



Better Regulatory Framework for Economic Development – How?

The decade of the nineties has seen a paradigm shift in economic management in India. Independent regulatory bodies have been established in several sectors to perform functions that were till now being performed by the line ministry. The process of setting up regulatory agencies in remaining sectors continues.

Surely, independent regulators will be governing a sizeable part of the economy and public services in the coming years; therefore institutional efficacy would have a bearing on the quality of public life. The expected outcomes of independent regulation include transparent procedures, participatory decision-making, investment inflow, better services at efficient prices and overall development of the sector.

However, the creation of independent regulators has raised some fundamental issues concerning their autonomy and accountability. Entrusting the regulators with sufficient autonomy is imperative to allow them take judicious decisions in a competent manner. Regulators need to be held accountable and answerable as well, for their actions.

Presently, in most cases, regulatory autonomy is being curtailed as a measure to ensure accountability, which is resulting in sub-optimal outcomes. Indeed, the fundamental issues concerning autonomy and accountability of regulatory institutions remain largely unaddressed, hence requiring immediate attention.

This policy brief seeks to address seven critical issues that affect regulatory autonomy and accountability, viz., dichotomy between policy and regulation, interface of regulatory bodies with the line-ministry, selection and appointment of regulators, their removal, setting up of appellate tribunals, accountability of regulators and financial autonomy granted to regulatory bodies.

1. POLICY vs. REGULATION

1.1 Background

In the emerging political-economy scenario, the government's role is seeing a paradigm shift. Traditionally, government has been performing multiple functions as policy maker, regulator and service provider. Over the years, it was realised that the government will not be able to match the growing demand for services; hence measures were taken to invite private investment.

In the changed circumstances, separation of the policy formulation function from regulation became imperative to offer a level-playing field to competing service providers. Consequently, the concept of (so-called) independent regulation gained popularity. Nevertheless, given that regulatory institutions have been created to achieve predetermined policy objectives, an absolute divorce between the two is not desirable. In fact, regulatory objectives have to be derived from the policy objectives. Sufficient provisions are required to ensure that the regulator's domain is not encroached upon by the government in the name of achieving policy objectives. This calls for having a clear distinction between policy and regulation, which is often missing.

To cite an ongoing case, the Department of Telecom (DoT) recently announced certain proposals (on Access Deficit Charges, one India call rate, inter-connection usage charges) to restructure the tariff regime in telecommunications, considering these to be policy

issues. However, the Telecom Regulatory Authority of India (TRAI), the sector regulator, has objected to these proposals. After TRAI's objection, the DoT contemplated exercising its powers under the TRAI Act to issue 'policy directives' to the regulator. Although the Ministry finally refrained from doing so, this event highlights the need to clearly demarcate policy and regulatory issues.

1.2 Recommendations

- *Underlying legislations need to be reviewed and modernised as per the changed circumstances*
- *Spell out clearly the objectives and scope of regulation and the powers of the regulator in the enabling legislation. Regulatory agencies should work within the framework spelt out in the legislation*
- *Provide a clear distinction between 'policy' and 'non-policy' issues*
- *Involve regulators in the evolution of policy*
- *Proper consultations with the regulator should be held prior to issue of policy directives. A gist of the discussions between the ministry and the regulator should be made public*
- *Appropriate mechanism should be in place to ensure that the policy directives remain consistent with the overall objectives of the Act*

2. INTERFACE WITH GOVERNMENT/LINE-MINISTRY

2.1 Background

Maintaining an arm's-length distance between the regulators and the line-ministry concerned is desirable to ensure that the latter does not influence the former unduly. It needs to be appreciated that the line-ministry is responsible for the overall development of the sector, and the regulator is instrumental in attaining this objective. In fact, both the regulator and the line ministry share common responsibilities *i.e.* orderly and sustained growth of the sector, attracting private investment, enhancing consumer protection and so on.

Presently, in some cases, the line Minister is made answerable to the legislature even for functions that have been transferred to the regulator. This makes the line ministry continue to want to perform the same functions and interfere in the domain of regulator, which impairs regulatory functioning and consequently, its efficacy.

