

COOPERATIVE FEDERALISM IN INDIA STATUTORY REGULATORY AUTHORITIES AND THE FEDERAL SYSTEM IN INDIA

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STATUTORY REGULATORY AUTHORITIES AND THE FEDERAL SYSTEM IN INDIA

ABSTRACT

Since the 1990s, there has been a marked expansion of the regulatory state in India. Statutory Regulatory Authorities (SRAs) are empowered to create and enforce regulations in their respective fields and often have the authority to issue licenses, conduct inspections, and take enforcement action against individuals or organisations that violate their regulations. This essay recognises the twin-deficit issue with SRAs in India. It focuses on the federal deficit issue and resists exploring the more obvious democratic deficit in them. Our analysis shows that over the twenty-three-year period between 1999 and 2022, the Rajya Sabha (Council of States) has reviewed 4 regulations by SRAs. For context, the securities regulator has issued 661 regulations since its inception in 1992. Such a federal deficit of a lack of State representation disallows decentralisation and restricts means for individuals and communities to have a greater say in the decisions that affect their lives.

INTRODUCTION

The division of functions in any federal system is conditioned by the interaction of two contending and conflicting forces. One favours centralization and promotes a strong centre to keep the federation intact. The other supports decentralization of powers to regional governments—since these governments are more proximate to the citizens, empowering them ensures more responsive governments. The federal scheme that finally emerges must balance these conflicting forces. The Constitution of India is imbued with such a federal vision.¹

In addition to distributing legislative powers between the Union and the States, the Constitution of India includes provisions for State participation in Union decisions. Similarly, the Union executive has the power to discharge its duty by giving appropriate directions to the State executive without being obliged to set up separate federal agencies to enforce federal laws. This is essential for the working of a federal Constitution as utilizing State agencies can be more effective and avoid conflicts between Union and State agencies.

Despite this apparent intention to protect State representation and interests, several federal agencies in the form of statutory regulatory authorities (SRAs) have been established in India since economic liberalization in the early 1990s. These agencies function in ways that are distinct—and comparatively independent—from government departments. They are essentially mini-States that fuse legislative, executive, and quasi-judicial powers.² In most of the literature on Indian federalism, discussion and analysis has primarily focused on the functional distribution of legislative powers.³ The role of SRAs and the protection of State representation and interests in Indian federalism has been studied less—partly because the SRAs are relatively recent creations. This, however, merits careful consideration and much deeper debate than existing literature offers. Thus, in examining how SRAs function, this essay seeks to contribute to the vast literature on Indian federalism, as seen from the standpoint of regulatory governance and its relation to protecting State representation and interests.

THE RISE OF THE REGULATORY STATE IN INDIA

Regulation—defined as the interventions made by public agencies in the activities of a target population⁴—is not a new concept. Before 1991 (or *pre-reform India*), regulation was primarily undertaken by executive ministries and departments. This traditional form of politically controlled administrative structure enforced parliamentary law and regulated the behaviour of public and private persons in several industries. Since 1991 (or *post-reform India*), Union and State governments have established ‘independent statutory regulatory authorities’ to undertake regulation.

For instance, in pre-reform India, the Controller of Capital Issues, conferred with sweeping powers under the Capital Issues Control Act of 1947, decided which company could issue capital, the timing and amount

1 Sunita Parikh and Barry R Weingast, “Comparative Theory of Federalism: India,” *Virginia Law Review* 83 (1997): 1593; H.M. Rajashekara, “The Nature of Indian Federalism: A Critique,” *Asian Survey* 37, no. 3 (1997): 245-253; and M.P. Singh and Douglas V. Verney, “Challenges to India’s Centralized Parliamentary Federalism,” *Publius: The Journal of Federalism* 33, no 4 (2003): 1-20.

2 Ministry of Finance, Government of India, *Report of the Financial Sector Legislative Reforms Commission: Volume I: Analysis and Recommendations* (New Delhi: Government of India, March 2013).

3 M.P. Jain, “Indian Federalism: A Background Paper,” *Journal of the Indian Law Institute*, 1964; M.G. Rao, “Fiscal Decentralisation in Indian Federalism,” in *Managing Fiscal Decentralisation*, eds. Ehtisham Ahmad and Vito Tanzi (London: Routledge, 2002); Louise Tillin, *Indian Federalism (Oxford India Short Introductions)* (New Delhi: Oxford University Press, 2019); Ministry of Home Affairs, Government of India, *Report of the Sarkaria Commission* (New Delhi: Government of India, 1988); Ministry of Law, Justice and Company Affairs, Government of India, *Report of the National Commission to Review the Working of the Constitution*, (New Delhi: Government of India, 2002); and Ministry of Home Affairs, Government of India, *Commission on Centre-State Relations* (New Delhi: Government of India, 2010).

4 Devesh Kapur and Madhav Khosla, “The Reality of Indian Regulation,” in *Regulation in India: Design, Capacity, Performance*, eds. Devesh Kapur and Madhav Khosla (Oxford: Bloomsbury, 2019).

of capital that may be raised, and its pricing. The Act was repealed after forty-five years, and the Securities and Exchange Board of India (SEBI) Act was passed in 1992. The statute established SEBI as an independent regulatory authority to protect investors' interests in securities and promote the development of the securities market in post-reform India.

