MODERNIZATION & LAW

1. Introduction

Regulation refers to "controlling human or societal behaviour by rules or regulations or alternatively a rule or order issued by an executive authority or regulatory agency of a government and having the force of law".1 Regulation covers all activities of private or public behaviour that may be detrimental to societal or governmental interest but its scope varies across countries. It can be operationally defined as "taxes and subsidies of all sorts as well as explicit legislative and administrative controls over rates, entry, and other facets of economic activity".2 The rules laid down by regulation are supported by penalties or incentives designed to ensure compliance

There are two main theories regarding the genesis of economic regulation. One is the "public interest" theory which conceives regulation as arising from the need to rein in the free exercise of market forces and consumer and producer impulses in cases where such a display can act as an obstacle to the maximisation of societal well being or to remove externally applied obstacles to market forces when their play is desirable. In certain cases, regulation is also justified by this school on equity grounds. An alternative theory is that of „capture‟ espoused by a variety of realists drawn from varied professional and academic backgrounds who see regulation as being supplied in response to the demands of interest groups struggling among themselves to maximise the incomes of their members.3 This school, therefore, gives importance to political economy factors which get manifested in the unequal bargaining powers of different vested interest groups which in turn result in their unequal influence over regulatory rules/norms and hence outcomes. In other words, regulation is seen as a tool which can be manipulated by different interest groups to their advantage using their respective bargaining powers with the regulating machinery.

It would be overly simplistic to label one theory as „superior‟ to the other on the basis of their abilities to characterise reality, given the complexities typifying economic activity. While the „public interest theory‟ can be defended on normative grounds (i.e. regulation as conceived by it is necessary to maximise welfare and bring about equity) the „capture theory‟ reflects quite well how regulatory frameworks can be manipulated by powerful interest groups to their own advantage. In other words, the former focuses on what "should be" whereas the latter concentrates on what "could be" in real world situations. The relevance of these schools to real world situations would vary across countries and within each country across sectors depending on the strength of regulatory institutions, often seen as being positively affected by the level of economic development, and the spread and relative strengths of vested interest groups

India started developing regulatory institutions with the introduction of reforms in 1991. But the regulatory environment which has developed over a period of time does not seem homogeneous across sectors. India still ranks very low in terms of the enabling nature of its business environment and unnecessary regulatory burdens are imposed upon business and investors.

What is Modernization?

"Modernization means the development of a modern outlook in everyday life." It does not mean the abandonment of religion and more acceptances of modern equipment's, tools and gadgets. Technological achievements and scientific advancement in developing countries is limited. The development of rational outlook and scientific approach is also limited. Still many aspects of socio- cultural life are still dominated by faith-oriented ideologies and traditions. It cannot be denied that the traditional approach is becoming significant and the traditional practices are being replaced by the modern ones. According to Deutch, "Modernization is a process in which major clusters of old social, economic and psychological commitments are eroded and broken and people become available for new pattern of socialization and behavior,"

Phases of Modernization

1. Pre-Independence Phase:

It is true and agreed by all that process of modernisation in India began with the establishment of British Raj in India. The British initially came to India as traders with least intention to rule India for about three and half centuries. As true businessmen the British has the Primary vested interest to exploit. Indians to the extent of their pauperization.

The profit-seeking attitude of the British prompted them to modernize the transport and communication system in India to export raw materials at a cheaper rate for the England-based factories so that finished products could be brought to India for sale in Indian market at a higher rate. Modes of transportation like Railways, roadways and shipways were modernized along with the modernisation of communication system like Post and Telegraph, Telephone and Radio facilities all over India.

The spread of English education worked as a boon for faster modernisation process in India. The spread of English education led to the creation of an enlightened middle class, A 'Baboo-dam' or 'rule by English- educated Indian Bureaucrats (ICS) came to support and strengthen the British rule in India. The Universalistic legal system, Judiciary and the Army unified India under the British Rulers. Very cleverly, the British Rulers in India did not touch the sensitive social institution like caste, family and religion and maintained a safe-distance.

In the meanwhile several socio-religious reforms movements flourished in India to generate and market neo reformist ideas and the people in the direction of modernisation mention among them may be made of Swami Dayanand Saraswati's ARYASAMAJ, Raja Rammohan Roy's 'BRAHMO SAMAJ', 'PRARTHANA SAMAJ', Ramakrishna Mission and the like.