Hence, a mechanism needs to be developed to make the regulators directly accountable to the legislature. Furthermore, having appropriate processes in place to facilitate consultations between the line ministry and the regulator is required to avoid a possible compromise on regulatory autonomy. The manner of consultations between the Reserve Bank of India (RBI) and the Ministry of Finance is a good model: the RBI holds consultations with the Ministry of Finance on a regular basis, at formal and informal levels, without compromising its autonomy.

2.2 Recommendations

- *Make regulatory agencies autonomous by legislation so that undue interference by the line ministry could be avoided;*
- *Given that regulatory agencies are instrumental in realising the policy objectives stated by the government, the line-ministry should defend the regulator's decisions before the legislature whenever required;*
- *There should be regular consultations between the line-ministry and the regulator; the RBI-Ministry of Finance interface model could be applied wherever feasible;*
- *Establish a Parliamentary Committee on Regulation and Competition as the reporting authority for all regulatory agencies. The Committee's domain should be confined to systemic issues only and not the individual decisions and orders of regulators. In case of operational matters, the regulator is anyway accountable to the Appellate Tribunal and the Judiciary (High Courts and the Supreme Court);*
- *Regulatory agency should submit an activity and outcome report to the legislature through the proposed Parliamentary Committee on Regulation and Competition;*
- *Constitute multi-sectoral regulators, such as one for energy and another for transport to reduce the possibility of regulatory capture by individual line-ministry, and for efficiency.*

3. SELECTION AND APPOINTMENT

3.1 Background

Selection and appointment of regulators is one of the most crucial aspects that need to be addressed upfront. There has been a tendency in recent years to appoint retired bureaucrats and judges to regulatory bodies without ascertaining their suitability. This is an unhealthy practice and needs to be curbed.

Indeed, attracting young talent is the key to making these institutions work in a desirable manner. This would not happen until the selection process is made transparent and attractive compensation is offered. Attracting professionals from diverse backgrounds would go a long way to attain regulatory efficacy.

3.2 Recommendations

- *Constitute a Committee consisting of eminent people to select regulators for various regulatory agencies at central and state level;*
- *Proper manpower planning should be done to ensure that selection of a regulator is made in advance of a position falling vacant;*
- *Applications should be invited against pre-determined selection criteria;*
- *Regulators should be given a fixed tenure of 5 years with a maximum age limit of 60 years for appointment;*
- *Remove those provisions in regulatory laws that deter people from business/non-government sector to move to regulatory bodies;*
- *The prevailing practice of sinecure needs to be discouraged. The bottom line must be to encourage experts and young professionals to join such positions;*
- *Offer attractive compensation to draw young professionals to join regulatory bodies;*
- *Former regulators should not be allowed to join a position of profit for one year;*
- *Department of Personnel, Government of India, should be designated as the Administrative Ministry for regulatory bodies, responsible for release of appointment letter and other administrative matters;*
- *Regulators and their staff should be provided with short-term training, prior to induction.*

4. REMOVAL

4.1 Background

Providing protection against a possible discretionary dismissal would go a long way to ensure functional autonomy to regulators. Such provisions would help regulators to work towards attaining the stated objectives without undue interference and prove as effective deterrent against a possible capture by the line-ministry.

Learning from experiences is desirable. For instance, in the year 2000, the then government amended the TRAI Act and in the process, reconstituted the Authority, which

is considered as a rather weak institution. This example demonstrates the vulnerability that ‘independent’ regulatory institutions face in India.

4.2 Recommendations

- *Protection of regulators against arbitrary removal by the government is necessary;*
- *Member of a regulatory agency should be removed only in case of a proven guilt or inability established in a judicial probe by a sitting judge of the Supreme Court. The proposed Parliamentary Committee on Regulation and Competition should initiate such probe, whenever necessary.*

5. APPELLATE TRIBUNALS

5.1 Background

Presently appellate tribunals have been proliferating along with regulatory agencies, though most of them do not have enough workload. This is an unnecessary burden on the exchequer and aggravates the undesirable practice of retired bureaucrats/judges getting sinecure positions.