Similarly, the Controller of Insurance carried out responsibilities under the Insurance Act of 1938. The Controller was not empowered to write the law, only to implement it. In due course, with ensuing liberalization, an independent regulator was envisaged for the insurance sector. The Insurance Regulatory and Development Authority of India (IRDAI) was first constituted via executive order as an autonomous body to regulate and promote the insurance sector. It was reconstituted in 2000 as a statutory body. To a great degree, IRDAI is vested with executive powers that the Controller of Insurance hitherto exercised. It also has quasi-legislative powers to issue subordinate legislations and quasi-judicial powers to award penalties for contraventions of the law.

These are only some examples of independent regulatory authorities established during this period in India's history. The aviation sector serves as another useful example of such a transition. Following the recommendations of an expert committee,⁵ the aviation sector, which was previously regulated by the Director General of Civil Aviation, is now primarily regulated by the Airports Economic Regulatory Authority (AERA). The telecommunications sector offers a more distinct scenario. The Department of Telecommunications was previously responsible for both the regulation of the sector and providing telecom services (at the time, it was the sole service provider in the market). An independent regulatory authority, the Telecom Regulatory Authority of India (TRAI), was set up in 1997 to encourage fair competition. Establishing TRAI also helped separate and delineate the regulatory and service-provision roles of the department.

Even before the 1990s, there were marginally more flexible arrangements where ministries were aided by statutory bodies established under their administrative control. For instance, the Coffee Board, established under the Coffee Act of 1942, was empowered to regulate the sale and marketing of coffee in domestic and international markets.⁶ With sweeping powers provided under the statute, it controlled coffee pricing and marketing; coffee planters were required to 'pool' coffee with the Board and register their estates with State government authorities. In 1996, the pooling system ended, the Board wound up marketing activities, and the free sale of coffee was allowed. Currently, the Coffee Board focuses on promotion, research and development, upgrading quality, and market intelligence activities.

The institution of independent statutory regulatory authorities was integral to market-oriented reforms aimed at addressing problems that would arise with greater private players in sectors with potential market failures. It was deemed necessary due to long-existing lacunae in the approach to regulation.⁷ Amongst other things, government departments were ineffectual in keeping pace with fast-evolving technological changes and their legal and financial implications. They also had limited ability to monitor compliance, arising, in part, from human resources (HR) and staffing issues, as government HR processes tend to be more rigid. Departments were a centralized form of organization, and there were worries that political considerations would emanate from the organizational structure of ministries. Certain government departments also owned parts of the production process—a clear conflict of interest.

5 Ministry of Civil Aviation, Government of India, *Report of the Committee on a Roadmap for the Civil Aviation Sector* (New Delhi: Government of India, 2003).

6 Ministry of Commerce, Government of India, "Explanatory Note for the proposed Draft Coffee (Promotion and Development) Bill, 2022," January 2022.

7 Shubho Roy et al., "Building State Capacity for Regulation," in *Regulation in India: Design, Capacity, Performance*, eds. Devesh Kapur and Madhav Khosla (Oxford: Bloomsbury, 2019).

Independent regulatory authorities could stay at arm's length from the industry they regulate. Thus, the establishment of such authorities ushered in a significant transformation of state structures.

Notably, since they are often empowered to perform quasi-legislative functions, law-making powers (in the form of regulations) have shifted from the legislature to SRAs.⁸ As such, the rise of the regulatory state in India has made it important to further consider holding regulatory authorities to the same standards of accountability, both democratic and federal, as the legislature. In this essay, we write with specific regard to Indian regulators that have the following features: (i) it is an authority created under a parliamentary statute; (ii) it is vested with executive, legislative, and quasi-judicial powers and functions; and (iii) the statute provides for the operational independence of the authority save for certain accountability requirements towards the government.⁹ Such authorities are termed SRAs.¹⁰ We are conscious that this definition excludes several bodies that have performed regulatory roles since Indian independence. These bodies, such as the Coffee Board, often performed the functions of a sectoral regulator and were creatures of statutes, yet had no legislative or judicial activity. Our analysis is poorer for the exclusion of these bodies; however, we hope future analyses of the regulatory state will examine their peculiar roles.

THE TWIN-DEFICIT PROBLEM WITH SRAs

The rise of the regulatory state is a global phenomenon. Its characteristics, however, are rooted in specific regional contexts and the varying forces that led to its development.¹¹ Several constitutional, administrative, and political concerns have emanated from its creation and operations over time.¹² In such a situation, a great deal of policymaking is performed outside the legislature, inviting questions about the precise means through which such policymaking is accountable.¹³

In modern states, some law is made by the legislative branch of the government (i.e., the branch that represents the people). In other instances, specific agencies are given broad mandates and delegated legislative powers. When done right, there is merit in delegating such responsibilities: it is a more efficient way of enacting rules on many technical subjects that the legislature may not have enough subject expertise on. In many cases, the process can be *more* perceptive—for example, because stakeholder comments on draft rules are considered, and the commercial or economic reasoning for the legislative intervention is published. Very often, this type of law will be more contemporary and responsive to fast-

8 Article 53 of the Constitution provides for the executive power of the Union Government. The executive power is vested in the President of India and exercised either directly or through officers subordinate to her. The Parliament can also confer executive powers on authorities other than the President. Wherever the Constitution requires the satisfaction of the President, such satisfaction does not necessarily have to be the satisfaction of the President in her personal capacity. It should be satisfaction in the constitutional sense, that is, the satisfaction of the concerned authority through whom the President may be acting.

9 K. P. Krishnan and Anirudh Burman, "Statutory Regulatory Authorities: Evolution and Impact," in *Regulation in India: Design, Capacity, Performance*, eds. Devesh Kapur and Madhav Khosla (Oxford: Bloomsbury, 2019).

