

## **POLITICAL ACCOUNTABILITY AND INTRA-GOVERNMENT COMMUNICATION OF REGULATORS IN INDIA: A CRITICAL ANALYSIS**

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### **Introduction**

Independence and Accountability are two essential ideals for good governance, but surprisingly both these principles appear contradictory and prima facie seem irreconcilable.<sup>6</sup> Nevertheless the success of any democratic legal system largely depends on the efficiency with which it addresses the conflict between these two ideals. The importance of balancing the aforementioned principles arises much more in case of those entities that though have been delegated the political power but are not democratically accountable in traditional sense to its citizens. These are the non-elected institutions called the independent regulatory agencies. The regulators communicate their means of maintaining good governance to the legislators in various ways. Such communication may or may not have the desired effect.

Governments across the globe have devised mechanisms to ensure this balance by incorporating enough checks and balances in their regulatory governance framework.<sup>7</sup> The purpose is to ensure that the regulators act in a responsible and transparent manner thereby sustaining larger public confidence. Hence, an ideal regulatory system should define parameters governing accountability of regulators and its assessment.<sup>8</sup>

This article explores the concept of accountability in regulatory governance in India. For this purpose it assesses Indian regulatory framework on ground of political accountability. It further analyses the recommendations of various committees and commissions for reforming the same.

### **Independent Regulators and its Evolution in India**

Regulators are the agencies responsible for achieving the social, economic and environmental objectives of a state in a specialized and focused manner.<sup>9</sup> They act as a public authority or an agency of the government responsible for regulating and supervising markets, sectors, human

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<sup>6</sup>UNCTAD Secretariat, Note on Independence and Accountability of Competition Authorities (2009) [https://unctad.org/meetings/en/SessionalDocuments/CCPB\\_IGE2014\\_UNCTADNOTE\\_EMCF\\_en.pdf](https://unctad.org/meetings/en/SessionalDocuments/CCPB_IGE2014_UNCTADNOTE_EMCF_en.pdf)

<sup>7</sup>OECD, OECD Regulatory Policy Outlook 2018, OECD Publishing, Paris (2018), <https://doi.org/10.1787/9789264303072-en>

<sup>8</sup> OECD, The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, (2012) <http://dx.doi.org/10.1787/9789264209015-en>

<sup>9</sup> OECD/Korea Development Institute, Improving Regulatory Governance: Trends, Practices and the Way Forward, OECD Publishing, Paris (2017) <http://dx.doi.org/10.1787/9789264280366-en>.

activity, profession etc. by enforcing safety standards, protecting consumer interest, price & quality control etc. A regulator exists in various forms and across different levels of the government. It can be in the form of a separate division within a ministry, a separate entity with its own statutory foundation (independent regulators) or it can even be an independent international agency subject to an international standard setting entities or supranational bodies. For example, the Forward Markets Commission (FMC) which has merged with Securities and Exchange Board of India (SEBI) in 2015 was a department of the Ministry of Food, Consumer Affairs and Public Distribution, whereas SEBI on the other side is an independent regulator deriving its power from the SEBI Act.<sup>10</sup> Similarly, the European Central Bank (ECB) is a great example of an independent international agency subject to a supranational body i.e., European Union.

This concept of regulation by independent agencies evolved in the United States of America. The Interstate Commerce Commission (ICC) emerged as the first independent Commission in the United States of America through repositioning outside the Department of the Interior in 1889.<sup>11</sup> A similar structure was later adopted in other areas of regulation in the country. The reformers believed that this would help to deal with the complexities of the market, reduce political intervention in decision making, thus safeguarding national and public interest. This structure of market regulation through independent agencies also helped to create a level playing field for both government and private entities in the market across various sectors.<sup>12</sup>

In the context of India, the introduction of economic reforms in 1991 led to the establishment of independent regulatory bodies across various sectors. Prior to 1991, the Indian markets were regulated through government departments and ministries with very few regulatory bodies such as the RBI, which was established in 1934<sup>13</sup>, and Securities and Exchange Board of India (SEBI), a non-statutory body in 1988 which was given statutory power in 1992<sup>14</sup>. The reforms paved a way for establishment of independent regulatory bodies in different sectors exercising legislative, executive and judicial functions which includes Telecom Regulatory

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<sup>10</sup> Harsimran Kalra & Sakshi Balani, Parliamentary Oversight of Regulator: Background Note for the Conference on Effective Legislatures, PRS Legislative Research (2012), <https://www.prsindia.org/parliamenttrack/discussion-papers/parliamentary-oversight-regulators>