The Freedom movement in India which began with the great revot of 18.57 was a major milestone in the process of modernisation in India. It brought together all Indian's men and women with nationalist attitude, to be united together to fight against the British and make India free. Under the dynamic leadership of Indian nationalist leaders like Gokhale, Tilak and Gandhi, freedom movement took the shape of mass-participation on which the British Rulers found difficult to suppress.

Our nationalist leaders who were fully inspired by the revolutionary ideals of the French Revolution the American war of Independence and the Russian Revolution became torch-bearers to lead India's Freedom movement to success at last on 15 August 1947.

2. Post-Independence Phase:

The post-Independence year in India was full of new vigor, reenergized vitality and new ideals and objectives. The new bulky constitution of India inaugurated on 26, January 1950, christened the independent India a Sovereign Democratic Republic and laid down there in the ideals and objectives of our constitution, such as Liberty, Equality, Justice, Fraternity, Secularism.

The Western educated liberal socialist Jawaharlal Nehru who became the first Prime Minister of India emphasized upon India's industrialisation and modernisation and took effective steps to achieve the end. A man with a scientific temper Nehru is often described as the maker of modern India. As many as ten Five year Plans have given effect to several socio-economic changes in the direction of modernisation.

The functioning of Parliamentary Democracy in India since 1950 and as many as fourteen elections held in India so far on the basis of Universal Adult suffrage have politically enriched the Indian electorate. Several progressive laws relating to Hindu Marriage system and succession of Property effected fundamental changes in the institution of Family & Marriage.

Measure like abolition of Zamindary system, introduction of Land Reforms and Consolidation of Holdings re-innovation of Panchayat Raj Institution (PRI's) through 73rd Constitution Amendment Act, 1993, Protective Justice and privileges' for the S.Cs. and STs. new Reservation policy for the benefit of the Backward classes, special protective measures for women and children arc praise-worthy indicators of modernity in India.

The government of India has also undertaken projects for rural development, suitable employment opportunities, eradication of poverty and development of education for all for modernization of rural-mass in India.

Regulation in India can be mapped under different broad categories: economic regulation, regulation in the public interest, environmental regulation , business regulations and sector regulations

Economic regulation

Economic regulation aims at preventing or tackling market failure. This is achieved with rules that proscribe and punish market distorting behaviour. Examples in the Indian context include The Foreign Trade (Development and Regulation) Act, 1992 for facilitating imports into and augmenting exports from India and the Electricity Act of 2003, which allows State regulators to fix tariffs for power consumption, thus preventing suppliers from taking advantage of natural monopolies.

Regulation in the public interest

This covers areas where industries are failing to meet a standard or uphold something of public importance. This is different from market failure. A classic case is of health and safety, where firms can fall short in protecting employees or the general public from harm. Although market competition can make firms more willing to address such issues, the standards adopted may not be adequate or uniform across the industry. In India, there is very little evidence to suggest that competition in its existing form has had a positive impact on quality.

The Bureau of Indian Standards (BIS) created by the Bureau of Indian Standards Act, 1986 has been setting quality and safety standards for various products, some of which are mandatory. The existence of an authority like BIS helps in laying down rules, especially in a situation of low consumer awareness about quality. In fact, mandatory standards can help to enhance quality awareness and protect the consumer. A large number of mandatory standards are in force but the desired extent of enforcement has not been facilitated. Generally, business is more partial to standards developed internally – the so called voluntary standards.

A related problem which calls for public interest regulation is the low level of consumer awareness on issues such as safety, which means there is not enough demand pull to make industry interested in implementing safety standards.

Apart from poor quality and low consumer awareness, skewed income distribution and lack of capacity of majority of the population to pay for essential services might call for regulation in the public interest. In fact this is often the ostensible reason for regulation in the public interest in India.

Yet another reason is the satisfaction of essential needs such as food security. This calls for support pricing of food grains and encourages farmers to maintain a higher acreage under food grain cultivation, thereby enhancing food security. Such produce bought by the government are then sold at prices much lower than the purchase price. The difference between government expenditure on and revenue from food grains is borne by the government as a subsidy burden.

