

# INDIA'S REGULATORY SHIFT: AN EXAMINATION OF FIVE AGENCIES OF THE POST- LIBERALISATION ERA

**Arkaja Singh**

STATE CAPACITY INITIATIVE  
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The **State Capacity Initiative** at the Centre for Policy Research is an interdisciplinary research and practice programme focused on addressing the challenges of the 21st-century Indian state. The purpose of this initiative is to place the critical challenges of building state capacity at the heart of the field of policy research in India, where it has always belonged but remains surprisingly marginalised. We therefore start with first principles and ground ourselves in existing realities to deepen and expand the understanding of the challenges and possibilities of building state capacity in a democratic and federal India. Our programme of work focuses on the changing roles of the Indian state: institutional design, implementation and administrative capacity; the challenges of regulatory and fiscal capacity; and the complex and changing relations between society, politics and state capacity in India.

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Arkaja Singh is a Fellow at the Centre for Policy Research and a part of the State Capacity Initiative.

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## ABSTRACT

This paper explores the design of Indian regulatory agencies established post-liberalisation from an administrative perspective. Regulatory agencies were set up to replace state inefficiencies, and to discipline profligate state agencies, even as much as they were a response to state-market reorganisations and the challenge of privatization. Regulation provided an opportunity for upper levels of the Indian bureaucratic state to recast their power, with the idea that it would provide a framework for economic rationality, independence and technical specialization to take centre-stage. In actual practice however, the design of each of the regulatory agencies is shaped largely by pre-existing legal frameworks and institutions, and the agencies have remained quite tied in with their counterpart departments and on retired bureaucrats. However, in spite of these limitations, these agencies have some common features imbued by legislative mandate and organisational design which are unique in the context of the Indian state. They have focus and stability, a degree of functional independence, and most importantly, a concentration of power, which enables them to think through and implement complex policy transitions from multi-year and context-specific perspectives. The paper builds on learnings from a series of conversations with regulatory agency chairpersons in order to identify what regulatory governance is, in terms of the powers and mandate of the regulatory agencies and what makes them distinctive from the rest of public administration.

## INTRODUCTION

Starting in the late 1990s, India established several regulatory agencies which were ostensibly inspired by the ideology of economic liberalisation and the institutional templates of regulatory agencies in the United States, Britain, and other more developed countries. These agencies are often called ‘independent regulatory agencies’ or statutory regulatory agencies. They are associated with the withdrawal of state monopolies or state control, and the transition to markets, or at least to market-oriented modes of provision.<sup>1</sup> They were acknowledged as products of global transplant, and the outcome of multilateral conditionalities,<sup>2</sup> and in specific cases, as a way for India to be better aligned with the global economy.

It has also been pointed out that for every regulatory agency that was established, there was probably a small but influential group of persons, located both within and outside government, who had been seeking to reform the institutions and culture of the old socialist state of the 1980s.<sup>3</sup> Indian reformers and influential policy advocates for regulation in India espoused the global regulatory discourse, with particular emphasis on ‘independent’ regulators, who could insulate ‘economic decisions’ from the political process, and who would have relatively higher degrees of operational flexibility and ‘technical’ expertise in the subject area, and in what might be considered the economic rationality view of that subject area.<sup>4</sup> Although the opportunity for setting up regulatory agencies arose in the context of India’s fiscal crisis of the 1990s,<sup>5</sup> it was also a response to the experience of India’s democratic transition, and its associated socialist state practice. These agencies were tasked with devising expert-led and economically viable solutions to social goals, or at least creating a balance between economic and social claims.<sup>6</sup> However, Indian regulatory discourse seems to suggest that their regulatory design should set limits and tight boundaries for the social and political demands that can be made of regulators.

It was of course, never going to be possible to really depoliticise regulation. The effort to create a technical and expertise-led zone of decision-making has been only partly successful.<sup>7</sup> Moreover, while writing this in 2022, we are in a time when the newness of economic liberalisation has long passed.

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1 Kapur and Khosla, *Regulation in India: Design, Capacity, Performance*. For a useful survey of the landscape of Indian regulatory agencies, see Amit Kapur, “Infrastructure.” 141-160 in the same volume.

2 Dubash and Morgan, *The Rise of the Regulatory State of the South: Infrastructure and Development in Emerging Economies*.

3 Thiruvengadam, “Flag-Bearers of a New Era?: The Evolution of New Regulatory Institutions in India (1991-2016).” 4–5.

4 Somanathan, “The Administrative and Regulatory State.”; Bhattacharya and Patel, “New Regulatory Institutions in India: White Knights or Trojan Horses.”

5 Bhattacharya and Patel, “New Regulatory Institutions in India: White Knights or Trojan Horses.” 421.

6 Kapur, “Infrastructure.”

7 Dubash and Morgan, “The Embedded Regulatory State: Between Rules and Deals.”

Regulatory agencies are no longer on the agenda of the multilaterals, and anyway, their influence on India's domestic policy is not so significant anymore. There is scepticism about the performance of existing regulatory agencies in India, coupled with disappointment that they are not really independent in an institutional sense. But admittedly, this is often a characterisation of current challenges, and not the past problems that necessitated the setting up of regulatory agencies in the first place.<sup>8</sup>

The Indian government is, however, still setting up new regulatory agencies. This contradiction suggests either a lack of new ideas, or the possibility that such regulatory agencies do serve some useful purpose in the context of the Indian state. The perception of Indian regulatory agencies is based less on the sector- and agency-specific discussions they are often a part of, and more on how they reorganise and concentrate administrative power to address Indian state capacity problems. They have come to set the terms for 'regulatory governance' as a framework for governance in which the rules can be negotiated, responsive and calibrated. This form of regulatory governance enables multi-year arrangements, as well as multiple specialised arrangements simultaneously for different types of regulated entities. Moreover, it is a framework in which the rationalities of business and investment can be accorded consideration, and which can be dynamic and responsive in its management of market conditions. In the context of the Indian state, this is not just a shift in ideology for business, but also a sincere effort to address long-term state capacity challenges, at least for the businesses and entities that were to be covered by the scope of regulation.

As we know from our experience of state innovation and reform, merely ordering or enacting a new agency does not breathe life into it. The landscape of the Indian state has many ambitiously enacted agencies that never took off or have become defunct—industrial development agencies, town vending committees and ombudsmen, to name a few—but the same cannot be said of regulatory agencies. They may have many shortcomings, but they do exist in reality and not just on paper. Furthermore, they enjoy and exercise a combination of regulatory powers which have rule-setting, information-gathering and behaviour-influencing power over the enterprises and entities that they regulate. To this (limited) extent, Indian regulatory agencies have succeeded where others may have failed.

Today, even as we continue to debate the many failures of the Indian state, the experience of regulatory agencies could help throw light on what it would take for the state to be more dynamic, responsive, and long-term in its everyday approach. Unlike its counterparts in more developed countries (to which Indian regulatory agencies are often compared), the Indian state has far from resolved issues that need intervention, like slum clearance, and provision of water, sanitation, and education for all. It is still expanding its remit and reach into society and welfare, but simultaneously there is an economic policy impetus to privatise and shrink. This is the context for any lessons that the everyday state might take from the regulatory agencies.

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<sup>8</sup> Pritchett, "The Regulatory State Goes South in the South."

