of seven working days on request. Larger time limits would render parliamentary oversight of very limited practical use.

### *g. Research Support*

Committees require a large amount of professional research support in order to be effective in their oversight work. The best example of this is the existence of professional research staff for different committees within the US Congress. Congressional committees enjoy a large amount of autonomy in employing personnel, as well as deciding compensation.<sup>187</sup> The officials working for the Parliament, as well as the Parliament library provide research support to parliamentarians in India. Neither of these consists of personnel who are technically qualified to provide sector-specific research support. Additionally, parliamentarians are not provided any personal research staff.

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<sup>186</sup> The average time taken to prepare the Action Taken Reports was 9.5 months in 2008-09. See Anirudh Burman, *Financial Oversight by Parliament: Background Note for the Conference on Effective Legislatures*, November 15, 2010, available at <http://www.prsindia.org/administrator/uploads/media/Conference%20note/Conference%20note%20on%20financial%20oversight.pdf> (Last visited on December 27, 2013).

<sup>187</sup> The House Rules of the House of Representatives allow for the appointment of up to 30 professional staff members for each committee. The chairperson of the committee decides the compensation of staff members. See Rules of the House of Representatives, Rule X(9)(a).

The proposed legislation would mandate that there should be at least five research personnel for every sub-committee. Each standing committee should have at least ten research personnel independent of sub-committee staff. The qualifications for research staff should be decided by a majority vote within the committee. Sub-committees may list their own qualification requirements, but these would have to be voted on by the standing committee. The compensation for such research staff should be uniform across all committees, and should be decided by the Speaker and Chairperson in consultation with each other.<sup>188</sup>

Safeguards should be included to prevent misuse of research staff for personal use by parliamentarians. *First*, personal use of research staff by a parliamentarian should be considered as an ‘ethics violation’, thereby subjecting him or her to an ethics proceeding. *Second*, one sub-committee should not be able to use research staff assigned to another sub-committee without the consent of both the chairperson of the concerned sub-committee as well as the standing committee. This would create sufficient insulation for parliamentary research staff from misuse by individual parliamentarians while also allowing for flexibility in allocating research staff in case of genuine need.

#### *h. Structuring incentives for committee members*

The legal changes proposed above would drastically alter the institutional structure of the committees from the present system. However, oversight will continue to be ineffective if parliamentarians do not have adequate incentives to conduct oversight in the first place.<sup>189</sup> Presently, parliamentarians by and large prefer working in the constituency to working in Parliament. This is largely because their electoral fortunes are determined by the work done in the constituency rather than their achievements in Parliament.<sup>190</sup> Additionally, the parliamentary model of democracy reduces incentives for strong oversight.<sup>191</sup> Committee members from the majority party do not have the same

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<sup>188</sup> Some standing committees are under the administrative supervision of the Lok Sabha secretariat while others under the Rajya Sabha secretariat. See *Parliamentary Committees*, available at <http://www.parliamentofindia.nic.in/ls/intro/p21.htm> (Last visited on December 27, 2013).

<sup>189</sup> As Mehta and Kapur state: “...opposition parties are unable to generate new information about government activities that can allow them to take the executive to task”, Mehta & Kapur, *supra* note 53, 10.

<sup>190</sup> See Mehta & Kapur, *supra* note 53, 19.

<sup>191</sup> Terry M. Moe & Michael Caldwell, *The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems*, 150 JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS 171, 177 (1994) (The authors argue that the governing party is much more free to pass its own program at will than in a presidential system. Though they say it increases structural accountability, in my opinion it also reduces incentives for oversight in Parliament. Though structural accountability is enhanced, mechanisms for such accountability rarely incorporate legislative inquiry as a means to prevent executive indiscretions).

incentives for oversight as committee members in the US Congress.<sup>192</sup> The political fortunes of committee members are tied to the fortunes of their party. Strong oversight that could cause potential embarrassment for the government may have negative consequences for committee members of the majority party. Minority members would also be wary of being subjected to stringent standards of oversight if they perceive that their party may come to power in the near future.

For this reason, it is proposed to establish certain minimum standards of performance for committees. This may be done by *first* requiring that all committees and sub-committees prepare agendas and action points on an annual basis. Both houses of Parliament should approve these. *Second*, all committees should be required to prepare a report of the work undertaken by them in the past year. This should contain a list of all work undertaken by them, a report on whether the work undertaken satisfies the agenda set at the beginning of the year, and reasons in case of non-fulfillment. *Third*, the Speaker should be mandated to fix time for chairpersons of committees to justify committee agenda and solicit feedback, and also raise any issues regarding their committee's interaction with the executive.

While these proposals do not directly address the issue of incentives, they create pressure on committees to publicize its work on the floor of the House. This should in turn create pressure for committee chairpersons to ensure that the committee is working effectively. While this framework is far from ideal, it does create some sort of competition between committees to do a better job of scrutinizing the executive.

