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# **Unintended Consequences of Regulatory Globalisation**

**An Evaluation of World Bank Initiated Legal Reform  
in India's Electricity Sector: The Case of Andhra Pradesh**

**By**

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A thesis submitted in partial fulfilment of the requirements of  
a Doctor of Philosophy (Ph.D.) degree in Law.

**University of Warwick, School of Law**

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## **Declaration**

I confirm that the thesis is my own work. I also confirm that the thesis has not been submitted for a degree at another university.

## **Abbreviations and Use of Terminology**

### **Abbreviations**

ADB	Asian Development Bank
AIR	All India Reporter
ALD	Andhra Legal Decisions
ALT	Andhra Law Times
AP	Andhra Pradesh
APERC	Andhra Pradesh Electricity Regulatory Commission
APCPDCL	Andhra Pradesh Central Power Distribution Corporation Limited
APGENCO	Andhra Pradesh Power Generation Corporation Limited
APHC	Andhra Pradesh High Court
APPCC	Andhra Pradesh Power Coordination Committee
APSEB	Andhra Pradesh State Electricity Board
APTRANSCO	Transmission Corporation of Andhra Pradesh Limited
ASCI	Administrative Staff College of India
AT	Appellate Tribunal
Bank	World Bank
BJP	Bharatiya Janata Party
BSES	Bombay Suburban Electricity Supply
CAD	Constituent Assembly Debates
CAS	Country Assistance Strategy
CEA	Central Electricity Authority
CEO	Chief Executive Officer

CIDA	Canadian International Development Agency
Congress or Congress Party	Refers to the faction of Congress Party associated with the Nehru-Gandhi family.
CPI	Communist Party of India
CPI (M)	Communist Party of India Marxist
DFID	Department for International Development
Directives	Directive Principles of State Policy
DISCOMS	Term used to denote the four regional distribution companies created out of the unbundled APSEB.
ELR	Manupatra Energy Law Reports
EU	European Union
FDI	Foreign Direct Investment
FSA	Fuel Surcharges Adjustment
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
HLC	High Level Committee
IAS	Indian Administrative Service
IEA	International Energy Agency
IMF	International Monetary Fund
IPP	Independent Power Producers
LDC	Less Developed Country
MANU	Manupatra Online Database
Naidu	Chandra Babu Naidu

NDA	National Democratic Alliance headed by the BJP
NHPC	National Hydroelectric Power Corporation
NTPC	National Thermal Power Corporation
NTR	Nandamuri Taraka Rama Rao
ODA	Oversees Development Authority
OSEB	Orissa State Electricity Board
PFC	Power Finance Corporation Limited
Powergrid	Power Grid Corporation of India Limited
SASF	Semi-Autonomous Social Field
SCC	Supreme Court Cases
SCR	Supreme Court Reports
SEB	State Electricity Board
SLDC	State Load Dispatch Centre
SRAs	Self-Regulatory Associations
TDP	Telugu Desam Party
UK	United Kingdom
UNDP	United Nations Development Programme
UPA	United Progressive Alliance headed by the Congress
US/USA	United States of America
USAID	United States Agency for International Development
YSR	Yeduguri Sandinti Rajasekhara Reddy

### **Use of Terminology**

- i. The words 'national state' and 'national government' have been used to describe the federal state or government.

- ii. The use of the word 'State' (with capital 'S') has been used to describe the provincial or sub-national governments in India.
- iii. The words 'state' (in lower case) and 'Indian state' have been used in a generic sense to refer to both the national and State level states or connote public ownership.
- iv. The word 'sectoral' has been used to describe the electricity sector.

## **Abstract**

Economic liberalisation initiatives at the behest of international financial institutions and bilateral donors have been accompanied by regulatory reform. This requires adoption of a standard regulatory template through legislative reform by the recipient jurisdiction. This thesis argues that every jurisdiction, given its unique social, political, economic and cultural attributes, possesses a unique character which in turn requires customised regulatory solutions. This thesis argues that a simplistic legal instrumentalist approach to regulatory reform, disregarding the unique regulatory attributes, is unlikely to succeed in achieving its regulatory objectives. In other words, it is bound to have 'less than intended' effect.

The thesis discusses this phenomenon of global diffusion of regulatory norms in the context of legislative changes incorporating the World Bank's global regulatory template in the electricity sector in India. Since the sector is administered at the State level, the thesis focuses on the implementation of the legislative arrangements regulating the state and privatising the state-owned entities in the State of Andhra Pradesh. It argues that any regulatory reform initiative aimed at introducing a standard model is bound to encounter societal forces in the nature of co-option, resistance, uneasy co-existence etc. As a consequence, a standard model will not be able to bring about the intended social and economic changes and that the institutional and administrative processes associated with the standard model themselves undergo a transformation. It demonstrates that this was the reason for the reform measures not yielding the desired results in the State level electricity sector in India.

# Chapter 1 – Introduction

## 1.1. Setting the Context

This thesis argues that every jurisdiction, given its unique social, political, economic and cultural characteristics, possesses distinct regulatory attributes, and therefore requires customised regulatory solutions. In saying so, the thesis argues that, to be effective, legal regulation of economic activity must engage the dynamics of the political-economy, rather than insulate economic decision making from politics. The thesis establishes this by examining the implementation of the World Bank's global regulatory reform template for the electricity sector in the State<sup>1</sup> of Andhra Pradesh in India.

The thesis explores social, economic, legal and political developments in India from the late 1940s till June 2014, from a global, national and State perspective. June 2014 is the cut-off date for the present analysis as the focus jurisdiction i.e. the State of Andhra Pradesh was bifurcated into two separate States thereafter. Bifurcation of the State machinery also resulted in bifurcation of the institutions put in place through the reform process, making it difficult to observe them. The resultant States are also separate political units with differing socio-economic dynamics, making continued analysis difficult. Also, as will be discussed, the thesis establishes the emergence of pluralism in state law through a chronological analysis of political, social and economic

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<sup>1</sup> The use of the word 'State' (with capital 'S') has been used to describe the provincial or sub-national governments in India. The words 'national state' and 'national government' have been used to describe the federal state or government. The words 'state' (in lower case) and 'Indian state' have been used in a generic sense to refer to both the national and State level states or connote public ownership.

developments, staffing patterns and case law. The relatively short time period between bifurcation and October 2017, i.e. 3 years, is insufficient to observe trends and draw conclusions relating to the newly formed States.