10 SRAs have the power to raise funds through fees and charges levied on regulated entities and are typically seen to have greater financial autonomy than a government department. At the apex level, they are guided by a Board or Commission that comprises a chairperson and generally has several public and private members who serve in whole-time and part-time capacities. This apex-level body has a legal identity and carries out the statutory functions entrusted to the regulatory agency. The establishing statute usually provides legislative powers to the agency to make laws or regulations for laying down standards of conduct for itself, functioning of its regulated entities, and implementing market processes. The statute also gives these agencies the powers to conduct executive functions like licensing, inspections, and audits; and undertake quasi-judicial functions such as investigations and imposition of penalties. An illustrative list of such agencies includes the Reserve Bank of India, Securities and Exchange Board of India, Insurance Regulatory and Development Authority, Telecom Regulatory Authority of India, Tariff Authority for Major Ports, Competition Commission of India, Airport Economic Regulatory Authority, Food Safety and Standards Authority of India, Insolvency and Bankruptcy Board of India, and the National Council for Teacher Education. The distinctive features of these regulatory agencies raise the question of whether the delegation of powers to such agencies is appropriate and according to the scheme of federalism.

11 Kapur and Khosla, "The Reality of Indian Regulation."

12 Giandomenico Majone, "The Regulatory State and its Legitimacy Problems," *West European Politics* 22, no. 1 (1999): 1-24; Vrinda Bhandari, Renuka Sane and Bhargavi Zaveri, "The Accountability Framework of UIDAI: Concerns and Solutions," *The Leap Blog* (blog), August 10, 2017, <https://blog.theleapjournal.org/2017/08/the-accountability-framework-of-uidai.html>.

13 Susan Rose-Ackerman, "Regulation and Public Law in Comparative Perspective," *University of Toronto Law Journal* 60. (2010): 519; Susan Rose-Ackerman, "Citizens and Technocrats: An Essay on Trust, Public Participation, and Government Legitimacy," in *Comparative Administrative Law*, eds. Susan Rose-Ackerman, Peter L. Lindseth, and Blake Emerson (Cheltenham: Elgar, 2017).

evolving developments in sectors characterised by dynamic and innovative market players. However, a long-standing objection to handing unfettered legislative power to agencies is that they may potentially be less democratic in exercising such power than the legislature.

Recently, the United States Court of Appeals for the Fifth Circuit reined in the federal securities markets regulator with a revival of the non-delegation doctrine.¹⁴ The Fifth Circuit, in a 2-1 majority, found that Congress ‘unconstitutionally’ delegated to the Securities and Exchange Commission (SEC) the power to decide whether to bring cases in federal court or before its own administrative law judges (ALJs).¹⁵ The SEC characterized its discretionary power for ‘forum selection’ as an exercise of executive and not legislative power. The Court disagreed. It cited a previous ruling that stated legislative actions have ‘the purpose and effect of altering legal rights, duties and relations of persons...outside the legislative branch’.¹⁶ As such, the Court ruled that the act of forum selection by the SEC amounts to legislative action. In a similar instance, the U.S. Supreme Court has applied the major questions doctrine¹⁷ (as a canon of statutory interpretation) to hold that Congress did not give the Environmental Protection Agency (EPA) the necessary authority (via statute) to adopt certain regulations.¹⁸ In the United States, the fight against the expanding role of the regulatory state is subsumed in the larger struggle between progressives and conservatives regarding the role of states. While being cognizant of these context-specific undertones, we nonetheless take note of the broad outcome—an incipient but noticeable shift that favours democratic legitimacy in the functioning of regulators.

The Indian judiciary has typically granted wide latitude to regulators in matters concerning the legality and appropriateness of their actions. In the recent past, however, it has begun taking a closer look at fundamental questions in regulatory functioning. In 2016, the Supreme Court of India set aside regulations by the country's telecom regulator.¹⁹ The court found that the regulator had not responded to stakeholder comments on draft regulations. Further, before striking down these regulations that penalized telecom companies for dropped calls, the Court held that the regulator had not established from data that all dropped calls were attributable to telecom companies. In this instance, procedure and merit were found lacking in regulatory action. In yet another decisive ruling, in 2019, the Supreme Court struck down a Reserve Bank of India circular for being ultra vires the Banking Regulation Act of 1949.²⁰ This brought the spotlight back on the requirement to have proper checks and balances when unelected officials of a regulator exercise their powers to write subordinate legislation.

Democratic deficit

SRAs, by design, are meant to stay at arm's length from the political executive. Such independence, however, has the potential to beget reduced accountability. In its ability to coerce and alter market behaviour, subordinate legislation makes for a crucial legal instrument. In a democracy, a key source of accountability and performance is the feedback loop of elections—the culmination of the will of the people. The power to write law is exercised by elected representatives. In an extraordinary arrangement of

14 Article 1, Section 1 of the US Constitution provides that “all legislative powers herein granted shall be vested in a Congress of the United States...”. As per Supreme Court precedent (*JW Hampton Jr & Co v. United States*, 276 US 394, 409 (1928)), Congress may only grant regulatory power to an agency if it provides an ‘intelligible principle’ - a guiding condition for the agency to follow when exercising quasi-legislative power. The non-delegation doctrine requires that Congress moderate the unfettered use of such delegated legislative authority to agencies.

15 *Jarkesy v. SEC*, No. 20-61007, slip op (5th Cir, May 18, 2022).