## ABOUT THIS PAPER

In the past year, the author was part of a collaborative *Know Your Regulator* seminar series, which included many interesting public conversations with current and former chairpersons of several regulatory authorities. These conversations all pointed in the direction of a stable agency form which performed some key and critical functions. Simply put, these were public retellings of the role and purpose of the regulatory authorities, from the point of view of the chairpersons. It was nonetheless apparent that regulatory agencies could potentially participate in more structured and specialised reasoning processes and are able to see policy transitions through their logical cycle. This was striking because it was not something one could take for granted in other parts of the Indian state.

This series provided the starting point for this paper, and the conversations themselves offered useful insights into how the chairpersons saw their own contexts and their roles within it. Detailed background notes that were created for the series helped understand the design and legal structure of the regulatory agencies. The paper examines the following five regulatory agencies from the *Know Your Regulator* series:

- the Central Electricity Regulatory Commission,
- the Pension Funds Regulatory and Development Authority,
- the Maharashtra Water Resources Regulatory Authority,
- the Food Safety Standards Authority of India, and
- the Real Estate Regulatory Authorities.

The above agencies were set up in pursuit of many goals, economic and developmental, which include electrification, social security, investment protection, environment and sustainable development, public health and safety. Two of these agencies regulate in the context of a market-oriented transition of public infrastructure, whereas another one was set up to regulate state-owned infrastructure and natural resources. Two agencies regulate open markets that have a very large number of private enterprises, whereas three regulate in domains that are controlled and at least partially monopolistic. Three are national-level agencies, whereas two are state-level. In all, these regulatory agencies span nearly two decades of regulatory agency development from 1998 to 2016. This is by no means a representative sample but covers a variety of regulatory functions and organisational clusters. There are, however, limits to what could be covered in an analysis of this nature, especially as there is no typology or even a complete list of regulatory agencies in India.

The next section of the paper sets out how the installation of regulatory agencies might be a response to a particular characterisation of India's administrative problems. Their deeply contextual design, and some unifying threads, are described in the third section. The fourth and fifth sections of the paper identify the proposed scope and potential, and the internal limits for regulatory governance respectively.

## REGULATORY AGENCIES AS A RESPONSE TO INDIAN ADMINISTRATIVE PROBLEMS

All five Indian regulatory agencies discussed in this paper were seemingly set up in response to significant and urgent administrative challenges. A unique feature of the liberalisation moment and its aftermath for India's policy reformers was that these challenges could elicit a regulatory response, whereas earlier they may have precipitated state consolidation. But nonetheless the failures were intense and mostly administrative.

The government-run power sector was in a financial mess, and had failed to invest in improvements in access and quality at the time when the electricity regulatory commissions were being set up.<sup>9</sup> In the same period, the agencies that were set up to establish and run irrigation schemes were similarly unable to balance their books, and were singularly ill-equipped to grapple with the challenge of sustainable resource management.<sup>10</sup> The government's increasing pension liabilities towards its own present and future employees seemed financially unsustainable for state and central governments.<sup>11</sup> These failures led, not to the rolling back of the state, but to realignments in the role of the state through a reform plan and a prescription for setting up a regulatory agency. The role of these agencies is as much about regulating the market as it is about taming profligate state agencies through the lens of economic rationality.

There is also recognition of the state's regulatory failures in relation to subjects for which the state's role has always been more regulatory and less about provisioning. These are principally problems of markets, in that they relate to market goods and services (real estate and food, in the examples used here). India's regulatory agency response, however, conflates problems of the market with problems of the state such as the presence of multiple and confusing laws, slow and ineffective control mechanisms, and the limitations of civil and commercial remedies. A maze of ineffective and low-grade state regulation allowed unscrupulous businesses to get away with feeble state control, leaving consumers at risk. For this reason, the regulatory agency response in such situations seeks to protect consumers from both state and market.

Regulation provided an opportunity for the elite state to recast its power in a centralised form, even as it facilitated a change in the direction of economic policy. This could be characterised as a response to the 'flailing state'.<sup>12</sup> The high quality, high level elite bureaucrats—the 'brains'<sup>13</sup>—of the Indian state (who are also usually officers of the Indian Administrative Service) could give themselves the power over its flailing extremities. These extremities, the electricity and irrigation departments, and the myriad

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9 Dubash and Chella Rajan, "Power Politics: Process of Power Sector Reform in India."

10 Warghade, "Regulatory Policy through Policy Transfer: The Case of an Independent Regulatory Authority in the Water Sector in India."

11 Dave, "India's Pension Reform: A Case Study in Complex Institutional Change."; "Report of the Project OASIS Expert Committee for Devising a Pension System for India."

12 Pritchett, "Is India a Flailing State? Detours on the Four Lane Highway to Modernization."

13 Pritchett, 3."

‘competent authorities’ who supposedly regulate food adulteration and building plan violations, are not so much corrupt as they are irrational, profligate and given to distributional politics. Since politics was often part of the problem, these agencies were given a little bit of insulation from politics, enough to create a zone of autonomous operation. However, the independence aspect of this response was hardly ever more than a formal separation from the political executive, so as not to lose ties with the state which is also the agencies’ source of power.

The regulatory template, borrowed substantially from international templates, usefully armed regulatory agencies with a mix of rule-setting, administrative, and adjudicatory powers. This mix of powers in the executive branch of the state is not by itself unprecedented in India,<sup>14</sup> but the legal design of regulatory agencies made this into a form of ‘concentrated power’<sup>15</sup> in the hands of a single full-time group of people (the chairperson and the members of the authority) who have a fixed five-year term in office and must directly and personally engage with the legislative, executive and adjudicatory dimensions of their power. The organisational stability afforded to regulatory agencies enables its members to stay focussed on one subject area, over several years; such luxury is seldom available to ministerial secretaries and departmental heads, whose power is diffused through file-notes and multiple decision-making levels, even as they grapple myriad topics and responsibilities, they can never quite stay on one thing for long enough. Stability also makes it possible to follow through: if the authority issues directions that do not work, the same members who issued the directions will have to respond to the representations of interest groups who were affected by it and will—albeit in professional and expert communities—be faced with criticism for its fallout.

Governance is not so personalised in other parts of the Indian state, where the general tendency is to disaggregate power and authority through standardisation and checks-and-balances. This is partly because of the long-standing and pervasive idea in the Indian government that its own officials should not be trusted because they are ‘corrupt, unresponsive and caught up in distortionary local political and social networks’.<sup>16</sup> Perhaps it also owes to the logic that with limited resources and capacity, the state can achieve more with standardised templates than if it set out to do high-quality, customised and thoughtful interventions in each place.<sup>17</sup>

To make a contrast, we can take the example of building regulation and the problem of unplanned construction in Indian cities. The rules for the control of land development and building are made by the planning authority (usually at state level) through a multi-layered planning process that entails many rounds of data gathering and approvals at the highest level of government. These rules have the force of law and carry considerable significance for land value and economic activity in the areas covered by it. On account of its complexity, and because of the potential for manipulation by powerful interest groups that this might entail, the rules are seldom altered once they are enacted.

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14 Somanathan, “The Administrative and Regulatory State.”

15 In disregard of the usual conventions of both the separation of power, and of its disaggregation through checks and balances.”

