

Regulatory Authorities: selection, tenure and removal

1. Planning Commission (PC), Government of India in its consultation paper 'Approach to Regulation: Issues and Options' stated that "*For achieving the desired objectives, it is necessary to ensure that the regulatory institutions remain independent and autonomous. The selection, appointment and removal of chairperson and members should be insulated against any perceived interference or manipulation that may influence the outcome.*"

2. As quality of regulation is directly linked to the quality of personnel, the government's resolve is to have professionally-run institutions, stated in the National Common Minimum Programme (NCMP) of May, 2004 and reinforced in the President's Parliamentary Address of June, 2005.

3. *Selection and appointment of regulators* is one of the most crucial aspects that need to be addressed upfront. There has been a tendency in recent years to appoint retired bureaucrats and judges as heads of regulatory bodies without ascertaining their suitability. Moreover, compensation offered to such posts is not competitive enough to attract younger talent. A common (rhetorical) refrain that is often heard is how one can get Members/Chairmen at a peon's salary. Thus, only retired civil servants or judges are available at such low salaries.

The PC mentions in its consultation paper, "*The terms of service should be sufficiently remunerative to attract qualified and experienced persons. Further, at least one of the members could be drawn from other than public sector background (such as academics, lawyers, chartered accountants, managers etc.). This would enrich the functioning of the respective regulatory bodies.*"

A study undertaken by CUTS for Planning Commission, titled, "Comparative study of regulatory framework in infrastructure sector: lessons for India" mentions that appointing retired bureaucrats/judges to regulatory bodies has become the order of the day, which is not a healthy sign, as the very purpose of setting up independent institutions gets defeated. They lack the vigour and rigour required to do such jobs. The job also requires substantial knowledge of law and economics and its intersection. Attracting young blood and talent is the key to making these institutions work in a desirable manner.

4. Currently, members of regulatory commissions and appellate tribunals have *tenure*, which vary between three to five years. Such wide range of tenure, may serve unfavourable in attracting qualified professionals and experts. Thus, it is desirable to provide a fixed tenure of five years.

5. At a Finance Ministry/World Bank seminar on Public Private Partnerships (PPPs) in New Delhi, on February 05-06, 2007, a senior executive of Mahindra and Mahindra, Arun Nanda, publicly stated that he is available to work in a regulatory authority at the prevalent scales, provided he is properly empowered. He defended his position stating that there are many like him who would be willing to do so at an advanced stage of their private sector careers, as they are financially well off. This view is borne out by the fact

that many High Court and Supreme Court judges are successful former lawyers who are attracted to the job because of the independence that they enjoy in discharging their adjudicatory functions, and the prestige of the job, in spite of suffering from a huge drop in their earnings.

6. In the case of appointing executives from the private sector, one common view is that their functioning may be compromised by their past associations. This may not necessarily be true. Judges who may have a relation with a lawyer or a client are required to recuse themselves from a case where there is the slightest doubt of conflict of interest. Similarly a regulator, too, can exercise discretion or caution in dealing with matters where any nexus is suspected to exist *vis-a-vis* their past association. Distortions can happen as in any system, but they will be more in the nature of exceptions rather than the norm. In any event, we have not been successful to ensure a corruption free system, so does it matter whether there was any past association at all.

7. Furthermore, providing protection against possible discretionary dismissal, unlike supersession, would go a long way to ensure functional autonomy to regulators. Such provisions would help regulators to work towards attaining the stated objectives without undue interference and prove an effective deterrent against possible capture by the line-ministry.

8. Recommendations

8.1 A standing committee of eminent people should be constituted to select regulators for various regulatory agencies at the central level and a similar model should be followed in the states;

8.2. Proper manpower planning should be carried out to ensure that a regulator is selected in advance of a position falling vacant; applications should be invited against pre-determined selection criteria;

8.3. Regulators should be given a fixed tenure of five years with a maximum age limit of 60 years for appointment, with the reasons for any exceptions recorded in writing;

8.4. Those provisions in regulatory laws that deter people from business/ non-government sector to move to regulatory bodies should be removed;

8.5. The prevailing practice of sinecure needs to be discouraged. The bottom line must be to encourage experts and young professionals to join such positions; and offer attractive compensation to draw young professionals to join regulatory bodies;

8.6. Regulators and their staff should be provided with short-term training prior to induction; and

8.7. Protection of regulators against arbitrary removal by the Government is necessary. A member of a regulatory agency should be removed only in case of proven guilt or inability established by due process.

8.8. The government's Department of Personnel should be designated as the administrative ministry for regulatory bodies, responsible for release of appointment letter and other administrative matters. This will ensure that there is an arms length relationship between the line ministry and the regulatory agency, which is otherwise under their control