Environmental regulation

Environmental regulation covers actions to protect the environment from harm. A healthy environment is desirable not just on aesthetic grounds but because environmental degradation imposes costs on land, labour and resources that have important consequences for economic development. Unsafe water, unhealthy air, species and habitat loss, and degradation of soil are some concerns with real world effects sought to be addressed through environmental regulation.

In India, environment protection has been given constitutional status. The Directive Principles of State Policy state that protecting and improving the environment is the duty of the State as well as citizens of the country. The Government of India has enacted various laws to protect the environment through the Environment (Protection) Act, 1986 as the umbrella legislation. These set standards for emissions and discharge; regulation of the location of industries; management of hazardous waste, and protection of public health and welfare.

According to the Act the term „environment‟ includes water, air and land and the inter-relationship among and between them. A policy framework to complement the legislative provisions has also been developed. Further, sector specific policies have also been evolved.

Under the EPA, statutory clearances relating to pollution control and the environment are necessary for setting up units in 31 categories of industries. This list includes petrochemical complexes, petroleum refineries, thermal power plants, cement, fertilizers, bulk drugs, dyes, papers etc.

Ministry of Environment and Forests is the nodal agency for environmental legislation. However, several states have also enacted their own legislation besides the major ones enacted by the central Ministry. The State Pollution Control Board (SPCB) established in each state, is responsible for implementing these legislations as well as issuing rules and regulations prescribing the standards for a clean environment. The activities of SPCBs are coordinated by the Central Pollution Control Board (CPCB).

Environmental clearances for investment projects in India take a huge amount of time, and for certain types of investment projects such as power, the number of approvals required is higher than for others. Environmental issues around any industrial project are highly sensitive and quite often lead to civil society activism.

Therefore, this aspect requires careful handling both by the central and state governments. Due to corruption, administrative delays, technical faults, popular protests etc., such clearances are time consuming and costly.

Listing of major regulations

Some major regulations – economic or in the public interest – enforced in India are listed below:

Table 1. List of major regulations in India

Act	Purpose
Securities Contracts (Regulation) Act, 1956	To prevent undesirable transactions in securities by regulating the business
The Foreign Exchange Management Act (FEMA), 1999	To facilitate external trade and payments and to promote the orderly development and maintenance of the foreign exchange market.

The Foreign Trade (Development and Regulation) Act, 1992	To provide for development and regulation of foreign trade by facilitating imports into and augmenting exports from India and for matters connected herewith.
The Industries Act, 1951	To empower the Government to take necessary steps for the development of industries; to regulate the pattern and direction of industrial development; and to control the activities, performance and results of industrial undertakings in the public interest.
The Indian Contract Act, 1872	Governing legislation for contracts, which lays down the general principles relating to formation, performance and enforceability of contracts and the rules relating to certain special types of contracts like Indemnity and Guarantee; Bailment and Pledge; as well as Agency.
The Sale of Goods Act, 1930	To protect the interest of buyers and sellers.
Indian Patents Act, 2005	To grant significant economic exclusiveness to manufacturers of patented products with some in-built mechanisms to check extreme causes of competition restriction.
The Company Act, 1956	To regulate setting up and operation of companies in India: it regulates the formation, financing, functioning and winding up of companies.
Competition Act, 2002	To ensure a healthy and fair competition in the market economy and to protect the interests of consumers: aims to prohibit the anti-competitive business practices, abuse of dominance by an enterprise as well as regulate various business combinations such as mergers and acquisitions.

Act	Purpose
The Trade Marks Act, 1999	To amend and consolidate the law relating to trade marks, to provide for registration and better protection of trade marks for goods and services and for the prevention of the use of fraudulent marks.
The Information Technology Act, 2000	To provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information; to facilitate electronic filing of documents with Government agencies
The Consumer Protection Act, 1986 (amended 1993, 2002) COPRA	To protect consumer rights and providing a simple quasi-judicial dispute resolution system for resolving complaints with respect to unfair trade practices.
The Industrial Disputes Act, 1947	To facilitate investigation and settlement of all industrial disputes related to industrial employees and employers.
The Factories Act, 1948	Umbrella legislation to regulate the working conditions in factories.
The Indian Trade Unions Act, 1926	To facilitate the registration of trade unions, their rights, liabilities and responsibilities as well as ensure that their funds are utilised properly: it gives legal and corporate status to registered trade unions and also seeks to protect them from civil or criminal prosecution so that these could carry on their legitimate activities for the benefit of the working class.