16 Mehta and Walton, “Ideas, Interests and the Politics of Development Change in India: Capitalism, Inclusion and the State.” 11.”

17 For a critical perspective on this, see Singh, “Hunger, COVID-19 and the Indian Administrative State.”



Local agencies, however, have to enforce these rules in all sorts of locational conditions, where the regulations often do not fit,<sup>18</sup> but there is little scope for modifying or adapting the regulations to local requirements in order to at least regulate what is possible. This is the problem which, in the context of urban planning, puts the state more at odds with urban informality than it might have been with a more facilitative framework. The divergence between rule and local conditions creates a huge economic and social impetus to build illegally (or to make ‘deals’),<sup>19</sup> but a more adaptive planning structure might perhaps have allowed for the negotiation of better outcomes for all concerned.<sup>20</sup>

This is the state capacity problem that regulatory agencies are set up to solve. They can make differentiated and multi-year rules, to account for different types of operators, changing situations and transitioning pathways. Moreover, they can make and adapt these rules, and decide issues with an eye to emerging situations, and responsively, to recent changes in the operating environment. They can make specialised technical regulations that respond to evolving financial market practices. While making regulations, they can also strike a fine balance between numerous competing domestic interest groups and international pressures. Insiders of regulatory studies take this feature of the regulatory agencies for granted, but for the rest of the Indian state, this capacity is available only in a few places, whereas it could be extensively available.

## REGULATORY RE-FORMULATIONS OF THE STATE

The design of regulatory agencies is deeply contextual, in that it is determined in large measure by the laws and institutional arrangements that are already in place for any given subject area. For this reason, each agency is unique, as opposed to emerging from an organisational cookie-cutter. In some cases, as in electricity and pensions, the regulatory agencies were set up in anticipation of overseeing a potential transition to privatisation. In others, the role of these agencies was principally to re-set rules to improve an existing situation.

Of the five agencies (electricity, pensions, water, food, and real estate) included in this paper, there are two (pensions, real estate) that take on entirely new state functions, whereas the others apply the framework of regulation to existing state functions. Electricity and pension regulatory agencies were set up in aid of a privatisation, whereas the water agency was meant to bring economic rationality to public sector managed water. The food and real estate agencies were set up to improve upon past regulatory inadequacies of the state. The framework of market failure could perhaps be applied, in different ways, to the electricity, pension, food and real estate regulatory agencies, but there are also compelling political and administrative failures that all of the agencies were set up to redress. This part of the paper looks at what these agencies were set up to do, in terms of markets, politics and governance, and what their powers and unique features might be in this relation.

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<sup>18</sup> Such as in historical, informally planned and low-income colonies, where road widths and plot sizes are less than what is stipulated in the regulations.

<sup>19</sup> Pritchett, “The Regulatory State Goes South in the South.”

<sup>20</sup> Dubash and Morgan, “The Embedded Regulatory State: Between Rules and Deals.”

## Applying economic rationality to electricity, pensions, and water

The Central Electricity Regulatory Commission (CERC) was one of the earliest of the post-liberalisation regulatory agencies. It was first set up in 1998,<sup>21</sup> and then re-constituted under a new law in 2003,<sup>22</sup> as part of an ambitious plan for electricity reforms in India. These reforms aimed to privatise and commercialise electricity operations. By this time, electricity operations in India were heavily dependent on public subsidy, and the objective of these reforms was to reduce this dependence, and introduce private investment, financial discipline and the logic of markets into the provision of electricity.

In the period from independence up until the 1990s, electricity operations were substantially under the direct control of the government.<sup>23</sup> As electricity is a 'concurrent list' subject in the Constitution's scheme of centre-state relations, both centre and states share responsibility for it. Electricity was supplied mainly by state electricity boards, with a much smaller role for private licensees. The centre was responsible for the inter-state, multi-state and national dimensions of electricity operation. Tariffs and conditions of service were determined by the states and the centre, based on their respective charges. The fiscal responsibility for electricity was also shared by both parties, with a substantial national government contribution towards state-level operations.

During the 1970s and 1980s, state-level management of electricity became increasingly politicised, thereby resulting in an erosion of institutional autonomy of electricity boards.<sup>24</sup> By the 1990s, this system had run into a cycle of low tariffs, and an increasing and unsustainable gap between cost of operations and revenue.<sup>25</sup> At the same time, there was a need to ramp up infrastructure and investments. This resulted in a few unsuccessful forays into privatisation and reforms, and eventually a plan for more comprehensive sector-wide reforms. These reforms were supported by the World Bank and included the establishment of central and state-level regulatory agencies as a necessary component.

CERC's remit, in broad terms, is to regulate multi-state electricity production and inter-State transmission, and to work in tandem with the Central Government and the Central Electricity Authority. Its domain and functions are substantially similar to the role of the central government in the pre-reform period, except that they have been re-cast as a regulatory process and with regulatory objectives.<sup>26</sup> Tariff setting and the conditions of operation were sought to be de-politicised through this regulatory process, which could ostensibly pave the way for more private investment, better maintenance and management and overall improvement in access and quality of services.

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21 The Electricity Regulatory Commissions Act, 1998. "

22 The Electricity Act, 2003."

23 Dubash and Chella Rajan, "Power Politics: Process of Power Sector Reform in India."

24 Dubash and Chella Rajan.

25 Dubash and Chella Rajan.

26 CERC's counterparts in the States, the State Electricity Regulatory Commissions, regulate intra-state generation, transmission and distribution, and they have taken over the state government's roles in these respects.

The regulatory functions of CERC include licensing, conditions of operation, service standards, rates and charges for both public and private sector entities. It makes regulations, sets tariff for generating and transmission companies, and issues licenses. In relation to the licensees, it can carry out investigations, conduct proceedings, and issue directions to enforce license conditions and legal requirements. It adjudicates disputes relating to the entities and activities under its jurisdiction.

In this period, the lead up to the establishment of the Pension Funds Regulatory and Development Authority (PFRDA) in 2003<sup>27</sup> (although re-constituted in 2014) seems to echo a similar fiscal concern, but it was more domestically driven. But at this time, the state government of Maharashtra was in talks with the World Bank to reform its irrigation management practices, which resulted in the establishment of the Maharashtra Water Resources Regulatory Authority (MWRRA) in 2005.<sup>28</sup>

PFRDA's history can be traced back to concerns in the government about increasing and unfunded pension liabilities of central and state governments.<sup>29</sup> The pension benefits of government employees were 'defined', akin to a salary structure, and the pension system was handled directly by the government, which treated them as current account liabilities. Project OASIS (the Old Age Social and Income Security Project) was set up in 1999 as a collaboration between the government, experts from the financial industry and multilateral agencies.<sup>30</sup> The Project OASIS Report called for a new 'defined contribution' pension system according to which, each employee would have an individual account, in which her and her employers' contributions, made in the working tenure of the employee, would be invested. The policy advocates of this reform also thought it was preferable for these pension funds to be managed by private fund managers, and for the state to play a regulatory rather than managerial role in this system.

These recommendations, which resulted in the establishment of the National Pension Scheme (NPS) and PFRDA, were obviously driven by the impetus of liberalisation. They also reflect an awareness of the political clout of government employees' associations, who are, even to this day, lobbying for the restoration of the pre-NPS pension system.