<sup>11</sup> Dominique Custos, The Rulemaking Power of Independent Regulatory Agencies, The American Journal of Comparative Law (September 2006), [https://www.researchgate.net/publication/265400028\\_The\\_Rulemaking\\_Power\\_of\\_Independent\\_Regulatory\\_Agencies](https://www.researchgate.net/publication/265400028_The_Rulemaking_Power_of_Independent_Regulatory_Agencies)

<sup>12</sup> Second Administrative Reforms Commission, 13th Report, Organizational Structure of Government of India, (2009)

<sup>13</sup> Reserve Bank of India Act, 1934

<sup>14</sup> Securities and Exchange Board of India Act, 1992

Authority of India (TRAI), Central and State Electricity Regulatory Commissions, Competition Commission of India (CCI) etc.

### **Accountability in Regulatory Framework**

The Regulatory bodies hold a greater burden of fairness, accountability and transparency when compared to government departments because unlike government agencies they are not elected by people even though their decisions and regulation are binding them.<sup>15</sup>

The two major components for an effective regulatory framework are the independence and accountability of the regulators. “**Independence**” guarantees protection against undue influence and ensures stakeholders' interest are conferred due importance in the formulation and implementation of regulation. “**Accountability**” on the other side warrants effective and efficient regulations based on careful examination. It protects the stakeholders against arbitrary decisions and also provides for a redressal mechanism in form of appellate authorities and judicial bodies against inappropriate regulatory decisions. A government needs to find a balanced approach between the above principles as a higher level independence tends to call for a greater accountability.

The three major stakeholders to which a regulator holds accountability includes:

- i the legislature,**
- ii the regulated entities/ subjects and**
- iii the general public**

On the basis of these stakeholders accountability of the regulators can be further classified as political and legal accountability. ‘**Political accountability**’ implies supervision by the concerned ministry or legislature of the working of the regulator. The reason for ensuring political accountability lies in the fact that it is the government which is democratically responsible for the functioning of the regulatory framework and not for the regulator. Therefore it needs to ensure that the regulator function in line to its objectives through various mechanisms including annual reporting, performance evaluation etc. ‘**Legal accountability**’ on the other hand provides the aggrieved regulated entities or the general public to challenge the regulatory decision or appeal against its orders. It ensures that the

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<sup>15</sup> Som, L. and F. Naru, Regulatory policy in India: Moving towards regulatory governance, OECD Regulatory Policy Working Papers, No. 8, OECD Publishing, Paris, (2017)

regulatory decisions are within the powers of the regulator and due compliance of administrative procedures in making the regulations.

### **Political Accountability of Regulators in India**

The existence of a regulator is derived from the act passed by the legislature and it operates within the ambit of powers conferred to it under the act. A regulator subsists to fulfill the objectives defined by the legislature and is believed to protect the interest of the public. Therefore a regulatory agency is required to be accountable to the legislature, either directly or through concerned minister, and should report regularly and publicly to the legislature establishing them, on its objectives and the discharge of its functions, and demonstrate that it is efficiently and effectively discharging its responsibilities with integrity, honesty and objectivity.”<sup>16</sup>

### **Communication channels between Legislators and Regulators:**

In the current Indian framework, regulators are held accountable to the legislature through the concerned ministries. The regulators also are required to submit their annual reports and/or audited accounts to the legislature at the end of the financial year. The regulatory actions could even be questioned in the parliament through various mechanisms such as:<sup>17</sup>

- i. **Question Hour:** During the question hour the member of the parliament can question the functioning of the regulators and the concerned minister has to answer the questions.
- ii. **Discussions:** Discussions can take place under various Rules of Procedure of the Parliament where the concerned minister can be questioned on various issues related to the regulator.
- iii. **Department related Standing Committees:** These committees consist of the members of both houses of the parliament and they review the functioning of the regulators within their departments.
- iv. **Finance Committees:** The statues establishing the regulators require annual audit reports of the accounts of the regulators to be prepared by the Comptroller and Auditor

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<sup>16</sup>OECD, The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, (2012) <http://dx.doi.org/10.1787/9789264209015-en>

<sup>17</sup>Harsimran Kalra & Sakshi Balani, Parliamentary Oversight of Regulator: Background Note for the Conference on Effective Legislatures, PRS Legislative Research(2012), <https://www.prsindia.org/parliamenttrack/discussion-papers/parliamentary-oversight-regulators>

General of India (CAG). These reports are presented before the Parliament and reviewed by the Public Accounts Committee (PAC).

- v. **Ad-hoc Committees:** When there is serious debate/crisis related to a regulator. Parliament may establish an ad-hoc committee to examine its functioning.

