

ILLUSTRATION BY AJAY MOHANTY



The democratic deficit in regulation making

We require special care when giving unelected officials the power to write law

In a liberal democracy, the power to coerce private persons can flow only from law, and law can come only from the legislature. In that case, how can we have mere officials of an agency writing law, as is the case with regulators? Unaccountable officials wielding power is the path to low state capacity. The solution lies in a narrow parliamentary mandate, in displayed technical expertise, in public consultation and in control by a board that is dominated by independent directors. India has begun on this important journey on numerous fronts.

If a policeman says I am not permitted to wear a blue shirt, I will respond: "Who are you to coerce me?" In a liberal democracy, all coercion of private persons can flow only from law. Coercion must be authorised by law, and law can emanate only from the legislature. The legislature is accountable to the people. It has a limited tenure and faces elections. Compared with this, officials are unaccountable. There is a democratic deficit, a lack of legitimacy, anytime an official seeks to write the law through which private persons are coerced.

When Parliament creates a regulator, this organisation has the powers to write law ("regulations") which coerces private persons. We in India have rushed into building such agencies without laying the sound foundations of their incentives and accountability. During the Financial Sector Legislative Reforms Commission process (FSLRC), Justice Srikrishna explained to us that the laws which create these agencies in India today veer into excessive delegation of the parliamentary monopoly on making law.

We in India are too quick to disrespect politicians and revere experts. I am an expert and I would like to believe that experts should matter in the drafting of law. But the surest path to low performance lies in unaccountable power. To get state capacity, we must envelop the working of these agencies in the rule of law, in checks and balances. This requires addressing this democratic deficit, this lack of legitimacy.

This problem is not new to India. It has been faced all over the world as legislatures have delegated legislative powers to specialised agencies. The problem of unaccountable powers is addressed through four elements of institutional design (<https://goo.gl/afMYj3>).



SNAKES & LADDERS

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The first issue is narrow parliamentary mandate. If a parliamentary law says "the Telecom Regulatory Authority of India (Trai) is empowered to make all law about the telecom sector", this is excessive delegation. The powers to make regulations have to be given to the agency in a narrow and controlled manner. One section of law is required for each regulation, stating objectives, identifying competing considerations, and delegating powers to the agency to write this regulation.

The second issue is the display of technical expertise. Unelected officials achieve legitimacy through expertise. It is not enough to claim expertise is present. Expertise must be displayed every time a regulation is drafted. This is done through the release of a documentation packet that shows the scientific evidence: What is the market failure, what is the proposed intervention, how does the proposed intervention address the claimed market failure, how this intervention is the lowest intrusion and cost when compared with all others, how the bene-

fits are greater than the costs. Legitimacy is earned by this display of expertise.

The third issue is public consultation. Every agency must release this documentation packet for public comment, accept comments in writing from experts and from industry, and substantively address them including through modifications to the regulation. Legitimacy is earned through consultation and responsiveness.

Finally, the entire process must be controlled by the board, and the board must have a majority of independent directors who are experts. Every regulation-making project must start as a board note, the board must authorise the regulation-making project, and the staff must come back to the board at the end of the regulation-making process to seek approval for the final regulation that would go out. The board would apply its mind to the substance of the regulation, and also verify that the staff has truly followed the stated process.

At present, these concepts are absent in India. The laws give sweeping powers to regulators, and are vulnerable to legal challenge on the grounds of excessive delegation. Most regulation-making projects are not controlled by the board. There is no display of expertise, which has made the regulation-making process vulnerable to lobbying and political pressure. While public comments are sometimes requested, they are generally ignored. The final regulation that is issued is generally the same as the draft regulation that was first released.

This lack of checks and balances has yielded low state capacity: We are routinely disappointed at the low quality of regulations issued by regulators in India. It also creates a lack of legitimacy. When questions are raised about (say) regulations on bank lending to small and medium enterprises, the regulation is on shaky ground because it was not developed through a thorough process and merely represents the view of some officials.

State capacity does not come from the rule of men and women who are benevolent or experts. State capacity comes from checks and balances, from conflict. The Indian elite has an immature understanding of political science: We like to hand over powers to persons that we consider good. Unaccountable powers at agencies are the core reason for their poor performance. Agencies that are given the powers to write law must be redesigned around these four design principles.

There is much progress in India on these questions in recent years. The FSLRC (2013,2015) developed a full understanding of regulators, including the role of the board and the process through which regulations should be issued. The Supreme Court ruling on the Trai calls dropped order (2016) demanded such due process in regulation-making, and Trai is building state capacity for a sound regulation-making process. All regulators should examine the implications of this order for their regulation-making process. The Insolvency and Bankruptcy Board of India has formally bound itself to a sound procedure through which regulations will be made (2018). The new payments bill (2018) embeds these concepts. Debates about the RBI (2018) have brought questions about the working of these agencies to the front-burner.

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