PFRDA's main role is to regulate the NPS and its 'intermediaries' (private entities and persons who carry out various parts of the NPS operation). PFRDA's work involves regulation-making, licensing, monitoring and surveillance. It is also responsible for adjudicating disputes between intermediaries, and between intermediaries and subscribers. Its key objective is to protect the interests of subscribers in relation to the scheme and its service providers, and thereby provide legitimacy and stability for the new pension arrangements for government employees. Its mandate, however, does not cover all pension schemes or products, many of which are covered by other laws and institutional frameworks. It regulates only the NPS and any other government pension scheme that is specifically handed over to it.

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27 The Interim Pension Fund Regulatory and Development Authority was set up by the Central Government through Resolutions No. F. No. 5/7/2003-ECB&PR, dated the 10th October, 2003 and F. No. 1(6)/2007-PR, dated the 14th November, 2008. It was replaced by the present statutory body after the Pension Fund Regulatory and Development Authority Act, 2013.

28 The Maharashtra Water Resources Regulatory Authority Act, 2005.

29 Dave, "India's Pension Reform: A Case Study in Complex Institutional Change."

30 The acknowledgements page of the government's Project OASIS report recognises the contributions of many Indian companies, private sector institutions and people along with some of the international institutions.

MWRRA was established in response to concerns about the growing financial burden of water resources management in the state of Maharashtra, which was in this case linked to intra-state regional politics.<sup>31</sup> The state's water resources were, at the time (and continue to be) managed by its department of irrigation and several irrigation development agencies that were responsible for constructing and operating the water management infrastructure. There was, however, increasing contestation around the allocation of irrigation water and funds to develop new irrigation projects, which were both sanctioned by the irrigation department. There were regional conflicts within the state over allocation of water between upstream and downstream reservoirs. There was, moreover, a spate of construction and funds being thinly spread in too many projects across the state. Projects had become increasingly unviable and were putting an unsustainable financial burden on the state government.<sup>32</sup>

However, unlike in the case of electricity and pensions, privatisation in water resources management was not on MWRRA's original agenda.<sup>33</sup> MWRRA was established to separate the regulatory roles of the state from provisioning rules of the state's irrigation development agencies, with the idea that the independent regulatory agency could rule by economic logic rather than for political reasons. The regulatory scope of MWRRA covers irrigation development agencies and users of 'bulk water supply', including industrial users, and urban and rural local bodies. Water allocations are determined through a multi-level structure, with 'categories of use' (such as agricultural, industrial, drinking water etc.), and 'entitlements' for water users from irrigation projects.

MWRRA's role is to make regulations which set out criteria for issuance of entitlements, prioritise water distribution during periods of scarcity, and ensure equitable distribution at all levels of irrigation management. MWRRA makes the framework for tariff determination, similarly through regulations, in which it meant to bring about cost recovery of operation and maintenance expenditures of the irrigation agencies. It has monitoring and supervisory functions, and adjudicatory powers in relation to disputes between and amongst irrigation agencies and water users.

MWRRA has an interesting additional role, which is to approve irrigation development projects proposed by the state's irrigation development agencies. This is an internal check, by which project proposals are put under technical and financial scrutiny, and evaluated against the state's water policy.<sup>34</sup>

## **Ramping up the regulatory power of the state in relation to food and real estate**

For food and real estate development, the focus of regulatory development is not the state in its role as a provider of services, but as a regulator of private businesses and commercial activity. The Food Safety Standards Authority of India (FSSAI) was set up in 2006 to consolidate multiple laws and orders relating

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<sup>31</sup> Warghade, "Regulatory Policy through Policy Transfer: The Case of an Independent Regulatory Authority in the Water Sector in India."

<sup>32</sup> Warghade.

<sup>33</sup> Warghade.

<sup>34</sup> *Know Your Regulator*: In conversation with Mr. K.P. Bakshi, Former Chairperson, Maharashtra Water Resources Regulatory Authority (MWRRA) on 29 March 2022. Video recording available at <https://cprindia.org/know-your-regulator-mr-k-p-bakshi-former-chairperson-maharashtra-water-resources-regulatory-authority-mwrra/>.

to the regulation of food, and to shift focus from the curbing of food adulteration to an integrated science-based food law with a risk-based approach to food safety.<sup>35</sup> Prior to this, powers relating to food production, trade and sales, including standards setting and control of adulteration and misbranding of food, were exercised directly by the government under the Essential Commodities Act, 1955 and the Prevention of Food Adulteration Act, 1954. This latter law provided for the establishment of a central committee which was not unlike the present-day FSSAI. However, the system was considered confusing and ineffective, with an over-emphasis on food adulteration. This was sought to be replaced by a 'single reference point' for food regulation, which was responsive to 'scientific advancement and modernisation'.<sup>36</sup>

There were two types of concerns around the inadequacy of the prevailing regulatory framework for food: one, that it was ill-equipped to deal with domestic and export trade in food articles, and two, that it lacked effective mechanisms to control chemicals and contamination in food. This is reflected in the preamble of the law that set up FSSAI in 2008, which states that it was formulated following recommendations from the subject group on Food and Agro Industries appointed by the Prime Minister's Council of Trade and Industry in 1998, the Joint Parliamentary Committee on Pesticides Residues in 2004, and the Standing Committee of Parliament on Agriculture in 2005.<sup>37</sup>

FSSAI's principal function is to make regulations that lay down standards and guidelines for articles of food, and provide for licensing, registration, and accreditation for food business operators. It is mandated to specify systems for enforcing its standards, for accreditation of certification systems and for certification of food safety management systems for food businesses. FSSAI also lays down procedures and guidelines for other food-related regulatory activities including quality control of food imports, accreditation of testing labs, labelling of food articles, and sampling and analysis of food items.

In this work, FSSAI is meant to be advised by a scientific committee and a number of scientific panels which include members from scientific and public research centres. It also has a central advisory committee which includes representatives from organisations and associations of the food processing industry, consumer groups and farmers organisations. By way of this structure, FSSAI can receive representations from interest groups, which feed into its regulation-making processes. The work of FSSAI also has an international dimension, as it approves food imports and represents India in global efforts to harmonise food standards. Standards set by FSSAI also seek to harmonise Indian regulation and bring it into conversation with global standards.

Of the agencies covered here, FSSAI is the one with the largest number of regulated entities (covering every food business), and the only one with a mandate to carry out 'risk-based regulation' based on scientific principles rather than economic ones. It is less directly concerned with its effect on food markets and competition, although of course these concerns might be well represented through farmer and food industry voices who participate in the regulation-making process.

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35 Khanna, "Food."; Sarma, "India: Paradigm Shift in Food Regulatory Environment."

36 The Food Safety and Standards Act, 2006.

37 The Food Safety and Standards Act, 2006.

The Real Estate Regulatory Authorities (RERA) responded to quite a different problem regarding real estate companies. The real estate business was already heavily regulated when the RERA law was being formulated. It was subject to building and planning regulations, environment law and labour law. The land on which projects are built is itself subject to a legal and administrative regime that controls its ownership and transfer. The contracts and commercial relations between promoters, financiers and buyers were subject to commercial law, consumer protection law and corporate governance laws and institutional mechanisms. However, as the real estate sector grew in the past couple of decades, there were concerns about risky financial practices and mis-selling by promoter companies, the prevalence of black money and shady dealings, and the imbalance of market power between buyers and sellers. This gap was sought to be filled through the establishment of a new regulatory agency.