The political accountability of regulators has always been a question of debate in the country. The parliamentary oversight is often considered an ineffective mechanism to ensure accountability. It is always argued that the annual reports submitted by the regulators are not discussed with any seriousness. The regulatory actions are also examined only in cases of impending crisis or a serious debate in the country. The accountability of regulators through concerned ministry is also questioned as it is much easier for the powerful groups to pressurize the regulator through the ministry then through the parliament.

The Reserve Bank of India is the central bank of India regulating the currency and the banking system of the country. Unlike the apex banks in countries like USA and UK, there is no formal accountability mechanism is laid down by statutes for the Reserve Bank of India.<sup>18</sup> The Reserve Bank remains accountable to Parliament only through the Finance Minister and is not regularly required to report periodically before the standing committee.<sup>19</sup> There is also no accountability mechanism against the regulatory actions taken by the RBI as there is no appellate authority or a mechanism to even review the regulatory and supervisory decisions of the Reserve Bank of India.<sup>20</sup> Similar situation prevails with other independent regulators in the country, as these regulators are not questioned before the Parliament and it only the concerned minister, who cannot be held responsible to the acts of the independent regulators, questioned before the Standing Committees.

The OECD Regulatory Policy Working Paper on the Regulatory Policy of India concluded by stating that “Many regulators fall under the administrative control of their parent ministry, efforts to create independent regulators have been resisted. Regulators have in other cases actively internalized political sentiments in their decision-making. Regulatory capture by local politicians is common and as a consequence undue influence exists. Even within this limited operating space for regulatory bodies, they have provided an increased range of

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<sup>18</sup> Central Board of Directors, Governance, Human Resources Development and Organisational Management, Reserve Bank of India Annual Report 2011-12, (2012)

<sup>19</sup> Harsimran Kalra & Sakshi Balani, Parliamentary Oversight of Regulator: Background Note for the Conference on Effective Legislatures, PRS Legislative Research, (2012)  
<https://www.prsindia.org/parliamenttrack/discussion-papers/parliamentary-oversight-regulators>

<sup>20</sup> Gautam Chikarmane, RBI versus the government: Independence and accountability in a democracy, (2018) <https://www.orfonline.org/research/rbi-versus-the-government-independence-and-accountability-in-a-democracy-46085/>, (April 13, 2020)

accountability and participatory possibilities through the processes of the regulatory design.”<sup>21</sup>

The Committee for Reforming the Regulatory Environment for Doing Business in India<sup>22</sup> established by the Ministry of Corporate Affairs also considered political accountability of regulators to be ineffective and stated that “in guise of administrative accountability, the functional autonomy of regulators tends to get impeded and sometimes the regulatory organisations resemble as subordinate offices of the Government Ministries and Departments”.

The government has taken various steps towards reforming the deficiencies in the regulatory framework. Different Commissions and Committees have been entrusted with the responsibility to develop frameworks and mechanisms for an independent and accountable system of regulators in the country. The Reports stating the observation and recommendations of the committees and Commissions have discussed in detail below:

- ***Second Administrative Reforms Commission’s 13<sup>th</sup> Report on Organizational Structure of Government of India***<sup>23</sup>:

The President of India set up a Commission of Inquiry called the Second Administrative Reforms Commission (ARC) to prepare a detailed blueprint for revamping the public administration system. The Commission’s objective was to suggest measures to achieve a proactive, responsive, accountable, sustainable and efficient administration for the country at all levels of the government. The Commission in its 13th Report on the Organizational Structure of Government of India analyzed and made recommendations for reforming the structure of the Government of India to create a pro-active, efficient and flexible organizational framework.

The chapter 6 of the report deals with creating an effective regulatory framework in India. It explained the current framework and structure of the regulators in the country and made recommendations to improve the same. The Commission considered the appearance of the independent regulators before the departmentally related Standing Committees of the Parliament to be a more effective legislative oversight and was of opinion that such parliamentary oversight to be limited to major decisions. The Committee was of the view that

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21 Som, L. and F. Naru, Regulatory policy in India: Moving towards regulatory governance, OECD Regulatory Policy Working Papers, No. 8, OECD Publishing, Paris, (2017) <https://doi.org/10.1787/b335b35d-en> (April 13, 2020)

22 Ministry of Corporate Affairs, GOI, Report of the Committee for Reforming the Regulatory Environment for Doing Business in India, (September, 2013)

23 Second Administrative Reforms Commission, 13th Report, Organizational Structure of Government of India, (2009)

having an exclusive Parliamentary Standing Committee for Regulators may not be feasible given the widely varying mandate and area of operations of the regulators. . However, the commission recommended that each statute creating a Regulator should include a provision for an impact assessment periodically by an external agency to reduce regulatory intervention.