16 *Jarkesy v. SEC*, citing *INS v. Chadha*, 462 US 919, 952 (1983).

17 See Congressional Research Service, *The Supreme Court's "Major Questions Doctrine": Background and Recent Developments*, May 17, 2022.

18 Kristin Hickman, “Thoughts on West Virginia v. EPA,” *Notice and Comment* (blog), July 5, 2022, <https://www.yalejreg.com/nc/thoughts-on-west-virginia-v-epa/>.

19 “Cellular Operators Association of India v. Telecom Regulatory Authority of India” (2016) 7 SCC 703.

20 “Dharani Sugars and Chemicals Limited v. Union of India and Ors”. (2019) 5 SCC 480.

powers, SRAs vest unelected officials with the power to write subordinate legislation. As such, there ought to be requisite checks and balances to address the democratic deficit in regulatory functioning.²¹

India continues to lack a common administrative law governing the conduct of SRAs, including how such agencies ought to carry out legislative processes. In 2016, the Supreme Court of India exhorted Parliament²² to frame legislation along the lines of the U.S. Administrative Procedure Act (APA) of 1946, especially since a predominant number of statutes establishing Indian regulators are thin on the requirement of ‘transparency’ when exercising delegated legislation-making powers.

The challenge is to minimize the trade-off between the advantages of governance through a regulator and the apparent threat to democratic accountability.²³ Inherent tensions in the design and expectations of independent regulators can be allayed through appropriate governance structures and procedural guidelines for exercising their powers. Structural arrangements may provide regulatory agencies with the requisite independence and accountability. Among other conditions, the regulator must effectively and consistently involve the public in the regulation-making process. Even if the obligation to do so is not enumerated in the establishing statute, regulators are required to follow a clear and transparent regulation-making process.

A key reason for creating regulatory bodies is the belief that regulators possess expertise in a subject. However, such expertise cannot be and ought not to be presumed. It must be adequately demonstrated in the quality of their regulation-making process and the ensuing regulations. One way to demonstrate quality is for the regulator to publish cost-benefit analyses of proposed interventions. Public consultations will bolster the regulator’s technical expertise while strengthening its democratic legitimacy. Further, the exercise of quasi-legislative power should be balanced with procedural checks. One such measure would be a review of extant regulations at regular intervals, which, among other things, would also demonstrate the regulator’s continued expertise in its field.

While the perceived lack of democratic accountability in the functioning of SRAs is a serious issue, there is also a good deal of scholarly literature on this subject.²⁴ For this reason, the rest of this essay will focus instead on a relatively under-examined deficit with these authorities: the federal deficit.

Federal deficit

A complete account of the regulatory state should consider its impact on protecting State representation and interests.²⁵ In addition to a democratic deficit, we contend that SRAs in India also suffer a federal deficit. Through regulations, they make laws concerning instrumental market functions. Parliamentary legislation constituting SRAs include broad enabling provisions to make regulations. As TV Somanathan points out in *The Oxford Handbook of the Indian Constitution*, the Indian regulatory state is defined particularly by excessive delegation.²⁶

21 Roy et al., “Building State Capacity for Regulation”; Government of India, *Report of the Financial Sector Legislative Reforms Commission*.

22 “Cellular Operators Association of India v. Telecom Regulatory Authority of India,” Supreme Court of India, (2016) 7 SCC 703.

23 Jonathan Westrup, “The Politics of Financial Regulatory Reform in Britain and Germany,” *West European Politics* 30, no. 5 (2007): 1096-1119

24 Anirudh Burman, “Legal Framework for the Parliamentary Oversight of the Executive in India,” *NUJS Law Review* 6, no. 3 (2013): 387-432; Anirudh Burman and Bhargavi Zaveri, “Measuring Regulatory Responsiveness in India: A Framework for Empirical Assessment,” *William and Mary Policy Review* 9, no. 2 (2019): 1-26; and Roy et al., “Building State Capacity for Regulation.”

25 Raeesa Vakil, “Indian Administrative Law and the Challenges of the Regulatory State,” in *Regulation in India: Design, Capacity, Performance*, eds. Devesh Kapur and Madhav Khosla (Oxford: Bloomsbury, 2019).

26 T.V. Somanathan, “The Administrative and Regulatory State,” in *The Oxford Handbook of the Indian Constitution*, eds., Sujit Choudhury, Madhav Khosla, and Pratap Bhanu Mehta (Oxford University Press, 2016); and Somasekhara Sundaresan, “Subversion of Law in Law-Making,” *Business Standard*, October 24, 2016.

However, unlike the case in ordinary legislation, the regulation-making process is not informed by State (federal) interests. When market functions are governed directly by parliamentary legislation, the Rajya Sabha (the Council of States) provides a mechanism for voicing and articulating State interests. As per the Constitution of India, the Rajya Sabha comprises ‘representatives of the States’ who are ‘elected by the elected members of the Legislative Assembly of the State’.²⁷ It is worth noting that the Rajya Sabha is empowered to consider and influence all legislations, including those on subjects in the Union List (and not merely those in the Concurrent List).²⁸ As a representative of State interests, the Rajya Sabha is an essential part of the original constitutional design to protect the Indian federal spirit. Unlike in ordinary legislation, however, its participation is quite limited and restricted when it comes to the regulation-making process driven by SRAs.

