

EDITORIAL NOTE

I. INTRODUCTION

India is currently in the throes of developing legislation that would theoretically create simpler frameworks to resolve disputes. In creating and conceptualising these laws, there is a clear need for there to be a comprehensive assessment of all factors that would aid or debilitate the problem-solving at hand. The role of a legislature in a modern-day economy and polity is to ensure that regulatory and governance measures are passed in the country so as to benefit the citizenry, and ensure the smooth functioning of the government at all levels. In India today, legislation is often drafted and developed by think-tanks and policy research organisations who then work closely with prevailing governments and ministries to enact it into law. In many cases, the ministries themselves draft legislation and circulate them for public comments before attempting to pass them through Parliament. While these background organisations do much of the leg work that is involved in legislative drafting, it may be time for the country's overall approach to legislative drafting to take place in a more systematic and structured manner. It is in this light that Regulatory Impact Assessment ('RIA') proves to be a useful tool in regulation and governance.

By 2005, twenty-six out of thirty OECD as well as various non-OECD countries had adopted formal policies mandating the use of RIA in law-making.¹ The objective of an RIA is to set out the problem the regulation seeks to address, the objectives sought to be attained by it, the different alternatives reasonably available to achieve the set objectives, the viability of the options considering their net benefits, followed by recommendation on the most appropriate option available.² Essentially, RIA is an evaluation of how proposed legislation will affect various stakeholders, whether from an economic, social, political or environmental standpoint.³

The increased public rhetoric for RIA globally was a consequence of the regulatory rollback movement, which reflected the increasing regulatory

¹ Mark Harrison, *Assessing the Impact of Regulatory Impact Assessments*, 16(3) A JOURNAL OF POLICY ANALYSIS AND REFORM 41 (2009), available at <http://www.jstor.org/stable/43200262> (Last visited on December 30, 2016).

² *Id.*

³ Claudio M. Radaelli & Fabrizio De Francesco, *Regulatory Impact Assessment*, 2, available at http://strathprints.strath.ac.uk/41173/1/Radaelli_De_Francesco_OUP_2015_Regulatory_impact_assessment.pdf (Last visited on March 3, 2017).

scepticism and lack of confidence in social regulation.⁴ The regulatory reform movement not only expressed dissatisfaction with the growing volume of regulation but also with the fall in the quality of new regulation.⁵ In this regard, RIA became a means to increase public acceptance of regulatory programs, particularly those entailing large costs for the exchequer, by enabling the stakeholders to appreciate the benefits flowing from them.⁶ Besides increase in public acceptance, RIAs enable the affected parties to gauge the extent to which new policies could exert an impact of them.⁷ The aim of encouraging RIAs was thus to not only enhance the legitimacy of laws and policies, but also to enhance accountability and transparency in governance.⁸ In this note, we will discuss issues surrounding RIA and how it can be implemented in India.

RIA evolved in the European Commission ('EC') as a consequence of its concern over the need for regulatory simplification and fuller risk assessment after the December 1992 Edinburgh Council, where it was decided that regulatory decisions should be assessed on principles of subsidiarity and proportionality, in light of cost-effectiveness.⁹ Three major motivations characterised the increasing use of RIAs in the formulation of EC policies: *first*, to increase the competitiveness of the European trading block over its American and Japanese counterparts; *second*, to promote good governance by restoring public trust in the Commission; and *third*, to promote sustainable development of resources.¹⁰

II. A CONCEPTUAL OVERVIEW OF RIA

In essence, RIA is a mechanism that ensures the validity and feasibility of a law before it is passed or implemented. The manner in which RIA functions will differ depending of the governance structure of each jurisdiction and therefore, there is no one specific manner in which RIA can be conducted. Therefore, the basic reason for RIA is to see whether the proposed legislation adequately aligns with the overall policy objectives of the country. In a

⁴ Richard W. Parker, *The Empirical Roots of the "Regulatory Reform" Movement: A Critical Appraisal*, 58(2) ADMIN. L. REV. 359, 360 (2006), available at <http://www.jstor.org/stable/40711959> (Last visited on December 30, 2016).

⁵ Harrison, *supra* note 1, 43.