The Bureau of Indian Standards Act, 1986	To set standards (quality, safety etc) for various kinds of products to protect consumer safety.

Business regulations enforced by the Government of India

The liberalisation of industrial and trade policies during the 1980s was accompanied by an increasingly receptive attitude towards regulatory reforms. The Industrial Policy Resolution of 1956 and the Statement of Industrial Policy of 1991 provides the basic framework for the overall industrial policy of India. Reforms which are being progressively implemented relate to investment licensing, taxation, particularly indirect taxation, prices and distribution systems, and trade. We outline below some regulatory requirements that cut across states:

Tax regulation

As India is a federal State, taxes are levied and regulated by both Central and State governments. However, the respective authority of Central and State governments is clearly demarcated. The Central Government levies and regulates income tax, customs duties, central excise and service tax.

Central Board of Direct Taxes (CBDT) and Central Board of Excise and Customs (CBEC) are part of the Department of Revenue under the Ministry of Finance, Government of India and deal with matters relating to levy and collection of direct and indirect taxes respectively. These are also responsible for policy formulation and administration of various related matters.

The State governments levy and regulate value added tax (VAT), state excise, stamp duty and taxes on professions and land while local bodies are empowered to levy and regulate tax on properties and utilities like water and drainage etc.

After reforms, tax rates have been rationalised and tax laws have been simplified resulting in better compliance, ease of tax payment and better enforcement. There are specific statutes for different taxes. Central tax statutes are passed by the Parliament and state tax statutes by the respective State Assemblies. Tax rates and duties are reviewed annually through budgets.

Business entities residing in India are taxed on their world wide income arising from all sources in accordance with the provisions of the Income Tax Act while non-resident entities are taxed on the income earned from a business connection in India or from other Indian sources. A business entity is deemed to be a resident if it is incorporated in India or its control and management is situated entirely in India.

In order to facilitate the computation of reasonable, fair and equitable profits and tax burdens for business carried out by multinational companies, there are provisions relating to transfer pricing. Transfer pricing is the process of adjusting the prices of cross-border transactions between related parties. The transfer pricing provisions generally follow OECD guidelines. However, there are certain fundamental differences.

To facilitate proper planning and avoid any future disputes under the Income Tax Act, a non-resident can approach the high powered Authority for Advance Rulings (AAR) to determine the income tax aspects of any proposed or current transaction. AAR can also be sought by a resident to determine the tax liability of a non-resident with whom transaction has been made or proposed.

India also has Double Tax Avoidance Agreement (DTAA) with various countries and tax rates are determined by such agreements. While calculating tax liability, domestic companies are granted credit on foreign tax paid by them. India has entered into a DTAA with various sovereign states. However, the government is planning to expand the scope of this cooperation by entering into DTAAs with non- sovereign territories such as Hong Kong, Taiwan and the Cayman Islands.

Such treaties will come in handy for the revenue department when Indian firms enter into cross-border deals.

Indian states also give a number of incentives for attracting investment (domestic as well as foreign) such as tax concessions, exemptions on the payment of electricity charges, registration fee, and stamp duty. In addition to this, concessions on land are also provided. There is a strong competition among the states for investment. Often many incentives at many levels create confusion among potential investors. The following general fiscal incentives are provided for SEZs:

- Exemption from custom and excise duty.
- Excise duty drawbacks
- Exemption from service tax, securities transaction tax and taxes on the sale or purchase of goods other than newspapers.
- Income tax concessions
- Sales tax holiday for the prescribed period by the state government.

Foreign exchange regulation

Foreign exchange controls have been liberalised after reforms. The rupee is fully convertible on the current account and almost fully convertible on the capital account for non-residents. Profits earned, dividends and proceeds out of the sale of investments are fully repatriable for FDI.

The Reserve Bank of India administers the Foreign Exchange Management Act 1999 (FEMA) which regulates transfer or issue of any security by a person resident outside.