Historically, the representative role of the Rajya Sabha was also discussed by the Constituent Assembly, which framed the Constitution of India. Dr BR Ambedkar, the Chairperson of the Drafting Committee of the Assembly, observed:

The Upper House in Parliament, fashioned as a Council of States, can be understood as an institutional arrangement through which constituent units become part of the decision-making process at the Central level itself.²⁹

Similar sentiments were echoed by the representative from West Bengal:

We have to consider [that] the entry of the States into the federation and second chamber would be an absolute necessity without which it would be difficult to fit in the representatives of the States in the scheme of things.³⁰

The representative from Saurashtra, too, noted that:

In a Federal Constitution, the Upper House is composed of the representatives of the various units or states.... The object of providing an Upper House in the Centre is to see that the States voice or the voice of the units is adequately represented.³¹

Resultantly, the federal purpose of the Rajya Sabha is evident in the Constitutional framework. For example, the Seventh Schedule and its constituent lists enumerate the legislative and executive powers of the Union and the States. List II, or the State List, contains subjects over which the State legislatures have exclusive competence and the role of the Union is only to give advice and money.³² While Article 249 of the Constitution provides for the power of the Union to legislate concerning a subject in the State List, it includes an explicit requirement for a special resolution by the Rajya Sabha that it is necessary and expedient for the Union to delve into the State List.³³ Without the approval of the Rajya Sabha—i.e., without the approval of State representatives—the Union government cannot make laws concerning subjects in the State List.

27 Constitution of India, 1950, Article 80 (Composition of the Council of States).

28 However, this does not include Money Bills.

29 Sharad Pawar, “The Role of the Rajya Sabha in Strengthening Indian Federalism,” Rajya Sabha Secretariat (New Delhi: Government of India, 2019)

30 Shri Naziruddin Ahmed: West Bengal, Constituent Assembly of India Debates, July 28, 1947.

31 Shri Chimanlal Chakubhai Shah: Saurashtra, Constituent Assembly of India Debates, May 20, 1949.

32 Seventh Schedule (Subject matter of laws made by Parliament and by the Legislatures of States), Constitution of India (n 26). See also, “State of West Bengal v. Committee for Protection of Democratic Rights,” West Bengal, AIR 2010 SC 1476.

33 Constitution of India 1950, Article 249 (Power of Parliament to legislate with respect to a matter in the State List in the national interest).

It is evident that, as per the constitutional framework, parliamentary law, by its nature, is scrutinized from the point of view of State interests by State representatives in the Union parliament. However, such scrutiny is effectively lacking in the case of regulations by SRAs. Issuance of regulations is not subject to explicit parliamentary approval. This is the case even when regulations have the *same effect* on a regulated industry as any ordinary legislation. For example, as of July 2022, there are over forty-five operational Securities and Exchange Board of India (SEBI) regulations.³⁴ They cover wide-ranging substantive issues such as listing obligations and disclosure requirements, regulation of vault managers, portfolio managers, depositories, and more. In the absence of SEBI, such subjects would be governed by dedicated parliamentary legislation—i.e., they would be debated and approved by the Rajya Sabha. Further, regulations are subject to frequent amendments. For example, SEBI's regulations concerning portfolio managers—issued in 2020—have been amended four times in the last three years.³⁵ Here, too, in the absence of SEBI, such amendments would be individually contingent on parliamentary approval.

Table 1 provides a select list of regulations by SEBI that govern instrumental market functions and have been subject to frequent amendments.³⁶ It demonstrates the depth and frequency with which laws are made (by an SRA) without the explicit involvement of the States.

Table 1: Regulations by SEBI

Year Issued	SEBI Regulation	Purpose	Amendments
2018	Issue of Capital and Disclosure Requirements	Regulation of an initial public offer, rights issue, further public suggestion, preferential issue, etc.	6
2015	Listing Obligations and Disclosure Requirements	Regulation of listed entities with any designated securities listed on recognised stock exchanges.	6
2012	Alternative Investment Funds	Regulation of entities and persons intending to act as Alternative Investment Funds.	5
2020	Portfolio Managers	Regulation of persons intending to act as Portfolio Managers.	4
2019	Foreign Portfolio Investors	Framework for registration and procedures concerning foreign investors who propose to make portfolio investments in India.	4
2011	Substantial Acquisition of Shares and Takeovers	Limitation of the substantial acquisition of shares and takeovers of companies	4

Similarly, the Insurance and Regulatory Development Authority of India (IRDAI) has fifty-four operational regulations.³⁷ Here, regulations range from the issuance of e-insurance policies to advertisements and disclosures by insurance providers. These, too, were issued without parliamentary approval. In fact, given the broad enabling powers of SRAs, regulations without explicit parliamentary approval also overlap with areas already covered by other legislative statutes.³⁸

34 "List of all SEBI Regulations (Updated)," Securities and Exchange Board of India, accessed on July 9, 2022, <https://www.sebi.gov.in/sebiweb/home/HomeAction.do?doListing=yes&sid=1&ssid=3&smid=0>.

35 Among others, this included the addition of certain definitions, criteria, qualifications, etc.

36 This table is only an illustration of SEBI regulations and is not an exhaustive list of regulated subject areas.

37 "List of all IRDA Regulations (Updated)," Insurance and Regulatory Development Authority of India, accessed July 9, 2022, https://www.irdai.gov.in/ADMINCMS/cms/NormalData_Layout.aspx?page=PageNo4133&mid=40.

38 For an overlap of TRAI regulations and the Copyrights Act, see *Star India v Department of Industrial Policy and Promotion*, (2019) 2 SCC 104.