Existing rules of procedure provide that disciplinary action may be initiated against a committee member if he/ she absents himself/ herself from two consecutive committee meetings.<sup>193</sup> This rule should be made non-discretionary by mandating that committee chairperson automatically take notice of such absence, and refer such cases to the Speaker/Chairperson. Again, while this provision may not actually ensure qualitatively better oversight, it would at least ensure that committee members do not abdicate their committee responsibilities in favor of other priorities.

This and other legislative proposals for strengthening the committee system would result in a vastly different committee system than the one at present. Committees would become far more specialized, more stable and have greater capacity to conduct oversight. However, incentive mechanisms for parliamentarians need a response addressing political incentives. While that is essential, it cannot be examined within this paper. It is however contended that

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<sup>192</sup> See Kapur & Mehta, *supra* note 53, 12-13.

<sup>193</sup> Rules of Procedure and Conduct of Business in the Lok Sabha, Rule 260, available at <http://164.100.47.132/LssNew/rules/rules.aspx> (Last visited December 27, 2013).

the proposals outlined above would in fact increase incentives considerably from the present system. Parliamentarians may oppose a structural shift if it takes time away from their constituency work. However, over time the emphasis on parliamentary and oversight work would be equally cumbersome for all incumbents. Therefore, the political incentives for conducting oversight itself may change over a period of time.

## VI. IMPROVING OVERSIGHT MECHANISMS IN THE LOK SABHA AND RAJYA SABHA

One primary issue with respect to the Parliament is paucity of time. The number of days the Parliament sits has reduced over the years.<sup>194</sup> Therefore, while the role of the State has grown more complex, the role of the legislature has become less relevant. One reason for the decrease in the number of days is the power of the President to convene Parliament.<sup>195</sup> Effectively, the council of ministers convenes the Parliament. The executive may have a tendency to take its majority in Parliament for granted. It would therefore have no incentive to convene the Parliament for any longer than necessary for the purposes of approving the government's agenda.

This paucity of time has obvious implications for oversight that may happen in the Houses. Parliamentary committees continue to hold meetings even when Parliament is not in session. However, hardly any of this work is ever discussed in either House. The oversight related work of the DSRCs has to be discussed and debated in Parliament for their work to be of any consequence. This cannot be done in an *ad-hoc* manner merely by scheduling discussions on important subjects as and when such demands arise.

Presently, the Question Hour is the only mechanism related directly to parliamentary oversight of the executive. However, there have been repeated instances of the Question Hour being adjourned in the face of disruptions or disturbances.<sup>196</sup> Additionally, the Question Hour allows individual parliamentarians to question the executive on matters important to them. It does not facilitate a systematic scrutiny of the executive on a particular issue. Such systematic scrutiny is stymied by the existing lack of scrutiny at the committee

<sup>194</sup> Kumar, *supra* note 153.

<sup>195</sup> Constitution of India, 1950, Art. 85.

<sup>196</sup> *Parliament Disruption Costs Exchequer Rs2 Crore a Day*, DNA INDIA November 22, 2011, available at [http://www.dnaindia.com/india/report\\_parliament-disruption-costs-exchequer-rs2-crore-a-day\\_1616166](http://www.dnaindia.com/india/report_parliament-disruption-costs-exchequer-rs2-crore-a-day_1616166) (Last visited on December 27, 2013); *Parliament Disrupted Over Anti-Chidambaram Protests*, TIMES OF INDIA December 16, 2011, available at [http://articles.timesofindia.indiatimes.com/2011-12-16/india/30523972\\_1\\_question-hour-protests-by-opposition-members-proceedings-in-both-houses](http://articles.timesofindia.indiatimes.com/2011-12-16/india/30523972_1_question-hour-protests-by-opposition-members-proceedings-in-both-houses) (Last visited on December 27, 2013); *Its Time to Make MPs Accountable*, Express Buzz February 26, 2012, available at <http://express-buzz.com/voices/it's-time-to-make-mps-accountable/366361.htm> (Last visited on December 27, 2013).

level, as well as the information asymmetry between individual legislators and the executive.

To remedy these issues, a variety of legislative provisions may be formulated. *First*, it must be ensured that the Parliament works longer to allow for greater deliberation and debate in the two chambers. This may be done either by modifying the President's power to convene Parliament, or mandating that the President convene the Parliament for a minimum number of days every year. The former requires a constitutional amendment and may be difficult to enact.

The *second* alternative qualifies the President's prerogative in a constitutional manner. It would be more viable to do so. Therefore, the President should be mandated to ensure that Parliament convenes for at least a hundred and twenty days every year. While it may be desirable to mandate that the Parliament must work longer, it may impede the work of parliamentary committees.