The period between the late 1940s and June 2014 is further divided into the 'interventionist' (late 1940s till late 1980s) and the 'regulatory' (late 1980s till date) phases. The interventionist phase was globally and nationally associated with a greater role for the state in economic activity and characterised by direct ownership and control of economic activity. The period from the late 1980s till June 2014, both globally and in India, has been associated with endeavours to restrain the role of the state in economic activity, as evidenced in the provisions of the new sectoral (electricity sector) regulatory arrangements; this has been described as the 'regulatory phase' for the purposes of the present discussion.

The thesis argues that the framers of the Indian Constitution assigned an interventionist role for the state in economic activity. This vision of the role of the state corresponded with the post-war global consensus and also emerged from the freedom movement's critique of the colonial state. The framers were however reluctant to juridify the scope of state intervention and were of the view that the same ought to be decided through electoral preferences. The thesis argues that certain unique national regulatory attributes pertaining to the role of the state in economic activity emerged in the interventionist phase owing to a closed economy, politics of redistribution, and state ownership of key industries.

The regulatory phase is associated with economic liberalisation and corresponding regulatory reform initiatives, aimed at the state and state owned utilities, at the behest of international financial institutions and bilateral donors. Faced with a balance of payments crisis, unsustainable budgetary deficits and fiscal instability, India indicated its willingness to depart from the post-independence interventionist philosophy and embraced economic liberalisation at the behest of international financial institutions such as the World Bank (hereinafter the Bank), the International Monetary Fund and bilateral donors. The international financial institutions and bilateral donors justified the need for regulatory reform with the claim that politicisation of sectoral regulatory decision-making burdened the public finances. The regulatory reforms aimed to reposition the role of the state from an owner and provider of goods and services to that of a regulator. In other words, the reform measures, in addition to opening sectors to private participation, also aimed at regulating the state and restraining its participation in economic activity. The regulatory reforms were brought into force by amending state law (both national and State), i.e. through legal instrumentalism. Therefore, state law was seen as an instrument to regulate (by control and contraction) the state, to depoliticise sectoral decision making, and to privatise state owned enterprises. The electricity sector in India was one of the first sectors identified as a burden on the public finances and became the face of the endeavour to reposition the Indian state as a regulatory state.

## 1.2. Importance of Electricity as a Source of Energy and Role of the Indian State in its Provision and Regulation

Electricity is a modern source of energy (Bhattacharya 2006:3388; IEA 2010:8; Kanagawa & Nakata 2008: 2017). One of the means to address the multidimensional phenomenon of poverty has been to 'promote opportunity' through access to modern sources of energy such as electricity (Kanagawa & Nakata 2008:2016). Electricity consumption has a proven positive impact on a nation's Human Development Index and Gross Domestic Product (Kanagawa & Nakata 2008: 2018). The United Nations Development Programme (UNDP) views 'universal access to modern energy services' as essential to achieving the millennium development goals (UNDP 2011). Its provision is indispensable for socio-economic development (IEA 2010:8).

Underscoring the transition of the Indian state from colonial to post-colonial, Sunila Kale rightly observes that, just as the colonial extractive state invested in developing the railway network, independent India's welfare state viewed the electricity sector as its 'new strategic railway' (Kale 2015:24). India is a federal polity and the institutional arrangements foreseen by the sectoral legislation during the interventionist phase made the State level state as opposed to the national state responsible for sectoral development. The State function was inextricably combined with the electricity utility. The State electricity utility performed the combined functions of generation, transmission and distribution, and was also the quasi-sectoral regulator. By the 1990s the State electricity utilities were serving 95% of all consumers (Chong 2004:111). From 1948 till 1991 the Bank aligned its lending priorities with the national government's interventionist or state led sectoral development model. By 1990

it had provided a total funding of \$35.3 billion to the sector. This amounted to 15% of the Bank's lending to the electricity sector world-wide and 60% of India's external borrowing (Chong 2004: 114).

Political competition and bad managerial practises led to the State electricity utilities incurring losses. In 1993, cumulative State electricity utility losses had reached around rupees 1.8 billion or \$US 30,774,227, which amounted to nearly 0.5% of the GDP and was a drain on the state's finances (Chong 2004:114).<sup>2</sup> Though the losses occurred at the State level and were a drain on the State's finances, the States in India's federal polity are dependent on the national state for revenues as the Constitution allocates a greater share of the tax revenues to the national government. Also, the Constitution vests the sectoral administration in both the national and State governments. In the early 1990s India's national government sought the Bank's financial assistance owing to an external balance of payments crisis and internal budgetary deficits. The electricity sector had become the focal point for the financial restructuring programme aimed at reducing budgetary deficits (Chong 2004:114).

The regulatory reform model suggested by the Bank and endorsed by the bilateral donors aimed to reduce the role of the state in sectoral economic activity and to usher in a regulatory state. The sectoral legislation incorporating the Bank's global regulatory model promised a turnaround in the sector's fortunes and to make it viable to sustain the nation's dream of rapid economic development. The sectoral regulator was the institutional mechanism aimed at bringing about this separation of politics from economic decision making. In

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<sup>2</sup> As per the currency conversion rates on 19 May 2014.

terms of the industry's structure the legislation foresaw an unbundling of the monolithic State owned electricity utility into generation, transmission and distribution entities in order to infuse greater transparency and efficiency and competition into the sector. The ultimate objective of the Bank sponsored reform prescription was privatisation of the sectoral utilities. The Bank's regulatory reform prescription was first incorporated through State level legislative reform amongst other States in the States of Orissa and the focus jurisdiction of the present thesis, i.e. the State of Andhra Pradesh. The State level model was up-scaled with some changes to the national level through the national Electricity Act, 2003.

More than a decade after the passage of the national legislation incorporating the Bank's model, the majority of the electricity utilities are State owned and continue to incur losses, burdening the public exchequer. As per a study commissioned by India's Planning Commission on the functioning of the distribution businesses in fifteen States and 91% of the power consumed nationally, the sectoral fortunes remain unaltered (Planning Commission 2011:8). Although the reform legislation aimed to disaggregate the SEB into separate generation, transmission and distribution companies, the separation 'is only in the form and not in substance' (Planning Commission 2011:1). It notes that the State level regulators did not show the requisite independence while discharging their obligations (Planning Commission 2011:64). The power sector debt equalled 5% of India's GDP in the year 2011 (World Bank 2015:4). The utility debt was more than 10% of the State's GDP in the States of Uttar Pradesh, Rajasthan, Meghalaya and Haryana.