State government business regulations

The State governments deal with subjects of law & order, agriculture, irrigation, water supply, electricity, roads, minor ports, health, education, VAT etc. under its exclusive jurisdiction. With liberalisation, the entrepreneurs mainly require to interact with state governments and local bodies to seek various regulatory approvals and for getting land and necessary infrastructure. Therefore, the state government‟s role and practice becomes important in the implementation of the project. In this context, red tape is an important factor constraining project implementation.

At the state level, there are regulatory constraints manifested in opaque and burdensome labour laws, inefficient land acquisition process and poor implementation of policies and procedures which are subject to political underpinnings and administrative inefficiency. Often, there is a disconnect between laws and implementation. For example, in Special Economic Zones, the function of administering compliance with labour laws is vested in the Development Commissioner of the Zone. Yet in some zones, visits from inspectors of the State Labour Department continue to take place.5

1. Sector Regulation in India

Because of market failures induced by anti-competitive actions or specific technical characteristics, the development of the sectors cannot be left to unregulated markets. Thus, some form of regulation of the market process is needed. Sector regulators are important as individual sectors have their own characteristics which, in turn, determine the nature of regulation. These provide orderly procedures and protect consumer and investors from market failures and anti-competitive actions in a particular sector.

Before the reforms of 1991, government owned monopolies provided most of the infrastructure and utilities. "These monopolies were established under the rationale that facilities required for rendering infrastructure and utilities are natural monopolies and a single provider would offer these services more economically. It was believed that vertically and horizontally integrated units would be better placed to provide these core services. It was also believed that monopoly power in such core areas should rest with the public sector to protect the consumer from exploitation by the profit motive of a private provider."8

The above model did not work for long and led to operational inefficiencies and poor quality of service which forced the government to alter its stance. The government introduced reforms in 1991 after realising that market forces and competition can improve the production and delivery of services without affecting economies of scale.

The present Indian regulatory system owes its origins to the mentioned processes of liberalisation, privatisation and globalisation initiated in 1991 as well as the more limited domestic reforms which preceded these in the eighties. Prior to 1991, public interest was sought to be served more through direct regulations that required the prior approval of government for many commercial decisions. Post 1991, in most sectors of the economy, the protection of public interest objectives rests with laws governing competition and regulatory regimes that have been set up for natural monopolies and network industries.

Government efforts have been progressive in promoting competition in the market place. In some areas such as telecom, civil aviation, insurance, railway container traffic, gas distribution etc, government monopolies have been curbed by allowing the private sector to enter. However, if one examines each sector in detail we find that principles of competitive neutrality (providing a level playing field) have been given the short shrift. In the airline sector, there is some evidence of the reverse – the public sector incumbent has been hamstrung in acquiring new aircrafts, while private players have galloped home.”9

Regulatory trends can be better evaluated by examining performance indicators in business regulation and regulation of key infrastructure sectors.

Before reforms the important sectors, including infrastructure and public utilities, were regulated by the immediate line ministries which were also the operators. The rationale for not allowing private participation was the urgency to expand service coverage towards universality. However, the shortcomings of state ownership became increasingly visible with time.

After reforms, the government made a paradigm shift in its policies and governance structure in some key infrastructure sectors. Specialised regulatory agencies were established in the telecom, electricity and oil & gas sectors. However, outcomes so far have been mixed and in many cases have fallen short of expectations, one important reason being the lack of actual independence of regulators despite legislative provisions. The status of regulation in different sectors is explained through Table 4 above.

The issue of independence of regulators is important in almost all these sectors as the government holds a major share in operations leading to the problem of competitive neutrality. Independence and accountability are properties that are required for good regulatory governance. Independence ensures that interests of various stakeholders are accorded due importance in formulating and implementing regulation and prevents regulatory capture by vested interests. Accountability ensures that regulation is based on careful weighing of pros and cons; arbitrary decisions are not taken as consumers have access to facilities for redressal and appellate authorities and courts for remedial action against incorrect regulatory decisions. One basic form of accountability is transparency in the regulatory decision making process which, to a certain extent, can be achieved through public participation.

Sector studies

This section delves into the mentioned issues through a study of the telecom, power, and higher education sectors. These sectors illustrate a case each of regulatory success (telecom), partial success (power) and failure (higher education).