The RERAs are amongst of the most recent of Indian regulatory agencies, established after a 2016 legislation which required each state to set up its own real estate authority.<sup>38</sup> Yet, of all the cases examined here, the establishment of RERAs had the least international influence. Experts involved in the formulation of the RERA legal framework hold that there were no international examples for them to refer to, and that in the design of this agency the Indian government was responding to a specific Indian real estate market problem of rogue real estate developers who could not be effectively controlled through the existing legal framework.<sup>39</sup>

The Centre's role in this respect was complicated by the fact that RERA relates to a subject area that is considered a 'state subject' in India's Centre-State power sharing scheme, and yet for reasons of uniformity a national regulatory arrangement was deemed preferable (albeit after considerable debate). However, the Centre's role was restricted to making the law, with a provision for establishing state-level RERAs.

The RERAs' principal function is to regulate financial governance of real estate projects and protect the interests of buyers. This regulation has two parts: executive and adjudicatory. The legislative part of regulation, i.e., setting up the rules of the market by regulation-making, is largely absent as the rules of the market are already provided in some detail in the legislation.

The RERA Act provides for registration and mandatory disclosures for real estate projects of more than 500 square metres land area or eight apartments. The terminologies, legal obligations, commercial practices and contract conditions of real estate projects are standardised through this registration process. A most significant condition is that 70 percent of the proceeds from project sales can be used only for land and construction costs of that particular project. This is meant to curb risky and Ponzi-like practices in the real estate business where funds collected from buyers in one project were used to raise another project. Only RERA-registered real estate projects can be advertised and sold in the market.

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<sup>38</sup> The Real Estate (Regulation and Development) Act, 2016.

<sup>39</sup> Personal conversation with author, November 2021. Name withheld on request.



RERAs play a significant role in matters regarding project delays or other disputes between buyers and sellers, and they have a range of adjudicatory functions for such times.<sup>40</sup> The Act provides for exit options, compensation and penalties for buyers in case of project default. The regulatory discretion available to RERAs comes into play, as RERAs might take the view that a strict interpretation of consumer remedies could lead to overall project failure, which does not serve the interests of buyers or of the economy. Consequently, they might instead seek to balance various considerations and encourage promoters and buyers to negotiate a settlement, which in their experience leads to better outcomes for all. This point leads us to the next section of the paper which discusses what regulatory governance means in the context of these agencies.

## THE SCOPE AND POTENTIAL OF REGULATORY GOVERNANCE

The choice of what is regulated by specialised regulatory agencies and what is not seems accidental: it is almost as if it depends on having been at the right place at the right time, and whether or not people who were influential seemed to think an independent regulatory agency was the answer. Not all privatised public services or big infrastructures, or places where formal financial systems are invested, have independent regulatory agencies. It is clear, however, that the work of Indian regulatory agencies does not engage directly with the concerns of the poor and underprivileged, with informal economies, and the issues around which mass politics is organised. This might well be a political choice, but it is not just that politically powerful interests have arranged a better quality of governance for themselves. Politics here is also the idea that regulatory power is something that can only be exercised by the elites of the state, IAS officers or their equivalents, and not by municipalities and in intermediate level offices (to go back to the contrast with urban planning). For this reason, regulatory agencies of the type discussed seem ill-suited to dealing with heavy street-level monitoring and enforcement.

On the other hand, regulatory agencies are likely to have a clearer understanding of the businesses they regulate than courts or conventional executive agencies. And that they wield considerable power over the marketplace and entities that they regulate. They can set the terms and conditions of the marketplace, review and investigate the operations of business entities, and cancel the operations of those that do not comply with stipulated conditions. They can also take steps to protect public interest in cases of difficulty, such as through interim arrangements. This is the reason why they can agree to multi-year pathways for achieving policy and regulatory objectives.

Many such instances were featured in conversations with the regulatory agency chairpersons. The chairpersons of CERC and MWRRA spoke of transitioning pathways that are set through regulation, which involve state and central government agencies and private sector entities.<sup>41</sup> The chairpersons of PFRDA and CERC both posited that rates that are set through regulation should reflect the cost of the

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<sup>40</sup> *Know Your Regulator*: In conversation with Mr. Navreet Singh Kang, Chairperson of RERA, Punjab on 21 November 2021. Video recording available at <https://cprindia.org/know-your-regulator-mr-navreet-singh-kang-chairperson-of-rera-punjab/>.

<sup>41</sup> *Know Your Regulator*: In conversation with Mr. P.K. Pujari, Chairperson, Central Electricity Regulatory Commission (CERC) on 21 December 2021. Video recording available at <https://cprindia.org/know-your-regulator-mr-p-k-pujari-chairperson-central-electricity-regulatory-commission-cerc/>; In conversation with Mr. K.P. Bakshi, Former Chairperson, MWRRA.

service, and that sensible methodologies for arriving at the cost of service could be varied for different types of entities.<sup>42</sup> This is quite different from the urban directorates who make planning rules with no institutional mandate for settling competing claims, or for considering the costs of compliance for different types of entities, incentives or the time taken in order to transition.

Even when regulatory agencies act as judges, they might be doing slightly different things from what judges would have done in their place. The chairperson of the state-level RERA in Punjab described RERA's adjudicatory purpose as one of providing 'quick resolution', and asserted that RERA 'is not a consumer forum for the real estate sector, but the body is a regulator that is focussed on balanced development of this sector'. When there is a delay in a real estate project, RERA encourages the promoters to complete the project, and it brings buyers and sellers together to negotiate. This function is carried out, not as a formal mediation, but by allowing the parties themselves to work out a mutually acceptable settlement.<sup>43</sup>

The courts might not concur with this reading of the RERA Act, although it is still an open question.<sup>44</sup> On their part, RERA chairpersons and subject experts claim that this power is implied in the statement of objects and reasons of the RERA Act, which states that RERAs are to be established 'for regulation and promotion of the real estate sector'.

The scope of a regulatory agency's power is frequently challenged in appellate courts, and is in a sense a part of an ongoing process of boundary demarcation between regulators and the judiciary.<sup>45</sup> From the point of view of the agencies themselves, however, it is clear that there is a legislative direction in their founding enactments that encompasses within it, concerns about the economic viability of enterprises, and of the business climate as a whole. In practical terms, this means that rate-setting regulatory agencies are meant to ensure that rate structures enable reasonable levels of profitability in regulated enterprises. For this they review input costs, and set standardised ways of determining costs in order to ensure that tariffs are viable from the point of view of enterprises. RERA, in the example mentioned above, nudges buyers and sellers towards a reasonable compromise to ensure that projects are completed even after delays and defaults have occurred. MWRRRA is meant to keep an eye on the recovery of operating costs of the irrigation agencies in rate setting and project approvals.

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42 *Know Your Regulator*: In conversation with Mr. Supratim Bandyopadhyay, Chairperson, Pension Fund Regulatory and Development Authority (PFRDA) on 21 January 2022. Video recording available at <https://cprindia.org/know-your-regulator-mr-supratim-bandyopadhyay-chairperson-pension-fund-regulatory-and-development-authority-pfrda-2/>; In conversation with Mr. P.K. Pujari, Chairperson, CERC.