What, then, is the mechanism holding the SRAs accountable for the regulations they make? The accountability of SRAs in states with parliamentary structures, like India, has traditionally been to the legislature through *ex-post* parliamentary oversight.³⁹ Parliament, and consequently the Rajya Sabha, still has a role in the functioning of SRAs. Although the design and structure of India's regulatory agencies vary considerably, the measures to ensure and enforce accountability are largely the same. To account for the federal deficit, each statute creating a regulatory agency typically mandates that the regulations framed by the SRA are placed before Parliament—which may rescind, modify, or annul them.⁴⁰ Thus, parliamentary scrutiny of the legislative power exercised by SRAs is assured.

Unlike in respect of parliamentary legislations, however, there is no evidence of any detailed discussion concerning such regulations, their modification, or annulment by either House of Parliament. While SRAs have complied with the requirement to place regulations before Parliament, the underlying objective of parliamentary scrutiny has seldom occurred. The laying requirement is only an *ex-post* intimation—as opposed to formal *ex-ante* approval—and does not result in effective oversight. This is the case even when regulations have the same effect on a regulated industry as any ordinary legislation. Parliament is almost universally accepted as failing to fulfil its role of accountability, not just concerning reasons of political composition and representation but also because of structural lapses that prevent it from holding the executive—and, as a result, SRAs—accountable.⁴¹ It is generally agreed that Parliament, as a mechanism of accountability for SRAs, is ineffective.

To account for weaknesses in the day-to-day functioning of Parliament, the Lok Sabha (the House of the People) and the Rajya Sabha have each constituted Parliamentary Committees on Subordinate Legislation. Parliamentary committees are microcosms of Parliament. Per the rules of procedure, the committees are tasked with, among other things, scrutinizing and reporting whether the power to make regulations, as delegated by Parliament, has been properly exercised.⁴² Scholarly research has shown that tools of parliamentary oversight, including parliamentary committees, have had limited and declining effectiveness.⁴³ But a 2006 Planning Commission consultation paper recognized the importance of an accountability framework for SRAs that involves a greater role for parliamentary committees.⁴⁴ In fact, in 2009, the Second Administrative Reforms Commission recommended that legislative oversight of SRAs should be performed by sector-specific committees rather than a cross-sectoral committee (such as the Committee on Subordinate Legislation) that reviews all SRAs.⁴⁵

39 Somanathan, "The Administrative and Regulatory State," 396.

40 See, for example, s 241 (Rules and regulations to be laid before Parliament), Insolvency and Bankruptcy Board of India Act 2016, and s 64 (Power to make Regulations), Competition Commission of India Act 2002.

41 Arun Agrawal, "The Indian Parliament," in *Public Institutions in India: Performance and Design*, eds. Devesh Kapur and Pratap Bhanu Mehta (New Delhi: Oxford University Press, 2005); Babubhai Chinai, "Parliament and Restraints over Executive Power," in *Parliament and Administration in India*, ed. L.M. Sanghvi (New Delhi: Metropolitan Books, 1970): 93-100; and Devesh Kapur and Pratap Bhanu Mehta, "The Indian Parliament as an Institution of Accountability," United Nations Research Institute for Social Development: Democracy, Governance and Human Rights Programme, Paper No 23 (2006).

42 Rule 204 (Committee on Subordinate Legislation), Rules of Procedure and Conduct of Business in the Council of States (Rajya Sabha).

43 Kapur and Mehta, "The Indian Parliament as an Institution of Accountability"; and Burman, "Legal Framework for the Parliamentary Oversight of the Executive in India."

44 Planning Commission, Government of India, *Approach to Regulation: Issues and Options* (New Delhi: Government of India, 2006).

45 Second Administrative Reforms Commission, *Organisational Structure of Government of India*, 3th Report (New Delhi: Government of India, 2009).

Table 2: Review of regulations by Parliamentary Committees on Subordinate Legislation

Period	Lok Sabha			Rajya Sabha		
	Reports containing a review of regulations	Regulations reviewed	SRA Regulations reviewed	Reports containing a review of regulations	Regulations reviewed	SRA Regulations reviewed
1999–2003 ⁴⁶	8	13	0	8	14	1
2004–2008	6	6	2	10	18	3
2009–2013	7	8	5	4	4	0
2014–2018	4	5	2	1	1	0
2019–2022	8	12	4	0	0	0
Total	33	44	13	23	37	4

Source: Lok Sabha Parliamentary Committee on Subordinate Legislation; Rajya Sabha Parliamentary Committee on Subordinate Legislation.

Table 2 shows the results of our analysis of the reports presented by the Lok Sabha and Rajya Sabha Parliamentary Committees on Subordinate Legislation. We sourced data from all reports presented by the concerned committees over the twenty-three-year period between 1999 and 2022.⁴⁷ This period was chosen based on the quality and completeness of data. We took particular note of (i) the reports containing a review of regulations, (ii) the number of regulations reviewed, and (iii) how many regulations were issued by SRAs.⁴⁸ This was because we wanted to distinguish between regulations issued by government departments such as the Central Board of Excise and Customs and those issued by independent regulatory agencies.