An appropriate approach towards sectoral growth, sectoral regulation and the utilisation of sectoral resources becomes essential, given that in 2013 the International Energy Agency estimated that of the 1.3 billion people worldwide who did not have access to electricity nearly 306 million reside in India (IEA 2013). Despite the progress made in terms of the sheer number of villages that have been electrified, wide disparities persist between States and regions in India (Patil 2010:17; Oda & Tsujita 2011:3087). The growth of electricity capacity across the country depended on the availability of resources for generation (Nouni et al. 2008:1191; ASCI 2002) and the ability of the state (both national and States) to invest in the sector. Electricity not only helps address poverty, but also help reduce 'disparities' between the electrified and not electrified villages (Oda &Tsujita 2011:3087) and it is in this context that rural electrification assumes great significance. One study examining the impact of electrification on villages in the State of Bihar notes that electrification had a positive impact on agricultural productivity (Oda &Tsujita 2011:3094). However, it notes that villages in remote areas have less access to electricity (Oda &Tsujita 2011:3094). Oda and Tsujita (2011) also observe that the extension of electricity lines at the household level did not mean that electricity was available or supplied and its provision varied both in terms of quality and duration of supply (Oda &Tsujita 2011:3091-92). The role of electricity in enhancing individual capabilities and promoting economic growth, and its consequent electoral appeal will be discussed in detail in Chapter 4.

This thesis argues that a simplistic legal instrumentalist approach to regulatory reform, disregarding the unique regulatory attributes, is unlikely to succeed in achieving its regulatory objectives. It demonstrates that this was the reason

for the reform measures not yielding the desired results in the State level electricity sector. It further argues that any regulatory reform initiative aimed at introducing a standard model is bound to encounter societal forces in the nature of co-option, resistance, uneasy co-existence etc. Consequently, a standardised model will not be able to bring about the intended social and economic changes and that the institutional and administrative processes associated with the standard model themselves undergo a transformation. This is demonstrated in the context of legislative changes incorporating the Bank's regulatory template into sectoral state law (both national and State) in the electricity sector in India. Since the sector is administered at the State level, the thesis focuses on the implementation of the legislative arrangements regulating the state and privatisation of the state-owned entities in the State of Andhra Pradesh.

### **1.3. Hypothesis**

State regulation of economic activity cannot be insulated from larger social and political dynamics. Regulatory models accompanying economic globalisation and implemented through state law will be effective only if they acknowledge the unique regulatory attributes of a regulatory space and engage them.

### **1.4. Research Questions**

- a. Should global regulatory diffusion pay attention to the national regulatory attributes?
- b. What are the unique regulatory attributes associated with the role of the Indian state in economic activity?

- c. Does the Indian state (both at the national and State level) exhibit these attributes in the electricity sector?
- d. What happens to state initiated regulatory interventions that ignore the sectoral regulatory attributes? In particular, what are the implications of such interventions for state law and the institutional arrangements giving effect to it?

### **1.5. Research Methodology and Method**

This thesis adopts a layered approach to uncovering the regulatory attributes of the State level sectoral regulatory space in Andhra Pradesh. The thesis firstly discusses the global and normative aspects of the role of the state in economic activity. It then discusses the regulatory attributes of the national state and the nationwide attributes of the electricity sector in India. It thereafter analyses the impact of the legal interventions, which ignore the regulatory attributes in the electricity sector of the State of Andhra Pradesh. The analytical construct of 'regulatory space' (Hancher and Moran 1989) and the notion of the unique attributes of the space or 'regulatory character' (Haines 2003) are deployed in conjunction with the 'living constitutions' approach (Ackerman 2007) to establish the unique attributes of India's regulatory space. The thesis draws on the dynamic concepts of 'regulatory space' along with that of 'living constitutions' to evaluate the efficacy of legislative interventions based on global templates which ignore the recipient jurisdiction's regulatory attributes. In this context, the thesis relies on the theories associated with the emergence of legal pluralism and the processual methodology for establishing the existence of a 'Semi-Autonomous Social Field' (Moore 1973).

The research supplements doctrinal and contextual analysis with empirical qualitative methods. In addition to text based sources, the research comprised three separate trips to India to conduct field work and interact with organisations and actors associated with the electricity sector. Gatekeepers and informants known to the researcher through professional and personal acquaintance and through introductions facilitated the interview process. Methods for securing information included relying on the statutory process for obtaining information from governmental organisations based on the Right to Information Act, 2005. Information pertaining to staffing patterns of the regulator in Andhra Pradesh's electricity sector for sixteen years from 1999 to 2014 was secured through applications made under the Right to Information Act, 2005. The thesis also relies on an extensive case law review comprising 88 cases appealed against the orders passed by the electricity sector regulator in Andhra Pradesh.

## **1.6. Chapter Outline**

This thesis comprises nine chapters ordered in keeping with the layered approach to understanding the regulatory attributes of a particular jurisdictional space, be it sectoral or territorial (national and State level), as discussed in the methodology section above. Chapter 2 introduces the reader to the theoretical underpinnings of the thesis in order to contextualise its scope and approach. In particular, it highlights the importance of a spatial approach to regulatory processes in understanding the changing role of the state in economic activity. It categorises the role of the state in economic activity into the post-world war and post-colonial consensus of an 'interventionist' state (Chang 2003) and the neoliberal notion of a 'regulatory' state advocating a

withdrawal of the state from economic activity (Yeung 2010; Majone 1994). One of the key arguments against the interventionist state by the supporters of a regulatory state has been that the politicisation of economic decisions in an interventionist state leads to inefficient allocation of resources and that the invisible hand of the market can achieve better allocation of resources. Those supporting the notion of a regulatory state argue for an insulation of economic decision making from political processes. The Bank and the bilateral donors viewed law reform, accomplished by legislating appropriate state law, as a means to achieve this transformation in the role of the state in economic activity (Tshuma 1999; Faundez 2010). In this context, the chapter discusses complementarity between the literature pertaining to the spatial approach to regulation and views on limitations to bringing about social change through legal instrumentalism (Twining 2004; Griffiths 1986; 2003). It discusses the influence of pre-existing societal relationships described as attributes of the space (Hancher and Moran 1989) or as 'regulatory character' (Haines 2003) on legislative interventions. The chapter then explores the literature on the relationship between regulatory interventions accompanying economic globalisation and the notion of legal pluralism. Since the legislations intending to establish a regulatory state aim to regulate the state itself, the chapter examines the notion of regulatory choices accompanying economic globalisation having constitution like implications (Rawlings 2010; Schneiderman 2001). Such an approach acknowledging the impact of legislation on the constitutional scheme is in keeping with the notion of 'living constitutions' (Ackerman 2007). A living constitutions approach acknowledges the impact of judicial decisions and political choices in addition to regulatory

interventions on the constitutional mandate. The chapter explores the complementarity of the approach of 'living constitutions' with theories which centre on exploring the unique regulatory attributes of a particular regulatory space. This helps contextualise the exercise, which is aimed at mapping the unique attributes of the role of the Indian state in economic activity, and the reflexive relationship between the constitutional mechanisms and the actor dynamics both external and internal to the state.