43 In conversation with Mr. Navreet Singh Kang, Chairperson of RERA, Punjab. See also 'Establishing Regulatory Capacity for the Real Estate Sector: The MahaRERA Experience', in conversation with Mr. Gautam Chatterjee, Chairperson, RERA Maharashtra on 31 December 2019. Video recording available at <https://cprindia.org/establishing-regulatory-capacity-for-the-real-estate/>.

44 In a recent ruling pertaining to appeals arising from RERA disputes, the Supreme Court noted that the right to refund was an 'unconditional absolute right', and that it was not dependant on any conditions and stipulations, but that the option to remain invested in the project was provided by statute to homebuyers, *Newtech Promoters and Developers v. The State Of Uttar Pradesh*, Supreme Court Civil Appeal No(s). 6745-6749 of 2021, judgement dated 11 Nov 2021.

45 This is predictably a source of legal contestations, which is far from over. The CERC and MWRRRA chairpersons were however able to quote decisive court rulings in which the sphere of regulatory action was defined and protected from legal appeal. *Kerala State Electricity Board v. Central Electricity Regulatory Commission*, Kerala High Court W.P.(C).No.22566/2020, judgement dated 2 Dec 2020; *Marathwada Janata Vikas Parishad v. State of Maharashtra*, Bombay High Court PIL No. 173 of 2013, judgement dated 23 Sep 2016 (also known as the Jayakwadi PIL).



The founding laws of regulatory agencies usually contain a detailed set of functions and various rules and principles to be followed for the discharge of said functions. Many of them also have, like in the RERA example above, a broad mandate for *regulation or to regulate*, which is frequently coupled with the mandate *to promote* a particular industry. One of the objectives of the Electricity Act is to provide the basis for ‘measures conducive to development of electricity industry’. In terms of the Electricity Act, CERC is mandated ‘to regulate the tariff’ for generating companies, and ‘to regulate the inter-State transmission of electricity’. The duties, powers and functions of PFRDA include a general duty ‘to regulate, promote and ensure orderly growth of the National Pension System and pension schemes’. PFRDA’s powers and functions also include ‘regulating the National Pension System and the pension schemes to which this Act applies’, and ‘regulating the regulated assets’, which in turn are the pension records that are maintained by designated agencies. FSSAI was set up ‘to regulate’ the ‘manufacture, storage, distribution, sale and import’ of food, and ‘to ensure availability of safe and wholesome food’. MWRRA was set up ‘to regulate water resources within the State of Maharashtra’.

These terms, ‘regulation’ and ‘promotion’, and more specific references to ‘multi-year tariff frameworks’ (as in electricity) or the power to make specific license conditions and regulations for different classes and categories of entities, give regulatory agencies the mandate and power to be very specific and detailed with respect to what they regulate. FSSAI can make different types of frameworks for enterprises based on the scale of their operation, and has been able to respond, in recent years, to the regulatory context of small-scale and informal food vendors and home-based food production, even as it regulates the multi-national corporations.<sup>46</sup> In times of water scarcity, MWRRA could make special provisions for drinking water, livestock and livelihoods needs, even as it formulates a tariff scheme and access conditions for high-value commercial and industrial uses.

Regulatory agencies are also responsible for various social concerns, which are mentioned in the laws, and which must be balanced with economic interests. These social concerns include consumer welfare, environmental protection and sustainable development. PFRDA is meant to promote old age income security by ‘establishing, developing and regulating’ pension funds and ‘protect the interests of subscribers to schemes of pension funds’. The Electricity Act lists ‘development of electricity industry’, ‘promoting competition’, ‘protecting interest of consumers’ and ‘supply of electricity to all areas’, ‘rationalization of electricity tariff’, ‘ensuring transparent policies regarding subsidies’ and the ‘promotion of efficient and environmentally benign policies’ amongst its various objectives. The RERA Act is meant to ensure that the real estate sector runs in ‘an efficient and transparent manner’, ‘to protect the interest of consumers in the real estate sector’ and ‘speedy dispute redressal’. The objective of MWRRA is to ‘facilitate and ensure judicious, equitable and sustainable’ water resources management, and ‘fix the rates for use of water for agriculture, industrial, drinking and other purposes’. The Food Act seeks to ‘consolidate the laws relating to food’ and set up FSSAI for ‘laying down science based standards’, and regulate ‘manufacture, storage, distribution, sale and import’, and ensure ‘availability of safe and wholesome food for human consumption’.

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<sup>46</sup> *Know Your Regulator*: In conversation with Ms. Rita Teaotia, Chairperson, Food Safety and Standards Authority of India (FSSAI) on 26 October 2021. Video recording available at <https://www.youtube.com/watch?v=m7TllvFyQJQ>.

The scope of social and non-economic concerns that regulatory agencies can consider is directed by the laws, (and perhaps supplemented by government policy). Such is the case for agencies like RERA, PFRDA and FSSAI that focus on consumer protection. Consumers might be a bit more remote for CERC and MWRRRA who regulate upstream of retail consumers, but this too is within their scope. Environmental sustainability, on the other hand, is a goal for CERC and MWRRRA, but not for FSSAI or RERA. CERC is directly concerned with the national development goal of increasing and improving access to electricity because this is stated in its legal mandate. Alternatively, RERA is not concerned with national housing policy or improving access to safe and affordable housing, and its interface with urban planning issues is limited to ensuring that RERA-registered projects do not engage in unauthorised construction. FSSAI's concern for food security, the agricultural economy and environmental issues is limited to the extent that these are framed through the lens of food safety and mediated through the interest group representations in FSSAI.<sup>47</sup>

## WHY REGULATORS WERE NEVER DESIGNED TO BE INDEPENDENT

Regulatory agencies have considerable administrative power, but they do not really undermine or disrupt political or executive authority in any significant way. They enjoy some formal autonomy, on account of their agency status and the way in which their roles and functions are organised, but they are neither really independent nor actually run by technical experts who could handle an alternative and parallel framework to the one promoted by the ministry or department to which the agency is attached. Their operational autonomy, understood in terms of how much rule-making, staffing and internal management they can do without specific departmental approval, is limited. They are rather wedged within an institutional mosaic that allows an upper hand for the parent ministry or department of the government in both policy and organisational matters.

This limited autonomy is often seen as a failure of the regulatory project, but close attention to the text of their founding statutes seems to suggest that this was precisely the intent behind the establishment of regulatory agencies. They are designed to enhance the power of administrative elites, rather than replace them. A formal separation from the department or ministry serves this purpose by separating it from the everyday constraints of the Indian state, but too much autonomy might have undermined the elites altogether. Being tied in with the norms and practices of the state serves a functional purpose of the agencies also, as it gives them the recognition and legitimacy they need in order to function effectively.

The previous sections have described some of the ways in which regulatory agency design could serve to address the powerlessness of the elite state. Regulatory agencies have the capacity to intervene more deeply, and in a more focussed way, in the markets that they regulate. The statutory form serves this purpose, by creating this power and providing the framework for it to be exercised.

There are, however, myriad ways in which the ruling regime has greater leverage in relation to regulatory agencies, and indeed most government agencies. This has sometimes been a point of contention,<sup>48</sup> but

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<sup>47</sup> In conversation with Ms. Rita Teatota, Chairperson, FSSAI.