In the last twenty-three years, the Lok Sabha committee has reviewed only thirteen regulations issued by SRAs. The Rajya Sabha committee has reviewed four. This is despite the fact that SRAs, such as SEBI and IRDAI, often pass multiple regulations in a year. For instance, since its inception in 1992, SEBI alone has passed 661 regulations (including amendments)—an average of more than twenty per year. These are only a small portion of the total regulations issued by all SRAs in the country. Yet, only very few, if not a negligible number, of regulations are subject to parliamentary scrutiny. This is especially evident in the Rajya Sabha, which has reviewed no regulations by SRAs since 2009. During this period, new SRAs have been constituted, including the Insolvency and Bankruptcy Board of India (IBBI) and the National Medical Commission (NMC).⁴⁹ Because new SRAs must issue regulations concerning a wide array of subjects that have not been addressed earlier, one would expect to see the number of regulations to rise over this period. Despite this, our analysis of the Rajya Sabha Parliamentary Committee on Subordinate Legislation makes it clear that scrutiny by State representatives has been lacking—thus demonstrating the absence of federal checks and balances over SRAs. This continues to align with previous findings that parliamentary committees have had limited and declining effectiveness as accountability tools.⁵⁰

In fact, despite this limited scrutiny by Parliament, SRAs have even developed means to sidestep the possibility of such scrutiny. Instead of issuing regulations, SRAs often pass master circulars or directions

46 The data for reports presented before the Lok Sabha in 1999 is unavailable.

47 In this period, 142 and 120 reports were presented by the Lok Sabha and Rajya Sabha Parliamentary Committees, respectively.

48 Reports often only dealt with the delay in laying regulations before parliament and did not actually review the regulations.

49 Established in 2016 and 2019, respectively.

50 Kapur and Mehta, "The Indian Parliament as an Institution of Accountability"; and Burman, "Legal Framework for the Parliamentary Oversight of the Executive in India."

to govern the conduct of regulated entities.⁵¹ Such master circulars and directions are equally coercive and binding on concerned parties. Instruments like circulars and directions are not within the purview of the Parliamentary Committees on Subordinate Legislation, meaning that even if Parliament, including the Rajya Sabha, wanted to scrutinize these instruments, it would not be able to do so—further shielding SRAs from checks and balances by State representatives.

This lack of checks and balances by State representatives is not just a conceptual or intellectual issue. It has resulted in meaningful disagreements between State governments and Union regulators in implementing regulations. For instance, as Kapur highlights, when independent power producers were entitled to access the publicly owned grid infrastructure and sell the power they generated, State transmission utilities in Karnataka blocked such open access. The State government acted in the ‘public interest’, sequestering the power generated to be sold to their utilities at a prescribed price. In effect, shortfalls due to deficiencies in the State distribution system were sought to be transferred to the private power generators by violating a legally guaranteed regulatory principle.⁵² Though the Central Electricity Regulatory Commission stepped in to secure open access, its verdict was overturned by the Karnataka High Court; appeals against which decisions are pending before the Supreme Court of India.⁵³

In another example, in 2006, the Supreme Court had to consider whether a State government’s policy regarding setting up colleges was required to be heeded by the National Council for Teacher Education (NCTE)—the Union regulator tasked with achieving planned and coordinated development of teacher education in India. In another instance, the NCTE had granted permission to an institute to start a Bachelor of Education (B.Ed) college in Maharashtra, despite the State government informing the NCTE that it did not require additional B.Ed-trained workforce. While the court held that no State government could refuse such permission by relying on a ‘policy consideration’ or even an Act passed by the State legislature, it also stated that the NCTE *must* consult State governments and consider their views during activities such as granting recognition.⁵⁴ The Regional Committees of the NCTE have been directed to give weightage to the recommendations made by State governments,⁵⁵ since they are best suited to assess local requirements for teachers, future employment opportunities, and other considerations in their respective States.

In yet another illustration, in September 2020, the Banking Regulation Act 1949 was amended to increase the regulatory power of the Reserve Bank of India (RBI) over Urban Cooperative Banks (UCBs) in matters concerning their audit, capital, winding up, and management. ‘Banking’ is a Union List subject in the Constitution,⁵⁶ and ‘incorporation, regulation and winding-up of co-operative societies’ are in the State List.⁵⁷ After the passage of the Amendment Act, RBI issued a circular relating to the appointment and removal of directors of cooperative banks.⁵⁸ Consequently, multiple High Courts across the country admitted petitions challenging the constitutionality of the Amendment Act, which brought UCBs under the direct supervision of the RBI. The courts stayed the execution of the RBI circular.⁵⁹ The Kerala High

51 Reserve Bank of India, *Report of the Regulation Review Authority 2.0* (Mumbai: Reserve Bank of India, June 2022).

52 Amit Kapur, “Infrastructure,” in *Regulation in India: Design, Capacity, Performance*, eds. Devesh Kapur and Madhav Khosla (Oxford: Bloomsbury, 2019). See also Akshay Jaitly, “Renewable Energy,” in *Regulation in India: Design, Capacity, Performance*, eds. Devesh Kapur and Madhav Khosla (Oxford: Bloomsbury, 2019).

53 The appeal was last heard by the Supreme Court on 18th February 2015. Civil Appeal 3894-95 of 2011.

54 “State of Rajasthan v. LBS B Ed College,” (2016) 16 SCC 110.

55 “St Johns Teachers Training Institute v. Regional Director, NCTE” (2003) 3 SCC 321.

56 Entry 45, List I, Seventh Schedule, Constitution of India (n 26).

57 Entry 32, List II, Seventh Schedule, Constitution of India (n 26).

58 Reserve Bank of India, “Appointment of Managing Director (MD) / Whole-Time Director (WTD) in Primary (Urban) Co-operative Banks”, RBI/2021-22/60, 25th June 2021.