Secondly, there is often an overlap between the functions performed by various regulatory agencies - between the competition authority and sectoral regulators, between electricity regulators and the proposed petroleum regulator and so on. Setting up an appellate body for each regulatory institution can lead to forum shopping and inconsistent decisions at the appellate level. A common appellate tribunal for related regulatory agencies will ensure convergence in application of various regulatory laws on issues where there is an overlap, and set healthy conventions to ensure harmonious application of regulatory laws.

5.2 Recommendations

- *Establish a common appellate tribunal with regional benches for a broad set of regulators, for instance one for infrastructure sector and another for financial sector;*
- *The law should provide for appeal against a regulator’s decision before the Common Appellate Tribunal first and then to the Supreme Court. The appeal should be made on points of law only;*
- *The power to deal with disputes should be with the regulator, not the Tribunal.*

6. ACCOUNTABILITY

6.1 Background

Accountability goes hand-in-hand with autonomy. The current provision of regulators submitting annual report to the legislature is not sufficient to hold them accountable in an effective manner. Having appropriate provisions to ensure accountability on an *ex-ante* basis is also important.

6.2 Recommendations

- *Make the Parliamentary Committee on Regulation & Competition the reporting authority for regulatory agencies. The Committee should have its own staff with suitable experience and must not depend on the CAG’s;*
- *The proposed Committee can call regulators for an explanation, only in case of systemic issues;*
- *Create a Consumer Advocacy Fund to build the capacity of consumer/civil society groups to raise consumer concerns more effectively and to facilitate review of regulator’s performance by an important stakeholder group;*
- *Provide for evaluation of regulator’s performance through a peer/external review system against the given mandate;*
- *Political parties and the government should give their feedback as stakeholders to the regulator whenever it is sought. Besides, they should participate in the open discussions/hearings conducted by the regulator.*

7. FINANCIAL AUTONOMY

7.1 Background

The regulator’s dependence on the line-ministry to get its budget approved is not desirable for the reason that such a provision might limit regulatory autonomy, indirectly. The number and nature of staff, appointing consultants, market investigation, etc are activities that can be controlled through budget allocations.

Presently, no common practice is being followed across the sectors. While the Insurance Regulatory and Development Authority (IRDA) and the Securities and Exchange Board of India (SEBI) have been allowed to raise resources on their own, other regulatory agencies do not have this freedom. Recently, the government turned down TRAI’s request to allow it to raise resources by imposing a cess on revenue generated by service providers, though the legislation provides for it.

7.2 Recommendations

- *Regulatory agencies should be allowed to generate resources on their own through a fee, cess, etc. wherever possible, and be allowed to spend it;*
- *The financial requirements proposed by the regulator should be linked with their work plan for a certain time period (say, the next 3 years) and approved by the parliament; the regulators budget should be a charged expenditure on the Consolidated Fund.*
- *Regulators should be given the liberty to hire required staff on contract and appoint consultants in a transparent manner.*

Note: The term ‘Regulator’ used in this policy brief refers to sectoral regulators and the competition authority

The Process

This policy brief is a result of a three-session policy roundtable organised by the Consumer Unity & Trust Society (CUTS), a policy research and advocacy group on 7th May, 23rd July, and 10th September 2005 at New Delhi.

A heterogeneous group of opinion leaders (listed below) comprising of former and present regulators, former judges, lawyers, government officials, media persons, representatives of civil society, academia and business discussed the matter at length and suggested measures to strike the right balance between autonomy and accountability to enhance the effectiveness of regulatory regimes.

Based on the outcome of the discussions, touchstones of 'Regulatory Autonomy & Accountability' have been identified and are presented in this policy brief.

A brief background on each of the issues discussed is given prior to the recommendations. The recommendations benefited from several experiences that were cited during the discussions. This has helped in making the recommendations pragmatic rather than just of academic interest.

Understandably, emergence of absolute consensus on each of the issues was not possible. Still, there was agreement on imparting autonomy to regulatory bodies commensurate with their mandate. The group recognised that regulatory accountability is an equally important aspect, which however has not been addressed holistically in the present discourse. Further, absence of an overarching law was observed to be the reason for lack of coherence in the provisions and practices across the sectors.

Though all the members of the group did not participate in each of the three sessions, the recommendations are based on a general consensus that emerged after an exhaustive discussion of all the aspects and dimensions of the issues.

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