<sup>48</sup> Somanathan, "The Administrative and Regulatory State."

for the most part, the government's upper hand has statutory basis in the regulatory agency laws and it seems to be a settled point in the day-to-day functioning of these agencies.

In almost identically worded provisions in the founding legislation of all the regulatory agencies covered in this paper, the relevant governments, central or state, can issue directions on 'questions of policy', on 'matters of policy involving public interest' and on 'questions of policy, other than those relating to technical and administrative matters', which the respective authorities are bound to accept. Furthermore, the governments have many different types of direction-making power, including on what subjects and entities the regulator may regulate, and sometimes to the regulated entities directly without going through the regulatory agency. The governments also retain broad powers to remove difficulties, and set the conditions for the operation of the agency through their power to make rules under these laws.<sup>49</sup>

The governments also have specific policy-making power in relation to CERC and MWRRRA, which is absent (at least in specific reference) for the others. This denotes the power to set high-level policy directions, which regulators must follow. The Electricity Act provides for the central government to issue various policies, which include a national electricity policy and a tariff policy, which are to be followed by the CERC in the issue of its national electricity plan and in its regulations and activities. In a discussion about the balance between ministry and regulatory authority roles, the CERC chairperson explained that the ministry sets the policy framework, while it was for the regulator to get the details in place.

In the case of MWRRRA, the high-level policy is meant to be set through the integrated state water plan, for which a government-run policy making structure is provided in the legislation. This was supposed to be implemented by the regulator through sectoral allocations (between agriculture, drinking water, industry and commercial use) and entitlements for users within each 'category of use'. However, in 2010-11, this law was amended, and the power to determine categories of use was taken back by the state government, leaving the regulator with a narrower power to determine entitlements.<sup>50</sup>

The regulation-making power of each agency varies in terms of how much independence they have to carry out their mandate to set the rules for regulated entities. CERC and PFRDA seem to have some autonomy in this respect. RERA also has some formal autonomy, but its regulation-making scope is quite limited, thereby reducing its significance. MWRRRA and FSSAI, on the other hand, have significant regulation-making scope, but they need government approval for their regulations.

In staffing and organisational matters, most regulatory agencies need support and coordination from concerned ministries and departments of the government. Their staffing structures and staff budgets need to be approved by the counterpart department, even though the regulatory agency might be able to hire independently. Some regulatory agencies raise their own revenues through fees and charges, but others depend on government grants and allocations. By virtue of being a government agency and because they use public funds, regulatory agencies are also expected to follow the government's financial rules and norms in the utilisation of their funds, which limits their flexibility in salaries and expenditures.

Another aspect of this point is that the people who do get selected to these posts are overwhelmingly from a government background. Chairpersons of regulatory agencies tend to be retired civil servants, usually from a generalist background. The other members of the authority are also more likely to be

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49 For clarity, this is rule-making, as distinguished from regulations that the agencies make.

50 Pallavi, "Maharashtra Amends Water Law."; In conversation with Mr. K.P. Bakshi, Former Chairperson, MWRRRA.

retired bureaucrats, although many of these tend to be from technical bureaucracies rather than from the IAS. Some members could be former public sector corporation executives, and in the case of judicial members, from the judicial services. At present, the chairpersons (current or last serving) in three of the five agencies covered in this paper are former IAS officers. In the state-level RERAs, there have probably been only a couple of instances since its inception, where the chairman's post—across all states—has not been occupied by retired bureaucrats. PFRDA is the only agency in this paper which is headed by a specialist, albeit one who previously worked in the public sector.

The overwhelmingly bureaucratic nature of the top-most level of the regulatory agencies could be, in part, an outcome of self-promotion within the bureaucracy.<sup>51</sup> Senior and superannuating bureaucrats are likely to have better access to the selection process and can lobby effectively to have themselves selected. Yet, discussions on this topic with knowledgeable experts suggest that there are other factors at play too. Private sector experts of stature and capability are seen as being compromised by their former closeness with regulated enterprises, and therefore prone to conflict of interest. But this does not explain the near absence of professionals and other non-government experts to these posts. Since there are too few experiments with non-government appointments, there is little evidence on this point.

On the other hand, the legal provisions relating to the appointment of regulatory chairpersons and members belie its alignment with government hierarchy. Eligibility criteria for the posts of chairperson and members include expertise and a specified seniority level. This is written into some of the laws in very clear terms. For example, the MWRRA Act says that the chairperson shall be a person having held the rank of Chief Secretary or equivalent. Subject area expertise is required of the other members, but none is specified for the chairperson. The FSSAI Act states that the chairperson shall be from amongst 'persons of eminence in the field of food science' or from amongst 'persons from the administration who have been associated with the subject' and is either holding or has held the 'position of not below the rank of Secretary to the Government of India'. Its other members include seven ex-officio representatives of concerned central government departments and fifteen other members to represent interest-groups, farmers, retailers, state governments, etc.

The RERA Act has the most detailed eligibility criteria for its chairpersons and members, which includes both subject matter expertise, years of experience and seniority. Chairpersons and members appointed to RERAs should have 'adequate knowledge of and professional experience of at least twenty years in case of the Chairperson and fifteen years in the case of the Members in urban development, housing, real estate development, infrastructure, economics, technical experts from relevant fields, planning, law, commerce, accountancy, industry, management, social service, public affairs or administration'. Additionally, candidates from government service can be considered for the post of chairperson only if they were of the rank of Additional Secretary to the Central Government. Candidates for member posts should be of Secretary to the State Government rank.

In contrast, CERC and PFRDA do not have a formal seniority requirement. The Electricity Act mentions seniority as an eligibility criterion only with respect to the (optional) appointment of a retired judge of the High Court or Supreme Court to the Commission. It does not make any mention of seniority in the appointment of its chairperson and members, but only lists subject expertise requirements. According to the PFRDA Act, the chairperson and members are to be 'persons of ability, integrity and standing and having knowledge and experience in economics or finance or law with at least one person from each discipline.'

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<sup>51</sup> Somanathan, "The Administrative and Regulatory State."

In several of the *Know Your Regulator* conversations, chairpersons emphasized the importance of their being able to work in concert with the government, whether it was to implement energy sector transitions, to get approval from the government for staffing structure additions, or to coordinate with other agencies of the state to implement their orders. This suggests the need for regulatory agency chairpersons to be recognisable within the government hierarchies of counterpart departments and other government agencies in order to function effectively. This is one of two essential prerequisites for being able to work together with the government. The other prerequisite is that regulatory agency employees should know the ways of government, its norms and protocols, and its procedures and financial rules. This is a form of legitimacy and institutionalisation that former bureaucrats, especially those who are senior enough to have wielded equivalent levels of government power, are able to bring about more effectively than outsiders to the system. This is perhaps why seniority scales that are recognisable within the government are extremely critical in the appointment of regulatory agency chairpersons and members, even in cases where they are not explicitly stated, such as for CERC and PFRDA.