⁶ *Id.*

⁷ Roderick Munday, *In the Wake of 'Good Governance': Impact Assessments and the Politicisation of Statutory Interpretation*, 71(3) THE MODERN LAW REVIEW 385, 391 (2008), available at <http://www.jstor.org/stable/25151208> (Last visited on December 30, 2016) (also discusses the relevance of RIA reports in statutory interpretation).

⁸ Katarína Staroňová, *Regulatory Impact Assessment: Formal Institutionalization and Practice*, 30(1) JOURNAL OF PUBLIC POLICY 117 (2010), available at <http://www.jstor.org/stable/40783571> (Last visited on December 30, 2016).

⁹ Ragnar E. Lofstedt, *The Swing of the Regulatory Pendulum in Europe: From Precautionary Principle to (Regulatory) Impact Analysis*, 28(3) JOURNAL OF RISK AND UNCERTAINTY 237 (2004), available at <http://www.jstor.org/stable/41761150> (Last visited on December 30, 2016).

¹⁰ *Id.*, 238-243.

governance structure, there are two main ways in which there can be effective regulation. The first lies in creating legal institutions and laws to achieve policy goals. The second is to ensure that the implementation of these laws takes place in a sound fashion. It is in this second aspect that RIA can play a crucial role.¹¹ The utility of RIA can be divided into ‘outcome’ and ‘process’ dimensions. The outcome aspect of RIA can focus on targeted goals like economic growth, social stability and environmental sustainability of a policy or legislation. The process aspect can be examined in light of general principles of good governance such as accountability, transparency, and efficiency, with avoidance of arbitrariness and corruption in the process of implementation.¹²

The basic purpose of an RIA is to examine the impacts of a particular legislation. A particularly crucial aspect of this is to encourage public consultations as far as is practicable. This not only brings in viewpoints from a variegated societal and market structure but also promotes transparency and inclusion as a positive political practice.¹³ Consultation, therefore, should not be limited to merely consulting economic or social experts on a matter but also strive towards attracting as many laymen’s problems with a proposed legislation as possible in order to ensure that the positive impact is felt strongly by the lowest common denominator and the negative impacts are also realised at an early stage. In order for there to be effective RIA, there also needs to be strong backing from within government machinery that will facilitate the arduous process of collecting data and analysing it against the socio-political backdrop of the country. This would involve interdisciplinary teams that would be able to engage with as many aspects of the legislation as possible. There may be a tendency to reduce RIA to merely financial costs but in order to judge the efficacy of a legislation, there is a need to ensure that opinion and analysis is collated from a diverse group of experts and professionals.¹⁴ Additionally, there needs to be a clear demarcation of the criteria upon which the RIA is to take place. While different laws have different objectives, there are certain common angles to each law such as the economic value of the law, the predicted social backlash, its compliance with existing constitutional or other regulatory laws, etc. This categorisation of the angles from which RIA should be examined is useful particularly in light of changing governments so as to ensure that there is no political expediency involved in passing a legislation.¹⁵

¹¹ Colin Kirkpatrick, David Parker & Yin-Fang Zhang, *Regulatory Impact Assessment in Developing and Transition Economies: A Survey of Current Practice and Recommendations for Further Development*, 4, available at https://www.researchgate.net/publication/228805965_Regulatory_impact_assessment_in_developing_and_transition_economies_A_survey_of_current_practice_and_recommendations_for_further_development?enrichId=rgreq-45c5e03f14d29e34562ee771d02efb90-XXX&enrichSource=Y292ZXJQYWd1OzlyODgwNTk2NTtBUzo5NzU1ODAwMjc5MDYxNjk2&el=1_x_3 (Last visited on March 3, 2017).

¹² *Id.*, 5.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

III. PROBLEMS WITH RIA

Despite these benefits, it is true that various studies have questioned whether RIA indeed helps in improving regulatory outcomes. RIAs often become a ‘bureaucratic sham’ when assessment agencies prepare poor quality RIAs by failing to quantify costs and benefits properly, by using inconsistent analytical assumptions, by ignoring qualitative benefits, by presenting vague and generalised statements of ensuing benefits, by failing to identify directly affected parties, etc.¹⁶ RIAs are bound to be of sub-standard quality when the concerned agency either does not have the requisite political support and resources, or is overburdened with tasks other than the RIA.¹⁷