Telecom

The achievements of the Indian telecom industry are considered a landmark achievement of the reform process. Since liberalisation, India has seen growth in the cellular network take off and tariffs fall across the board. The impact of reforms and successful regulation are quite visible in this sector.

The reforms in the telecom sector were initiated in 1992. However, the independent regulator, TRAI (the first independent regulator in India) could be established only in 1997, after five long years. After the establishment of TRAI, there have been definite changes in this sector. TRAI was supposed to ensure proper functioning of markets and protect consumers. However, the power to issue licenses remained with the government.

Since the inception of TRAI, its independence has often been challenged. For a regulator to be independent in the true sense it needs to have functional and financial independence from the government. In the case of TRAI there has been a weakening of functional independence over time. Political barriers to such independence are quite evident from a study of the sector‟s regulatory history, as relations between the government and the TRAI have been characterised by a rollercoaster ride.

TRAI‟s independence to take decisions relating to key policies and licensing has always been limited by the government. For example, the Department of Telecommunications (DoT) has made various decisions without even seeking consultations with TRAI. In 2000, the bruising disputes and turf battle between DoT and TRAI ultimately led to a legislative decision to clip the wings of the latter. While the new legislation of 2000 ostensibly made an attempt to re-establish a credible regulator, the new Act led to weakening of the security of tenure for the chairman and members of TRAI. The term of the authority was reduced to three years from five years. The conditions for the removal of any member of the authority or its chairman were also made less stringent.

"At that time, independent economic regulation was at a nascent stage in India. The experience with TRAI made the government extra cautious while delegating functional independence to regulatory authorities. In the amended Act, the government assigned itself overriding powers to issue policy directives and supersede the Authority in certain situations. The government still continues to the be the policy maker and seller of telecom operating licenses while it also owns India‟s biggest telecom company, BSNL."10

Another dimension of independence relates to financing of the regulatory body. As mentioned, if there is no assured and independent funding for the regulator, its decision may be constrained due to its dependence on the government, thus introducing scope for abuse and manipulation. TRAI has been weak on this front also as it has had to depend on the line ministry for funding.

Again, as mentioned, a regulator also needs to be transparent and accountable to consumers. The prime purpose of a regulator is to defend and promote consumer choice, welfare and quality of service. TRAI has made efforts to buttress participation by regularly consulting consumer groups among other things. But consumer participation is lacking as mostly service providers attend these meetings and very few consumer groups participate actively. TRAI is not authorised to impose penalties and therefore all its directives are not followed by operators.

However, despite these inadequacies, TRAI has been successful in widening access and reducing price by introducing competition in the market.

Power

Given the importance of the government�even s role in the electricity market, it is not easy to identify the impact of regulators. So what we get at best is a fragmented view. The view that we do get is that regulation in the electricity sector has not been effective. The reason is the persistent refusal by the political class to view electricity as a private good and therefore empower the regulators properly. The very concept of independent regulation has still not been fully accepted.

In the pre-reform period, the power sector was dominated by the state. Power generation and distribution throughout the country was controlled by state owned enterprises. In the early 1990‟s India opened this sector to private investment recognising that the public sector alone was unable to generate the required resources. To attract private investment, the need to create an appropriate regulatory environment that minimises unwanted political interference in the sector was felt.

As a follow up, independent regulatory agencies -- Central Electricity Regulatory Commission (CERC) and State Electricity Regulatory Commissions (SERCs) -- were constituted at the central and state levels respectively. The major regulatory functions of these bodies were licensing, setting tariffs, ensuring maintenance of service standards and promoting competition in the sector. Later, the government enforced the Electricity Act, 2003 for further reforms in the sector.

However, outcomes across states have not been very encouraging as political interference has adversely affected the quality of regulation. As electricity is an essential service and used by all sections of society, it provides wide scope for electorally profitable political intervention in the regulatory decision making process. As a result, decisions relating to tariffs and investment have been highly influenced by political interests. A review shows that the regulatory system in this sector lacks independence, accountability, transparency and stakeholder participation11.