## CONCLUSION

At the start of this paper, it was noted that there is no established typology of Indian regulatory agencies, although the use of the term regulation in their founding legislation seems to identify a fair number of them. On the basis of this analysis however, one could propose a first step in this direction by examining certain questions. Does the agency in question possess the legal and institutional heft to establish rules and standards that are negotiated, responsive and calibrated, and can it facilitate multi-year arrangements, and multiple specialised arrangements simultaneously for different types of regulated entities? Moreover, can it accord due consideration to the rationalities of business and investment, and to the costs entailed in regulatory transitions? Another point of examination could be its basic organisational structure, which should include a full-time chairperson and members with a fixed term of five years. It would also be worthwhile to see if this agency had at least a zone of technical autonomy within which it could function without needing day-to-day approvals from administrative bosses in the parent department or ministry.

The effort in this paper has been to go back to basics, and to not take our understanding of regulatory agencies for granted. It started with the assumption, perhaps a generous one, that regulatory agencies are not merely window dressing, but are of actual use to the Indian state. Or in other words, that the regulatory shell—which was indeed borrowed from other countries and contexts—has been embraced because it is of value to the Indian state. In summary, this enduring value is that it strengthens the hands of administrative elites to provide a better quality of governance in some very specific places. These places, in which regulatory agencies have been established, are simply those in which the reforming elites of government were able to argue for state failure to be addressed through regulation.

In conclusion, it is worth noting, however, that the regulatory experiment is still a precarious one. Much depends on factors that cannot be specified by law, such as commitment and support that the government (and its executive and political bosses) can provide for sustaining and promoting the mandate of regulatory agencies. As noted in the paper, the government's broad power to issue directions to regulatory agencies is significant, not only as and when it is actually used, but also in the background, for its deterrent effect. As governments have demonstrated time and again, they retain the power to dispose of an agency or to clip its wings in multiple ways. In what might be a legally grey area, governments can create long delays in the appointment of regulatory agency members and chairpersons when incumbents retire. At the time of writing this paper, two of the five regulatory agencies discussed here were without chairpersons and members. The government can also amend the law, as it did in the case of MWRRA, to claw back some of the powers it had delegated to the agency.

## REFERENCES

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- Bhattacharya, Saugata, and Urjit R. Patel. "New Regulatory Institutions in India: White Knights or Trojan Horses." In *Public Institutions in India: Performance and Design*, edited by Devesh Kapur and Pratap Bhanu Mehta, 406–56. Delhi: Oxford University Press, 2005.
- Dave, Surendra. "India's Pension Reform: A Case Study in Complex Institutional Change." In *Documenting Reforms: Case Studies from India*, edited by S. Narayan, 149. New Delhi: Macmillan, Observer Research Foundation, 2006.
- Dubash, Navroz K., and Sudhir Chella Rajan. "Power Politics: Process of Power Sector Reform in India." *Economic and Political Weekly* 36, no. 35 (2001): 3367–90.
- Dubash, Navroz K., and Bronwen Morgan, eds. *The Rise of the Regulatory State of the South: Infrastructure and Development in Emerging Economies*. 1st ed. Law and Global Governance Series. Oxford: Oxford University Press, 2013.
- . "The Embedded Regulatory State: Between Rules and Deals." In *The Rise of the Regulatory State of the South: Infrastructure and Development in Emerging Economies*, edited by Navroz K. Dubash and Bronwen Morgan, 1st ed., 279–96. Law and Global Governance Series. Oxford: Oxford University Press, 2013.
- Hood, Christopher, Henry Rothstein, and Robert Baldwin. *The Government of Risk: Understanding Risk Regulation Regimes*. Oxford; New York: Oxford University Press, 2001.
- Kapur, Amit. "Infrastructure." In *Regulation in India: Design, Capacity, Performance*, edited by Devesh Kapur and Madhav Khosla, 141–60. Hart Studies in Comparative Public Law, volume 24. Oxford, UK; Portland, Oregon: Hart Publishing, 2019.
- Kapur, Devesh, and Madhav Khosla, eds. *Regulation in India: Design, Capacity, Performance*. Hart Studies in Comparative Public Law, volume 24. Oxford, UK; Portland, Oregon: Hart Publishing, 2019.
- Khanna, Vikramaditya S. "Food." In *Regulation in India: Design, Capacity, Performance*, edited by Devesh Kapur and Madhav Khosla, 229–49. Hart Studies in Comparative Public Law, volume 24. Oxford, UK; Portland, Oregon: Hart Publishing, 2019.
- Mehta, Pratap Bhanu, and Michael Walton. "Ideas, Interests and the Politics of Development Change in India: Capitalism, Inclusion and the State." *SSRN Electronic Journal*. ESID Working Paper No. 36. Manchester: University of Manchester, 2014. <https://doi.org/10.2139/ssrn.2503367>.
- Morgan, Bronwen, and Karen Yeung. *An Introduction to Law and Regulation: Text and Materials*. The Law in Context Series. Cambridge, UK; New York: Cambridge University Press, 2007.
- Pallavi, Aparna. "Maharashtra Amends Water Law." *Down to Earth*. Accessed October 21, 2022. <https://www.downtoearth.org.in/news/maharashtra-amends-water-law-33404>.
- Pritchett, Lant. "Is India a Flailing State?: Detours on the Four Lane Highway to Modernization." *SSRN Electronic Journal*, 2009. <https://doi.org/10.2139/ssrn.1404827>.
- . "The Regulatory State Goes South in the South." In *The Rise of the Regulatory State of the South: Infrastructure and Development in Emerging Economies*, edited by Navroz K. Dubash and Bronwen Morgan, 1st ed., 225–34. Law and Global Governance Series. Oxford: Oxford University Press, 2013.
- "Report of the Project OASIS Expert Committee for Devising a Pension System for India." New Delhi: Ministry of Social Justice and Empowerment, Govt of India, 2000. <https://www.pfrda.org.in/writereaddata/links/rep2d5do2004-a7c9-4875-be6e-f8b92744e210.pdf>.



Sarma, Krishna. "India: Paradigm Shift in Food Regulatory Environment." *Food and Drug Law Institute (FDLI)* (blog), January 2, 2017. <https://www.fdpi.org/2017/01/india-paradigm-shift-food-regulatory-environment/>.

Singh, Arkaja. "Hunger, COVID-19 and the Indian Administrative State." *State Capacity Initiative Working Paper No. 2020-1*. New Delhi: Centre for Policy Research, 2020.

Somanathan, T.V. "The Administrative and Regulatory State." In *The Oxford Handbook of the Indian Constitution*, edited by Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta, 386-

411. Oxford University Press, 2016. <https://doi.org/10.1093/law/9780198704898.001.0001>.

Thiruvengadam, Arun K. "Flag-Bearers of a New Era?: The Evolution of New Regulatory Institutions in India (1991-2016)." *SSRN Scholarly Paper*. Rochester, NY: Social Science Research Network, April 1, 2016. <https://papers.ssrn.com/abstract=2862808>.

Warghade, Sachin S. "Regulatory Policy through Policy Transfer: The Case of an Independent Regulatory Authority in the Water Sector in India." Tata Institute of Social Sciences, 2018. <http://hdl.handle.net/10603/213577>.



DHARMA MARG, CHANAKYAPURI,  
NEW DELHI – 110021 INDIA

TEL: +91 (11) 26872746 (4 LINES)  
FAX: +91 (11) 26872746  
[cprindia@cprindia.org](mailto:cprindia@cprindia.org)