Chapter 3 identifies the unique attributes of the Indian state regarding its role in economic activity. It establishes the reluctance of the framers of the Constitution to juridify the role of the state in economic activity. The chapter argues that, although advocating an interventionist role for the state in economic activity, the Constitution leaves the scope of the interventionist state to the electoral processes. The chapter is thereafter organised into two global trends pertaining to the role of the state in economic activity, i.e. the interventionist and the regulatory as they play out in the Indian context. The chapter explores how the politics of resource allocation through the interventionist phase led to the capture of states' resources by entrenched interests. It relies on Pranab Bardhan's (1998) broad categorisation of these interests as rich farmers, industrialists, career professionals or bureaucrats and the politicians who mediate between these groups. The chapter endorses the view that this 'dominant coalition' of interests is 'heterogeneous' in nature (Bardhan 1998) and that the same places conflicting demands on the limited resources of the state, thereby generating tensions. The chapter also identifies the prevalence of tensions owing to factors both within the state, i.e. the interpretation of the redistributionist mandate of the Constitution by the

judiciary on one hand and the executive and legislature on the other, and the influence of the external factors associated with the global perception of the role of the state in economic activity. The phase of the regulatory state in the late 1980s generated tensions between the national state which had repositioned itself as a regulatory state and the States over resource allocation and the reluctance of the States to move away from the interventionist model. The attempts at establishing a regulatory state included legislative disaggregation of the state's institutional apparatus through legal instrumentalism creating further tensions between the prevalent 'centrifugal' forces and the 'centripetal' legislative endeavour (Black 2007). In its attempt to establish the regulatory attributes, the chapter tries to construct a larger picture by correlating legislative, political and judicial developments, thereby endorsing a 'living constitutions' approach to identifying the role of the state in economic activity.

Chapter 3 concludes that, given both internal and external tensions, the Indian state cannot act in an insular and autonomous manner (Bardhan 1998; Mukherji 2016). The chapter however agrees with Mukherji that, despite being surrounded by a powerful society, the state retains the capacity to bring about change (Mukherji 2016). It identifies five attributes pertaining to the role of the Indian state in economic activity. The first is the influence of the changing global notions of the role of the state in economic activity on the national state, be it during the interventionist state phase or the regulatory state phase. The second is the relative weakness of the Indian state vis-à-vis societal forces and entrenched interests in particular. The third is the continued dominance of the state as an actor in economic activity and its ability to influence change

despite its relative weakness. The fourth is the presence of entrenched interests of groups such as rich farmers, industrialists and bureaucrats associated with state led development resisting attempts to establish a regulatory state. The fifth is the semi-autonomous nature of the Indian state owing to tensions internal and external to the state.

Chapters 4 and 5 explore the legislative developments and the corresponding sectoral dynamics in the electricity sector in India (at both the national and State levels) in the course of the interventionist state and the regulatory state phases. These chapters demonstrate how the electricity sector reflects the regulatory attributes of the national state in economic activity through the phases. The chapters portray the institutional arrangements ushered in through state law as reflective of the state's self-perception of its role in sectoral economic activity.

Chapter 4 discusses the political, economic, legal and social developments in the sector associated with the interventionist phase. It introduces the reader to the importance of the sector both from the perspective of enhancing individual capabilities and promoting economic growth. The electricity sector had captured the imagination of the newly independent interventionist Indian state. The Electricity (Supply) Act, 1948, modelled on the legislation of the British welfare state, was enacted to operationalise the interventionist role of the state. This led to the establishment of State Electricity Boards and the sectoral dynamics came to be associated with the States in India. The chapter thereafter traces the way in which increasing political competition led to a downturn in the finances of the State Electricity Boards and affected the fiscal health of the States.

Chapter 5 discusses the sectoral developments from the late 1980s corresponding to the emergence of the regulatory state. The chapter relies on the methodology of 'principles, actors and mechanisms' devised by Braithwaite and Drahos (2000) to trace the processes whereby the Indian state embraced economic liberalisation and its corresponding implications for the electricity sector. In this context, the chapter focuses on the role of the World Bank and bilateral donors in influencing sectoral policy aimed at changing the state's (at both national and State level) role in economic activity through legal instrumentalism. The chapter discusses the architecture of the sectoral legislation proposed by the World Bank and the institutional mechanisms put in place to disaggregate the state and insulate regulatory oversight from political processes.

Chapter 6 discusses theoretical perspectives pertaining to the implications of regulatory globalisation for the recipient jurisdiction. It argues that regulatory models external to the social, economic and political context of the recipient jurisdiction and introduced without an understanding of the unique regulatory attributes are bound to have 'unintended consequences', which include the emergence of legal pluralism (Tshuma 1999). The chapter discusses how a spatial approach to regulation facilitates observation of the processes and actor dynamics leading to the emergence of legal pluralism. The chapter thereafter focusses on Sally Falk Moore's notion of the Semi-Autonomous Social Field (Moore 1973) in the context of the emergence of legal pluralism and its relevance given the non-autonomous attribute of the Indian state.

Chapter 7 contextualises the discussion pertaining to the national regulatory attributes and the changing role of the Indian state in economic activity, as

discussed in the national and sectoral context of the State level electricity sector in Andhra Pradesh. This comprises the final layer of this layered approach to understanding the implementation of regulatory reform based on global models introduced through legal instrumentalism. The chapter establishes that the regulatory attributes of the electricity sector of the State of Andhra Pradesh reflect the non-autonomous nature of the Indian state owing to the tensions inherent to and external to the state. It discusses the political, social and economic developments associated with the interventionist phase. The chapter focuses on the dwindling fortunes of the State Electricity Board owing to the politicisation of sectoral decision-making and its implications for the State's finances during the period corresponding with the interventionist phase. The chapter thereafter traces the legislative attempts to reposition the state as a regulatory state by the World Bank and bilateral donors with active encouragement of the national government. The Andhra Pradesh Electricity Reform Act 1998, endeavoured to implement the World Bank's globalising sectoral regulatory template with the intention of depoliticising sectoral decision making. However, as Tshuma (1999) and Chang (1999) note, depoliticisation itself leads to reallocation and creates winners and losers. This in turn led to popular opposition and the electoral reversals for the party implementing the reforms, leading the political establishment to reconsider the State's sectoral posturing.