The choice exercised between the assessment agencies often operates in an all or nothing fashion – this implies that if the agency believes that quantification and monetisation is either impossible or cost-ineffective, then it often tends to dismiss the entire exercise of evaluation.¹⁸ Sometimes, RIAs are often avoided for politically sensitive policies or used as a means to justify policy formulations already decided by the government, thereby feeding the interests of bureaucrats, politicians and lobbyists.¹⁹ RIAs have also failed in jurisdictions where there were no effective sanctions against the bodies failing to conduct RIAs, thereby resulting in low levels of compliance with the mandate of conducting RIAs.²⁰ They fail to be of any significant assistance to decision-makers when they are prepared very late in the policy development process, shortly before submissions to the cabinets.²¹ Often the guidelines on the conduct of RIAs do not provide for post-implementation reviews; this makes it difficult to determine the difference in the assessment stated in the RIA and the actual experience of enforcing the legislation.²² RIAs often fail in achieving their objective of transparency when neither is the impact assessment made public nor are the stakeholders informed of the criteria and analytical tools employed to reach the conclusions.²³ For this reason, it is advocated that the assessment agencies should not only provide a comprehensive RIA but also provide a reasoned justification for excluding certain policies and laws from RIA.

The traditional analysis most frequently applied in evaluating the reasonableness of the costs of regulation is the cost-benefit comparison. However, cost-benefit analysis becomes problematic in cases when all benefits flowing from legislation cannot be quantified or even when quantified, cannot

¹⁶ Harrison, *supra* note 1, 42.

¹⁷ Staroňová, *supra* note 8, 133.

¹⁸ Parker, *supra* note 4, 394.

¹⁹ Harrison, *supra* note 1, 42.

²⁰ *Id.*, 43.

²¹ *Id.*, 44.

²² *Id.*, 45.

²³ Anne Meuwese, *The European Court of Auditors Steps Out of its Comfort Zone with an ‘Impact Assessment Audit’*, 2 EUR. J. RISK REG. 104, 105 (2011).

be monetised.²⁴ For instance, benefits of procedural rules, disclosure rules, rules promoting enforcement, etc. do not lead to benefits which are countable.²⁵ Determination of cost-benefit effectiveness often requires analysis of potential trade-offs between different dimensions (such as environmental well-being, employment, economic prosperity, etc.), which requires making of normative decisions.²⁶

IV. MECHANISMS FOR A SOUND RIA POLICY

Effective implementation of RIAs requires a very sound administrative set-up. For instance, the probability of good performance of assessment agencies increases when detailed guidelines are laid down; thus providing clear instructions to the administration on the process to be followed while preparing the reports.²⁷ Similarly, countries where RIAs have successfully been used have set up strong centres of government responsible for coordinating between different ministries for synchronising the assessment process, as well as for providing training in the field of RIA.²⁸ Some governments, as in Slovakia, in order to reap the benefits of specialised expertise, have adopted a ‘joint methodology’ on RIA, under which different ministries are responsible for particular areas of the RIA – for instance, the Ministry of Finance for fiscal aspects, Ministry of Economy for economic aspects, Ministry of Environment for environmental aspects and Ministry of Labour, Social Affairs and Family for social RIA.²⁹ In order to further refine the process, some jurisdictions, such as the UK and the EC, require extensive consultations between the departments involved in the RIA exercise.³⁰ The requirement of extensive consultation not only enhances the pool of resources available to the agency responsible for the RIA, it also compels the responsible body to enhance the quality of the reports prepared by it.³¹

Countries also differ in the criteria employed by them for impact assessment. There are usually three different models: *first*, defined criteria; *second*, reference to priority areas in line with national strategies; and *third*, no obligatory areas.³² While the determination of fixed criteria has the advantage of uniformity and quality control, it can become inflexible and often redundant in the context of newer legislations.³³ Similarly, while the open approach allows

²⁴ Parker, *supra* note 4, 375.

²⁵ *Id.*, 376.

²⁶ Klaus Jacob, *Regulatory Impact Assessment and Sustainable Development: Towards a Common Framework?*, 3 EUR. J. RISK REG. 276, 280 (2010).

²⁷ Staroňová, *supra* note 8, 119.

²⁸ *Id.*, 122.

²⁹ *Id.*, 123.

³⁰ Jacob, *supra* note 26, 278.

³¹ *Id.*

³² *Id.*

³³ *Id.*

the agency to determine the impact areas itself depending upon the nature of the policy in question, it can lead to both ambiguity and removal of significant criteria from the assessment process.³⁴ Therefore, one of the solutions could be to prescribe a fixed set of criteria, along with the flexibility in the assessment agency for adding criteria as required.