*Third*, there must be specific time allocated for discussion of committee oversight reports. One example is the time allocated for the discussion of Private Member Bills every Friday afternoon. The Speaker/ Chairperson should schedule at least one such session every week. The chairperson of the relevant committee as well as the minister of the relevant ministry should be mandated to attend such discussion. The session should end with the response of the minister to the points raised during the discussion.

Financial oversight has to be exercised in the houses as well as the committees. Presently, most discussion on finances takes place during the budget session of Parliament, and when supplementary demands for appropriation are made later in the year. Analysis of parliamentary activity reveals that the budgetary demands of most ministries are not discussed at all.<sup>197</sup> Most demands are guillotined.<sup>198</sup> Any reform aimed at making the executive more accountable should ensure that most ministries are discussed at length. It is proposed that if the budgetary demand for a particular ministry exceeds five percent of all demands made for that particular year, the demand should not be guillotined. Moreover, standing committee reports on budgetary demands should be compulsorily discussed before a particular demand can be put to vote.

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<sup>197</sup> See Burman, *supra* note 50.

<sup>198</sup> *Id.*

## VII. CONCLUSION: CONSEQUENCES OF THE PROPOSED FRAMEWORK

The committee system is at the centre of the framework proposed above. This is simply because committees seem best suited to conduct oversight over the executive. However, reform of mechanisms in the Houses is essential to enforce accountability on the basis of the work done by committees. While committees may be better suited for oversight, political accountability can be best ensured on the floor of the House. Questions raised on the floor of the House attract the attention of the Parliament as a whole. They also attract greater attention from society in general. Moreover, the government necessarily gives greater deference to the will of Parliament as expressed in the Houses since it also has to get its own business approved.

The framework proposed above should facilitate the development of more effective committees. Committees would initiate the year by discussing its agenda and get it approved after discussion in the Lok Sabha or Rajya Sabha. This would enable the executive to shape its response to queries from committees, and also lead to greater transparency. Subpoena and contempt powers would lead to more comprehensive disclosures from the executive. Finally, changes in the internal structure such as the creation of sub-committees and provision for research staff should exponentially increase the level of expertise within the committees.

These changes would have indirect consequences for discussions on the floor of the Lok Sabha and Rajya Sabha as well. *First*, the provision for greater number of working days would allow a greater diversity of views to be expressed. This would hopefully reduce the incentives for disruption, and also force the executive to respond to a much greater number of queries. Specialization attained from committee work would also enable members to ask sharper questions from ministers. The general level of deliberation within Parliament would therefore change. The result of these structural changes would hopefully aid in *ex-ante* oversight over the executive.

It is my contention that the best way to uniformly enforce these structural changes is through enactment of a central legislation. The provisions detailed in this legislation should ideally facilitate synthesized functioning of the various Parliamentary components as discussed above. It is pertinent however, in light of the aforementioned need for maintaining stability, that such legislation does not alter or impede existing powers and functions of the Parliament. The underlying idea is to reinforce the existing framework, through expanding the range of functions of components of the legislature. An expansion in the range of functions would also require increasing both qualitative and quantitative capacity.

As discussed above, qualitative capacity can be increased through bestowing powers on committees and sub-committees to perform oversight functions. In addition powers of subpoena and contempt will also aid in ensuring compliance with oversight mechanisms. However, these powers have to be balanced as against the executive's need to function efficiently, thus warranting the imposition of certain restrictions and duties on committees and sub-committees. For instance the committees/sub-committees should be prevented from monitoring existing investigations being carried out by the executive. Furthermore as a method of ensuring accountability and transparency in the committee system, submission of an annual report detailing the workings and recommendations of the committee should be mandated.

An increase in quantitative capacity can be brought about by better staffing, especially in terms of research associates available to the Parliament. A strengthened resource base will help in mitigating the existing information asymmetry between the executive and the legislature, and empower the legislature to provide informed policy inputs.

The boost in the infrastructure of the committee system needs to be accompanied by proactive participation in parliamentary proceedings in the Lok Sabha and Rajya Sabha. One way to increase such participation is to increase the number of working days of the Parliament, so as to account for the contemplated increase in the workload of the Parliament.

The intended objectives of this legislation, thus when culled out from the aforementioned detailed discussion should be threefold: *first* to institute a mechanism by which the Parliament can monitor the Central Government; *second* to empower the Parliament such that it can ensure executive compliance with the legislations it creates; *third* to increase the legislature's input in policy-making.

Taken together, the passage of legislation firmly codifying Parliament's oversight role and its attendant consequences would structurally alter the functioning of the body, and in doing so, change the way the executive functions. While there is a possibility of some administrative stagnation, policymakers have to make the tough call to strengthen democratic institutions, and create virtuous cycles of accountability and efficiency.