Chapter 8 examines the functioning of the sectoral institutional mechanisms put in place by the reform legislation to operationalise a regulatory state. This examination is undertaken from both structural and behavioural perspectives. It identifies the emergence of alternative institutional arrangements to what

Sally Falk Moore observes regarding how the state acknowledges the 'diverse social fields within society and represents itself ideologically and organizationally in relation to them' (Moore 2001:107). The chapter argues that the same is made possible because of the non-autonomous nature of the state, owing to tensions discussed in earlier chapters, and the State in Andhra Pradesh itself becoming a Semi-Autonomous Social Field. It concludes with the observation that the alternative institutional organisation giving effect to the interventionist state results in legal pluralism in sectoral state law. It categorises the plural forms of state law as legislated or 'public law' and self-generated or 'self-regulation'.

Chapter 9 is the concluding chapter, it draws together the analyses in the preceding chapters and provides suggestions and conclusions pertaining to devising effective regulatory interventions, keeping in mind the attributes of the regulatory space associated with the role of the Indian state in economic activity.

## **Chapter 2 - Changing Role of the State in Economic Activity and Significance of a Spatial Analysis for Understanding Regulatory Reform**

### **2.1. Introduction**

This thesis argues that for legal regulation to be effective it must engage the dynamics of the political economy. It endeavours to identify the regulatory attributes of the role of the Indian state (national and States) in economic activity and to analyse their influence on the implementation of state law. This is examined in the context of the State of Andhra Pradesh legislating to implement a global regulatory template in the electricity sector. This chapter discusses theoretical approaches which help identify the regulatory attributes of the state (national and States) and the electricity sector in India. The influence of the regulatory attributes on the implementation of state law in India is in turn analysed in the context of legal interventions associated with the differing normative approaches to the role of the state in economic activity. For the purposes of this thesis, these differing normative notions have been categorised as 'interventionist' and 'regulatory'. The chapter firstly discusses the normative underpinnings of the notions of the interventionist state and the regulatory state, which differ in their conceptualisation of the role of the state in economic activity. This exercise becomes relevant in the context of the Indian state (national and States) adopting an interventionist model after independence in 1947 and a regulatory approach from 1991 onwards.

The chapter then discusses the analytical construct of 'regulatory space', which belongs to what Bronwen Morgan and Karen Yeung (2007) describe as 'institutionalist' theories of regulation. The institutionalist theories 'consider

institutional dynamics to have, in a sense a “life of their own” in regulatory regimes, such that they will often shape the outcomes of regulation in surprising ways, given the preferences and interests of regulatory participants’ (Morgan and Yeung 2007:53). Such an approach allows one to observe actor behaviour and institutional dynamics and helps identify the regulatory attributes in the Indian context.

Since the exercise of identifying the regulatory attributes is undertaken in the context of identifying the role of the Indian state in economic activity, and since constitutions empower and restrain state action, the chapter discusses the notion of a ‘living constitution’ (Ackerman 2007). The notion of a living constitution acknowledges the role of political mandates, legislative interventions and judicial interpretation in influencing the scope and content of the constitution. The economic, political and judicial developments in India are explored through the perspective of living constitutions to ascertain the role of the Indian state in economic activity and the attributes associated with the same. Since the thesis proposes to examine the implementation of global regulatory models, the chapter briefly discusses literature pertaining to regulatory globalisation and its ‘less than intended effects’ (Haines 2003:482). The thesis argues that the emergence of legal pluralism in state law is one of the less than intended consequences of introducing the Bank’s regulatory model in the Indian electricity sector.

The notions of regulatory space and living constitution complement one another. The former helps identify the broader attributes of a jurisdictional space and the latter facilitates the contextualisation of the influence of these attributes on the nature of the state. They facilitate construction of a

normatively neutral framework with which to observe the implementation of legal interventions associated with the differing normative notions informing the role of the state in economic activity i.e. interventionist and regulatory. The identification of the regulatory attributes of a particular jurisdiction also helps better observe the impact of the global dynamics on the national level and the national level on the States, as will be demonstrated in the forthcoming chapters. The next section discusses the characteristics of the interventionist and regulatory states.

## **2.2. Changing Role of the State in the Economy**

### 2.2.1. The Interventionist State

The role of the state in the economy has always been ‘controversial’ (Chang 2003:1). Ha-Joon Chang observes that the interwar period saw the drawbacks of ‘liberal capitalism’ through events such as the Great Depression and the Russian Revolution (Chang 2003:3-4). He argues that this paved the way for ‘interventionist economic theories’ of Keynesian economics and the New Deal in ‘advanced capitalist countries’ (Chang 2003:4,17). The same resulted in a greater role for the state in economic activity after the Second World War, with ‘advanced capitalist economies’ embracing the welfare state and the spread of socialism (Chang 2003:4,17).

Karen Yeung is of a similar view and observes that post war industrialised western countries envisaged a greater role for the state in economic activity (Yeung 2010: 65). In Yeung’s words

‘There was widespread social consensus that the role of the state was that of macroeconomic planning, market stabilisation, the provision of

welfare, and acting as employer of last resort. To fulfil these ambitions, many states expanded their control over major resources, most visibly through ownership of key industries, including public utilities such as gas, electricity, water, telecommunications and the railways. This extended the state's capacity to effect changes to macroeconomic policy unilaterally through discretionary direct intervention in the activities of key industries. The hierarchical authority exerted by the state over significant swathes of industrial activity was replicated in the organisation of the state's bureaucratic apparatus, through a departmentally organised central government with executive control lying in the hands of a Minister situated at the pinnacle of each departmental hierarchy' (Yeung 2010 :65-66).

Giandomenico Majone observes that the move to nationalise utilities such as gas, electricity, telecommunications, etc., which were considered as 'natural monopolies', 'was to protect the public interest against powerful private interests' (Majone 1994:78). He however emphasises that 'the purpose of public ownership was not simply to regulate prices, conditions of entry and quality of service, but also to pursue many other goals including economic development, technical innovation, employment, regional income redistribution, and national security' (Majone 1994:79). In other words, regulation in an interventionist state viewed economic regulation as part of the larger social and political dynamics and sought to achieve inter-related goals including regional distribution, employment, etc.