While there are significant differences in the RIA practices of different countries, guidance can be found in 'OECD Guiding Principles for Regulatory Quality and Performance'.³⁵

V. NEED FOR RIA IN THE INDIAN CONTEXT

While the need for RIA has been particularly felt in the realms of health, safety and environment regulations, most of the outcry in the Indian context has been raised to highlight the need for RIA for regulations affecting the viability of business.³⁶ However, a comprehensive policy perspective requires that fiscal, socio-economic and administrative effects of the proposed regulation are considered while making policy choices. Aside from the regulation of businesses, it is important for RIA to be present in order to understand the efficacy of present legislation as well. In this regard, it is useful to look at data from other countries on the impact of regulations. It can be seen that there are multiples aspects of regulation in matters such as labour and employment, intellectual property, and corporate law. More often than not the regulatory process reflects a poor governance structure within which the regulatory bodies (which may also be adjudicatory, like a Labour Commissioner) are not able to function efficiently. In several studies, it has been found that more stringent labour regulations have resulted in less efficient outcomes and productivity. In a research carried out by McKinsey Global Institute, it was posited that developing countries could maximise their efficiency if harmful and interfering labour regulations are reduced.³⁷ The inefficiency mostly lies in the various complicated rules and procedures which are to be followed.

A popular example that can be cited is that of the insolvency and bankruptcy laws that existed prior to the passing of the Insolvency and

³⁴ *Id.*

³⁵ OECD, *OECD Guiding Principles for Regulatory Quality and Performance*, available at <https://www.oecd.org/ir/reformereg/34976533.pdf> (Last visited on December 30, 2016); See generally Office of Information and Regulatory Affairs, *Regulatory Impact Analysis: A Primer*, available at https://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf (Last visited on December 30, 2016).

³⁶ The Economic Times, *India Needs to Launch Regulatory Impact Assessments to Weed Out Laws That Hurt Business Growth*, August 23, 2012, available at http://economictimes.indiatimes.com/articleshow/15609529.cms?intenttarget=no&utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (Last visited on December 30, 2016).

³⁷ World Bank, *Doing Business in 2004: Understanding Regulation*, October, 2003, available at <http://documents.worldbank.org/curated/en/724511468762587518/pdf/271470PAPER0Doing0business02004.pdf> (Last visited on March 3, 2017).

Bankruptcy Code, 2016. All the laws in question pointed towards different methods of debt recovery and were passed in succession without any heed to prior laws which dealt with the same area of regulation. Therefore, there were simultaneous insolvency and bankruptcy proceedings happening before different fora, further complicating the process that, by definition, ought to be completed in a limited amount of time. The new Code that has come into force seeks to remedy this criss-crossing of legislation and streamline the process of debt recovery in India. The entire process requires extensive empirical data and analysis. It would only benefit the country if there were to be a dedicated body that would examine existing laws and policies and their efficacy in regulation as well as look at proposed legislation. This point is crucial in the Indian context, as well as possibly the entire South Asian context (as there are no countries in South Asia which have a formalised RIA process) as there are still archaic legislations operating in crucial areas of law and governance.

VI. CONCLUSION

RIA presents a model of governance in which laws and policies are only made more transparent and their implementation is made more accountable to the people. The biggest challenge that Indian governance faces is to ensure that laws are abreast of the socio-political situation and do not deviate from the same. In that light, it is hoped that RIA will be introduced into Indian policymaking as a prior measure before the passing of any legislation. In order for this initiative to take effect, it is necessary for there to be a dedicated team within the government that incorporates viewpoints from multiple sources and assimilates them to provide the best possible regulatory structure. In view of the benefits of decentralised work hierarchies, this could be best achieved by individual ministries or departments being mandated to set up such teams. India, today, represents a growing economy and society that is witnessing rapid changes in almost every discipline. It is vital that the lawmakers of the country stay afloat in this tide of revolutions that are happening without causing any inadvertent damage or violations. Although there exist measures such as Environmental Impact Assessment and Social Impact Assessment, these still focus on very limited aspects of governance. It must be remembered that the law has the power to regulate almost anything and in that light, the importance of it being evaluated in advance cannot be overstated.