A regulator needs independence from the government to discharge its functions in a free and transparent manner. On paper, the role of the government (central as well as state) is to issue appropriate policy guidelines in consultation with the respective regulator but there are overlaps in the respective jurisdictions of the government and regulators. For example, ERCs are empowered to fix tariffs for end users but the government has not allowed them to determine tariff at their discretion. The Act allows the state governments to provide subsidy to deserving consumers but the respective governments have to pay the subsidy amount in advance to the utility. In practice, the governments provide subsidy but do not make equivalent payment to the utility which adversely affects it financial health and quality of service.

An important aspect of regulatory independence is financial independence. Dependence on uncertain budgetary allocations reduces the independence of regulatory bodies. “In India, ERCs, with few exceptions, depend upon state exchequers although the Electricity Act 2003 empowers them to generate revenue through license fees etc. The lack of financial independence also leads to problems relating to quality and capacity of personnel. The ceiling on salaries imposed by governments prevents the ERCs from appointing quality personnel. At the same time, financial constraints prevent them from conducting adequate training programmes to enhance the capacity of their staff.”12

Policy guidelines require regulatory bodies to adopt transparent and participatory decision making processes. The ERCs provide a platform for consumer participation in the decision making process but due to lack of awareness and inadequate capacity of consumers, public participation has been weak.

However, on the brighter side, ERCs have been successful in ensuring fast redressal and this in turn has led to an improvement in the quality of service. To sum up, political issues have played a very important role in the regulation of this sector; by and large, political interests have been able to regulate the regulators. However, ERCs have been able to augment transparency and accountability to some extent.

Higher education

Higher education in India is going through a transitory phase with rapid changes in a sector used to stagnation. However, the changes are not uniform; two contrasting trends are emerging in higher education with a rapidly expanding private sector at one end, and a public sector at the other in terminal decline. The regulatory system has failed to hold new private institutions to standards while erecting formidable barriers to competition and quality.

The sector is tightly controlled by the government and as a result, regulatory bodies are poor at enforcement. In effect, the University Grants Commission (UGC), professional councils, a few research councils and state governments are the main regulators of the higher education sector. In addition, there are almost fifteen ministries/departments in the Government of India that establish, finance, or regulate higher education institutions and hence interfere in their working.

"The government has not armed regulatory bodies with the powers mandated by the Constitution. The regulatory bodies have also failed to devise a mechanism at their own level and have not framed appropriate rules and regulations; they have also not developed a system of supervision and control over the institutions they are required to deal with. These bodies have been hampered by low levels of independence, both functional and financial, in discharging their functions. For example, the UGC is vested with the responsibility of coordination and provision of funds and, determination and maintenance of standards in higher educational institutions. The UGC does not have the means to control the quality of teaching and recruitment of faculty, ensure minimum infrastructure for all institutions and engage in the monitoring and promotion of research."13

In all, the higher education institutions and regulatory bodies are maintained and funded by the government and key appointments are also made by the government. This enables the government to have a final say on major issues.

To improve the regulatory environment in this sector, the National Knowledge Commission (NKC), an expert group, has recommended the establishment of an Independent Regulatory Authority for Higher Education (IRAHE) that would be an umbrella organisation founded under a separate statutory act. The IRAHE is expected to foster competition as well as accountability in institutions.

The IRAHE would be the only agency to accord degree granting power to higher educational institutions and monitor standards, settle disputes, and license accreditation agencies. IRAHE would provide single window clearance and replace multiple existing regulatory agencies which have often been inconsistent in their adherence to principles.

To sum up, regulatory reforms are important for attracting investment to creation of infrastructure and promoting consumer satisfaction to the extent possible. In India, (so called) independent regulators have been established in certain sectors but the government has continued to encroach on the domains of various regulators in the name of achieving policy objectives. A clear distinction between policy and regulation and its use in practice is required.

Coordination between the regulator and the line ministry is missing. Rather the line ministry has tried to limit the regulator‟s independence. In some cases, the line ministry continues to be answerable to the legislature even for functions that have been transferred to the regulator. This makes the line ministry continue to want to perform the same functions and interfere in the domain of the regulator, which impairs regulatory functioning and consequently, its efficacy.

Regulation in India has certainly not matched the naive expectations of the designers but it has led to a process of re-thinking governance, opening doors to the construction of regulation as a new democratic space.