The period after the Second World War also witnessed many newly independent developing countries embracing the notion of an interventionist

state, often as a reaction to the 'free-market' approach of the colonial state (Chang 2003:4). The tilt towards state interventionism by newly independent states saw them leaning towards a welfare state model, with the state investing in industrial activity geared towards import substitution and development of an industrial base (Chang 2003:22-23). Another state interventionist policy adopted primarily by the emerging East-Asian economies such as Japan, Korea and Singapore in the post-war period has been defined as the developmental state model. The notion of the developmental state holds that 'economic development requires a state which can create and regulate the economic and political relationships that can support sustained industrialization' (Chang 1999: 183). Immediately after attaining independence in 1947, India adopted an interventionist role for the state in economic activity. This aspect will be explored in Chapter 3, which undertakes a chronological examination of the dynamics of the Indian state culminating in the emergence of its unique regulatory attributes.

#### 2.2.2. Neoliberal Economic Policies and Roll-back of the Interventionist State

The 1980s and 1990s once again witnessed a contestation pertaining to the role of the state in economic activity (Chang 2003:1). This time the argument was against state interventionism, favouring a roll back of the state. This was reflected in the collapse of the Soviet Union, which led to the introduction of capitalism in Eastern Europe and the abolition of economic planning (Chang 2003:1). Chang categorises the 'anti-interventionist' theories under the broad nomenclature of 'neoliberalism' (Chang 2003:19). This thesis uses the term 'neoliberalism' to name an approach advocating the withdrawal or reduction of role of the state in economic activity. The neoliberals critiqued the state

interventionist model of economic development.<sup>3</sup> Chang notes that the neoliberal critique of the interventionist state questioned the role of the state as ‘a guardian of public interest’ (Chang 1999: 183). Those advocating neoliberal economic policies portrayed the state ‘as an organization controlled by interest groups, politicians, or bureaucrats who utilize it for their own self-interests, producing socially undesirable outcomes’ (Chang 1999: 184).

In the context of this thesis, the term regulatory state is used to connote a roll-back of the state from the policy of interventionism associated with the welfare state and the developmental state.<sup>4</sup> The term ‘regulatory state’ will be used in the forthcoming chapters to mean and include certain characteristics that Yeung identifies across the differing variants of the regulatory state in the EU, the US and the UK (Yeung 2010:75). These are, a. the notion of separation between the policy making and service delivery functions of the state; b. regulatory agency as the institutional arrangement intended to give effect to the roll back of the state in economic activity and c. the necessity to depoliticise economic decision making in the interest of encouraging economic efficiency and competitiveness (Yeung 2010 :75).

### 2.2.3. Regulatory State as the Neoliberal Embodiment of the Role of the State in Economic Activity

Yeung observes that the term ‘regulatory state’ is essentially an analytical construct and that neoliberal scholars have given it a normative flavour to

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<sup>3</sup> It is to be noted that Majone’s (1994) observations are with regard to the welfare state in Europe whereas Chang’s (1999) pertain to a developmental state in East Asia, however since both the models argue for the need for an interventionist state in the public interest, they are being discussed together here.

<sup>4</sup> Yeung argues that the notion of the ‘regulatory state’ cannot be deployed to mean a singular set of characteristics, and that there are several variations regarding what can be termed as a regulatory state (Yeung 2010 :76).

mean 'minimal state intervention for the purpose of correcting market failure' (Yeung 2010:71). The notion of a regulatory state in other words is premised on the neoliberal critique of the interventionist state.

The objective of public regulation in a regulatory state differs from that of an interventionist state. As discussed, the objective of regulation in an interventionist state was not just to regulate prices but had 'many other goals including economic development, technical innovation, employment, regional income redistribution, and national security' (Majone 1994:79). Observing the emergence of a regulatory state in Europe, Majone states that 'regulation has a single normative justification: improving the efficiency of the economy by correcting specific forms of market failure such as monopoly, imperfect information, and negative externalities' as opposed to the numerous and 'conflicting' regulatory objectives in a welfare state (Majone 1994:79). Thus, state regulation in the regulatory state is confined to economic issues alone. Yeung observes that 'Majone's account of the emergence of the European regulatory state resonates with rational choice theories, at least to the extent that individuals and institutions are portrayed as self-interested, rational actors seeking to maximise their power and position' (Yeung 2010:70). Majone further observes that the regulatory agency is the institutional solution to enforce the insulation of economic decision making from politics (Majone 1994:84).

Chang questions the neoliberal critique of the interventionist state. He is of the view that, but for critiquing the state and advocating a reliance on the market, the neoliberals do not give any indication as to the nature of markets (Chang 1999: 188). He is critical of the neoliberal policy suggestion 'that developing

countries should copy the Anglo-Saxon economic institutions characterized by arm's-length relationships between contracting partners', as prevalent in the developed world, and their insistence on a singular universal institutional solution (Chang 1999: 188). The Bank's regulatory model for the electricity sector as adopted by Andhra Pradesh was based on a similar neo-liberal policy suggestion and advocated a singular institutional arrangement across jurisdictions, irrespective of their regulatory attributes.

Schneiderman says that economic globalisation institutionalises the political project of neo-liberalism. Schneiderman gives the illustration of the 1980s debt crisis in Latin America which led to an active push towards the privatisation model at the behest of the Bank in countries that had socialist constitutions. Schneiderman opines that, with the fall of the Soviet Union, these countries had 'far fewer political options' available apart from privatisation (Schneiderman 2001:88). The institutionalisation of political project of neo-liberalism occurs through 'rules and structures' aimed at creating a 'global vision of economic policy, property rights, and constitutionalism' (Schneiderman 2001:83). In this regard, Schneiderman uses the term 'constitutionalism' to imply a spirit or flavour of the constitutional scheme (Schneiderman 2001: 83). He observes that neo-liberal constitutionalism requires state institutions to give precedence to economic considerations over political ones (Schneiderman 2001:85). That the political project of neo-liberalism requires the state to 'recede from the market and that limits should be placed on the redistributionist capacity of the State' (Schneiderman 2001:85). The project of neo-liberal constitutionalism involves controlling the

government through constitution or ‘constitution-like limitations’ restraining it from interfering in the market (Schneiderman 2001:85).<sup>5</sup>

#### 2.2.4. Neoliberal Economic Globalisation and Developing Countries

In a developing country context, Chang observes that

‘[t]he neoliberal attack was, more than anything else, a “political economy” attack. The neoliberals argued that the apparent policy “errors” in many less developed countries (LDCs) had deeper causes than the technical incompetence of their bureaucracies or the “irrational” goals imposed by the political rulers, namely, the nature of interest groups and the nature of the state’ (Chang 1999: 189).