- ***Draft Regulatory Reform Bill 20\*\*<sup>24</sup>***:

This draft bill prepared by the Planning Commission of India for consultation provided an institutional framework for regulatory commissions, defined their roles and functions, accountability towards the legislature and interface of regulators with the markets and the people. The proposed bill applicable to the infrastructure regulators aimed to supplement the existing sector specific laws. The provisions for political accountability are included under Section 16, Section 59 etc. of the said draft bill and are based on the recommendations of consultation paper of the Planning Commission of India titled “**Approach to Regulation of Infrastructure**”.<sup>25</sup>

The consultation paper aimed to establish democratic accountability of regulators. It suggested that the regulations must be compulsorily subject to prior publication with sufficient time for notice and comment and with compulsory obligation on regulators to respond to the comments prior final approved regulation. It supports the parliamentary oversight of regulators by requiring regulators to submit an annual report stating the regulatory approach for the forthcoming year and outcomes expected in context of the legislation and the policy directives set by the ministry. The annual reports should be finalized after transparent consultation with stakeholders and submitted to parliament through the concerned ministry. These reports would then be scrutinized by appropriate legislative sub-committee and the regulator would be made answerable in writing to the questions either directly or through the concerned minister.

It also supported legal accountability in addition to political accountability as provided a mechanism to challenge the regulatory decisions through appellate authority and also provided for an appeal to the Supreme Court of India, but only on questions of law. However, the power of judicial review would be limited only to questions of law and decision making and not extend to policy choices made by regulatory institutions.

The above draft bill and consultation paper in light of accountability of the regulators failed to ensure the independence of the regulators. It provided for strict legislative control over the regulators which could hamper the basic objective of an independent regulator.

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24Planning Commission, GOI, Draft Regulatory Reform Bill, 20\*\*, (April, 2009)

25Planning Commission, GOI, Approach to Regulation of Infrastructure, (September, 2008)

- ***Report of the Committee for Reforming the Regulatory Environment for Doing Business in India***<sup>26</sup>:

The Report was submitted by a Committee set up the Ministry of Corporate Affairs in 2012 for Reforming the Regulatory Environment for Doing Business in India in response to the World Bank's Doing Business Report, 2012 (DBR) which ranked India amongst the countries ranked at the bottom of various sub-indices. The Committee included representation from State Governments, Public Sector Enterprises and Regulatory Bodies.

It recommended that the regulatory bodies should undertake self-evaluation in every three year and put out conclusions in public domain for discussions and debate. It believed that this process would also help in regaining public confidence in the regulators. The committee further recommended for setting up internal regulatory review authority in each organization empowered to write rules and regulations. The committee was of an opinion that an organisation writing regulations including regulatory authority, ministry or department of the Central or State Government would have a better understanding of the context in which the regulations are written and can contextually assess the continuing relevance of these regulations. The internal review authority would examine, in consultation with all stakeholders, whether an existing rule or regulation has outlived its utility. It would also review draft regulations to ensure no unnecessary regulations come into force. The Regulatory Review Authority would also be responsible for the regulatory impact assessment (RIA), which should be a condition precedent to the writing of regulations and would be done before the public consultation process of regulation.

The Committee therefore suggested towards a regulatory framework with limited political intervention in the functioning of the regulators and at the same time ensured accountability through other measures. It focused on improving the transparency in regulatory framework which is an important component of accountability.

### **Conclusion and Suggestions**

The present regulatory framework in India makes it challenging to ensure the independence and accountability of the regulators in the country. The functioning of the regulators is completely left to the ministry concerned as the regulatory actions are rarely discussed before the parliament. This process makes it easier for the influential to guide the regulatory policies and decisions. This has led people to lose their confidence in the independent regulatory

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<sup>26</sup>Ministry of Corporate Affairs, GOI, [Report of the Committee for Reforming the Regulatory Environment for Doing Business in India](#), (September, 2013)



agencies in the country. The recommendations made by various committees and commissions to improve the present framework have not been implemented by the government. There is dire need to revise the present regulatory framework and also develop mechanisms to evaluate the performance of the independent regulators.

International Organisations (such as Organisation for Economic Co-operation and Development (OECD)) have developed best practice principles for regulatory policy and governance. Such principles could be implemented to develop an effective, independent, transparent and accountable regulatory framework for India. Mechanisms could be developed to evaluate the performance of the regulators on pre-designed parameters based on international experiences. Considering the important role of the regulators in the economy, an independent department or commission could also be established to reform and evaluate the regulatory framework.

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