59 Notices were issued by the Madhya Pradesh, Punjab & Haryana, Rajasthan, and Kerala High Courts. See “High Courts Stay Execution of RBI Circular on Urban Cooperative Banks,” *Moneylife*, September 6, 2021, <https://www.moneylife.in/article/high-courts-stay-execution-of-rbi-circular-on-urban-cooperative-banks/65053.html>.

Court, in particular, issued notice to both the Union and the RBI.⁶⁰ The state cooperatives contend that the amendment transgressed into the State's legislative powers. Since the matter is sub-judice, jurisprudence on the subject of a federal regulator exercising control over societies governed by State-specific statutes is yet to be settled.

THE WAY FORWARD

India's common-law inheritance, thinly conceived administrative law concerning legislative and administrative functions, and the absence of a unifying legislative approach have shaped the character of its regulatory state. Given the ever-increasing scale and scope of SRAs in India, studying these institutions is unavoidable. While this essay recognizes the twin-deficit problem marring SRA effectiveness, we focus on the federal deficit issue and resist exploring the democratic deficit.

The federal purpose of the Rajya Sabha within the constitutional framework is met, at least ostensibly, when the legislative branch exercises the law-making power. With the delegation of legislative power to regulatory agencies, however, the requirement to consider the 'will of the people' has eroded. In enabling statutes, the objective of any requirement to bring them before Parliament is to subject the subordinate law-making authority to the vigilance and control of the legislature.⁶¹ There is no evidence, however, of any detailed discussion concerning regulations issued by these bodies, their modification, or annulment when laid before Parliament. Further, in our analysis of the Lok Sabha and Rajya Sabha Committees on Subordinate Legislation—mechanisms specifically intended to improve Parliament's efficiency—we

find underwhelming evidence of parliamentary scrutiny (*ex-post* approval) over regulations passed by independent regulators. The Indian regulatory state, characterized by excessive delegation, is barely held accountable through parliamentary oversight. Under the U.S. Congressional Review Act, once each chamber receives a copy of subordinate legislation promulgated by federal agencies, it is automatically sent to the standing committee with jurisdiction on the subject.⁶² In India, the choice of subordinate legislation to be reviewed by committees is largely discretionary.

The primary function of Parliament is to hold the executive, including its agencies, accountable. To wrest back its space as an institution that does so, some structural weaknesses ought to be addressed. We propose that sub-committees be created under (existing) subject-specific standing committees. Under the current oversight schema, committees on subordinate legislation demonstrate more appreciation for reviewing administrative law concerns, such as whether an SRA is acting within the four corners of the law. While such review, in and of itself, needs to be undertaken with more robustness, it may be bolstered and balanced by a review of the subject matter of regulations. The latter is best performed by sectoral sub-committees since they possess greater expertise and can provide requisite attention for the task.

Further, to legitimize the role of States in fields where Union regulators have been established, we propose that mechanisms to ensure their representation and contributions be conceptualized. These mechanisms must go beyond general procedural requirements such as 'stakeholder consultations'. They should justify adherence to the federal setup and consequent engagement with States. Much like its administrative counterpart, the regulatory state exhibits centralization tendencies. In many cases, the control exercised by

⁶⁰ Ibid.

⁶¹ Justice (Rtd.) GP Singh, *Principles of Statutory Interpretation*, 15th Edition (New Delhi: LexisNexis, 2021).

⁶² Congressional Review Act (5 USC § 801)

federal regulators over fields in the State and Concurrent Lists is an unintended consequence of regulatory design. For instance, SEBI's regulation of municipal bonds,⁶³ in simplified functional terms, may be understood as the regulatory arm of the Union Ministry of Finance exercising control over a subject in the State List. The RBI's regulation of UCBs mirrors the same pattern of control. However, no other regulatory entity currently has the necessary jurisdiction or powers to exercise control over issues concerning capital access or the banking sector. One way of ensuring participation by States in regulating such fields is to constitute Regional Committees that advise on context-specific aspects. This is not a novel solution and has already been embraced by a few regulators. The RBI, for instance, has four Local Boards, which are expected to advise the Central Board on local matters and represent the territorial interests of local cooperative and indigenous banks. Similarly, the NCTE has four Regional Committees.

In most instances, the central authority may choose not to consult its regional representatives unless required to do so by law or directed to do so by the judiciary. Thus, a statutory requirement to undertake both general *and* State consultation on any topic that State governments are *likely* to have a view on may be introduced. The executive already has a well-oiled mechanism like this—the Inter-Ministerial Consultation (IMC). The IMC is a procedural requirement for proposals and notes concerning new legislation to be considered by various government departments. The ministry sponsoring the legislation is expected to circulate the proposal to other ministries and departments whose business is *likely* to be impacted by the proposal. The IMC is a timebound procedure during which the inputs of the consulted ministries and departments are collated for consideration by the final authority.

Under the Constitution of India, federalism is an arrangement for the division of responsibilities and an aspiration. The constitutional aspiration should be realized by allowing minimal encroachment into the spheres earmarked for States. The fluid operation of SRAs—in and out of, as well as sometimes in disregard to these constitutional demarcations—must be investigated closely by Parliament.

⁶³ In 2015, SEBI published the Issue and Listing of Debt Securities of Municipalities Regulations. The constitution and powers of municipal corporations are a subject under the State List. In 1992, the Constitution (74th Amendment) Act endowed Urban Local Bodies (ULBs) with the power and authority to mobilise resources, independent of state governments, for the provision, operation and maintenance of urban services listed under the Twelfth Schedule. In exercising such power, several ULBs have raised funds through municipal bonds.

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