He observes that, after attacking the dynamics of the political economy in the interventionist state, the neoliberals went a step further and argued for ‘depoliticizing the economy’ (Chang 1999: 190). The neoliberals ‘regarded politics as an “irrational” corrupting force that prevents a rational management of the economy. The neoliberals hold that the conflicting desires of different individuals and groups can be best reconciled by the “invisible hand” of the competitive market and that “political” resolutions of these differences will subject the process to abuses by those with privileged access to political power’ (Chang 1999: 190). The influence of interest groups in the nature of rich farmers, industrialists and bureaucrats on the Indian state during the interventionist phase will be discussed in Chapter 3. The notion of insulating economic decision making from political influence becomes essential in the

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<sup>5</sup> Amongst others, Schneiderman lists limitation on the redistributionist function of the state and the establishment of institutions which facilitate the same as examples of ‘constitution-like limitations’ (Schneiderman 2001:85).

Indian context, where the Constitution framers linked the state's role in economic activity with electoral expectations from the state.

Neoliberal reforms aimed at establishing a regulatory state in developing countries were implemented under duress from multilateral organisations like the Bank, the International Monetary Fund and bilateral donors (Dubash and Morgan 2013:4; Chang 2003:1). In other words, the reforms advocating a roll back of the state in developing jurisdictions were externally driven, as opposed to the internal notion of an interventionalist state that emerged in response to the laissez faire policies of the colonial state. India too embraced the neoliberal notion of the regulatory state, which aimed to insulate economic decision-making from political considerations, as a pre-condition to avail the Bank and International Monetary Fund's assistance owing to an external balance of payments crisis and internal fiscal deficits in the early 1990s. Dubash and Morgan correlate the establishment of a regulatory state in developing jurisdictions with the establishment of regulatory agencies in pursuance of state law owing to external pressures to promote economic efficiency (Dubash and Morgan 2013:3-4). As discussed earlier, the regulatory agency is the institution which enforces the actor relations envisaged by the regulatory state (Majone 1994; Yeung 2010). Chapters 5 and 7 will consider the World Bank's sponsorship of legislative reforms aimed at institutionalising regulatory agencies to usher in a regulatory state in the Indian electricity sector.

### **2.3. Depoliticising Economic Regulation and Bank Sponsored Legal Reform**

The neoliberals sought to transform the role of the state in economic activity by means of legal reform, establishing institutions which insulated economic

decision-making from political considerations. Lawrence Tshuma notes that the Bank has taken a lead in this legal reform initiative involving other regional development banks and bilateral donors (Tshuma 1999:76). The Bank's approach to legal reform reflected the neoliberal Washington Consensus which advocated a shrinkage of the state (Faundez 2010: 183-184). In the reforms proposed by the Bank, '[l]aw has been accorded a pre-eminent role in confining the state to its proper place in the new neo-liberal dispensation' (Tshuma 1999:76).

Julio Faundez observes that legal reform meant tinkering with matters of policy, which was essentially political and beyond the Bank's scope of intervention (Faundez 2010: 182). However, the neoliberal Washington Consensus required 'institutional transformation' and this facilitated the Bank's foray into legal reform which was part of its governance agenda (Faundez 2010: 181-183). Tshuma states that the Bank defended its foray in to governance reforms stating that though its previous programmes were 'technically sound' they did not produce the desired outcomes given the shortcomings in the recipient government (Tshuma 1999:79). The Bank 'made it clear that it is concerned with law reform only in so far as it relates to economic development' (Tshuma 1999:81). Tshuma observes that the 'Bank perceives the legal reforms it finances as technocratic and apolitical in character' (Tshuma 1999: 83). He disagrees with this view of the Bank and opines that

'law reform by its very nature is a political process involving choices about restructuring social relations and the means of achieving them. As conceived by the Bank, law is an instrument of government for

achieving economic development. In this respect, it is an instrument of state power and its making and application involves gains and losses for different groups in society' (Tshuma 1999:83).

In the context of the separation of economic decision-making from politics, which forms the basis of the regulatory state, Chang wonders if depoliticisation can ever be possible, and whether it might only result in disempowering certain sections of society to the benefit of others (Chang 1999: 190-191). He gives the illustration of the weakening of labour unions in the interest of capitalists. Amongst other functions, he argues that the functions of 'coordination' and 'conflict management' are integral to the role of the state in the economy (Chang 1999:192-197). He observes that the earlier purpose of development economics by the state was coordination to ensure that there are 'complementary investments' (Chang 1999: 192). With regard to 'conflict management', Chang argues that economic development necessarily implies reallocation of resources towards more productive endeavours and that the same gives rise to conflicts (Chang 1999). He gives the example of reallocation of resources meant for agriculture to industrial activity as an example of the same (Chang 1999: 196). He is of the view that the state has no other option but engage with the issue of conflict management. In his words

'The question is not whether the state should be involved in such conflicts, because, as the ultimate guarantor of property and other rights in the society, it is bound to be. The real question is how the state can manage such conflict in a forward-looking manner or, more concrete, help different groups in the society to come to an (explicit or implicit) agreement by which the losers would accept the need for adjustment

and the gainers would compensate them for the burdens of such adjustment' (Chang 1999: 196-197).

Tushma's observation regarding the impossibility of a depoliticised role for state law and the inevitability of legal reform to affect the interests of different sections of society corresponds with Chang's view that economic development necessarily involves reallocation of resources and generates conflict between different sections (Tshuma 1999; Chang 1999). As discussed earlier, Chang holds that neoliberalism champions the cause of markets and does not offer viable answers to the question of the nature of markets. It advocates a singular universal institutional solution adopted in developed jurisdictions as the framework for facilitating the functioning of markets around the world (Chang 1999: 188). Tshuma explores this notion in the context of the legal solutions proposed by the Bank when endeavouring to roll back the interventionist state. He notes that the Bank's rule of law reform projects focus on formal state law and institutional reforms based on the notions of new institutional economics (Tshuma 1999). He observes that the work on legal pluralism and the notion of semi-autonomous social fields demonstrate the limitations of formal legal interventions and that the interaction between the formal and informal institutions produce 'unintended consequences' (Tshuma 1999:91). This thesis endorses Tshuma (1999) and Chang's (1999) view that reforms aimed at depoliticising economic decision-making reallocate resources and create winners and losers. The thesis also argues that the neoliberal universal institutional solution aimed at insulating economic decision making from larger social and political processes will not achieve the desired results. This is demonstrated through the experience of the State of Andhra Pradesh in

implementing the Bank's institutional solution aimed at insulating economic decision making from social and political processes in its electricity sector, which is discussed in Chapters 7 and 8.

## **2.4. A Spatial Analysis of Regulatory Interventions**

### 2.4.1. Regulatory Space

As discussed earlier, this thesis focuses on the interactions between the state and economy and the impact of state initiated legal interventions on economic activity. Bettina Lange is of the view that the interaction between state and economy cannot and does not take place in a 'vacuum' (Lange 2003:413). It is the space within which these interactions take place that helps identify the 'space of legal regulation' (Lange 2003:413). It is argued that a spatial approach helps us understand the local regulatory dynamics in order to strategize responsive interventions as opposed to the singular institutional architecture of the regulatory state. A spatial analysis, by contextualising state legal regulation within the matrix of the wider political economy, helps us understand the reasons for what Tshuma (1999) calls the unintended consequences of legislative interventions and accompanying institutions mirroring the neoliberal role of the state.

Lange categorises the meanings assigned to 'space' in legal regulation into 'abstract' and 'geographical' (Lange 2003:414). The abstract portrayal of space occurs through the invocation of concept of 'regulatory space' as an analytical construct (Lange 2003:414; Hancher and Moran 1989:277).<sup>6</sup> The

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<sup>6</sup> The phrase 'regulatory space' has been deployed by different authors for different purposes, Hancher and Moran (1989) have used it as an 'analytical construct', Colin Scott (2001) has

concept of 'space' shall be used both as an analytical construct and in geographical or territorial terms in the course of this thesis. As Hancher and Moran explain 'dimensions and occupants can be understood by examining regulation in any particular national setting, and by analysing that setting in terms of its specific political, legal and cultural attributes' (1989:277). Therefore, though initially appearing to be an abstract framework, the analytical construct helps study peculiarities of a geographical space (or any other imagined or demarcated space) based on its unique legal, political and cultural features.<sup>7</sup> According to Colin Scott, the concept of 'regulatory space' is 'linked to economic, sociological and political theories which emphasise the role of institutional structures (such as legal culture and organisational forms) in shaping change and public policy outcomes'(Scott 2001:333).

Hancher and Moran reject both public interest and private interest theories and associated claims regarding the capture of regulatory power, and view organisations and associated organisational status as having an important role in economic regulation (1989:273-274). Spatial analysis of regulation acknowledges that the occupants of the space are competing for spatial advantage in a struggle involving relationships of power dictating who are included and excluded from the dynamics of the space (Hancher and Moran 1989:277). A 'regulatory space' approach therefore helps generate a nuanced

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used it as a 'metaphor' and Frank Vilbert (2014) has used as a means of 'social framing'. This chapter and the thesis as a whole use the phrase as an analytical construct.

<sup>7</sup> Though the present discussion pertaining to attributes of space takes a geographical approach, Hancher and Moran are of the view that the concept of regulatory space need not necessarily be restricted to territorially situated communities and can also be deployed from an individual sectoral perspective. Amongst others, Hancher & Moran give examples of the automotive and the pharmaceutical sectors (Hancher and Moran 1989:277).

understanding of dynamics within the national space, helping one understand the role and limitations of state initiated legal regulation (Hancher and Moran 1989). Scott observes that an approach associated with regulatory space differs from the 'New Institutional Economics' approach and does not consider the relationship between the regulators and regulatees to be hierarchical (Scott 2001:351). As will be discussed in the course of this thesis, such a non-hierarchical approach to regulation helps one understand the way society responds to regulatory interventions.

Scott associates the regulatory space analysis with theories in public policy and law which 'emphasise pluralism in legal and policy processes' (Scott 2001:332).<sup>8</sup> He agrees with Hancher and Moran that the nature of relationship between the actors in the regulatory space is defined by interdependence and that 'fragmented possession of resources within the regulatory space is central to the more pluralistic re-conceptualisation of regulatory processes' (Scott 2001:335; Hancher and Moran 1989:275). He opines that 'regulatory authority and responsibility are frequently dispersed between a number of organisations, public and private, and that authority is not the only source of power within a regulated domain' (Scott 2001:331). The 'dispersed nature of resources between organisations' within the shared space make them interdependent and that the regulator 'lacks monopoly over formal and informal authority' (Scott 2001:330). Lange terms these interrelated and interdependent processes as described by Scott, Hancher and Moran to illustrate the 'bounded nature of legal regulation' i.e. legal regulation as being

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<sup>8</sup> The complementarity of a spatial approach to regulation to an analysis identifying legal pluralism shall be further discussed in Chapter 6 of the thesis.

intricately associated with societal processes (Lange 2003:414). In the Indian context, the unique attributes of the political economy which emerge as a result of constitutionally engineered dynamics will be relied on to characterise the nature of the space. In terms of geographical deployment of the notion of space, this thesis discusses the implications of adopting globalising regulatory norms for the national state, the States and the electricity sector in India.

#### 2.4.2. Less than Intended Consequences of Regulatory Globalisation

Scott summarises the concept of regulation in the context of the notion of 'regulatory space' as 'a conception of regulation in which relations between organisations within regulatory domains are perceived as interdependent and the subject-matter of strategic action, but within which the institutions of culture and organisational form play an important role in delimiting the range of possible actions which the interdependent actors may take' (Scott 2001:333). It is argued that, though abstract concepts, the notions of 'culture' and 'organisational form' help delimit the space and predict the nature of interactions within it, making the analytical construct of 'regulatory space' a reliable framework for analysis of actor interaction within a community, geographical location, economic sector etc. (Scott 2001; Lange 2003).

According to Lange, '[I]inking an analysis of space and culture also highlights the social construction of space and hence guards against its reification' (Lange 2003:414). The importance of culture in a spatial analysis (both in its abstract and geographical sense) of regulation is further expanded by Fiona Haines (2003). Haines uses the term 'regulatory character' to observe 'the interaction between social norms and formal laws' with reference to the

implementation of international regulations or the translation of international regulation in local contexts (Haines 2003: 463-464).<sup>9</sup> Haines is of the view that '[r]egulatory character is in a sense a distillation of economic, political and cultural history' (Haines 2003:468). She states that '[r]egulatory character provides the resources for both understanding and acting within a given set of circumstances and critically establishes the means to exert power and influence' (Haines 2003:469). Haines is of the view that, such an analysis 'provides a means to understand how the 'macro' environment ('globalization') intersects with and is incorporated into the local environment. Finally, it can explain both the uniqueness of a given context as well as resonance of one context with another' (Haines 2003:469). Haines argues that '[g]lobalization interacts with regulatory character, but regulatory character has an integrity which means that the effect of global policies may be less than intended' (Haines 2003:482). As discussed earlier, Tshuma voices a similar opinion with regard to legal interventions accompanying economic globalisation and states that the 'unintended consequences' may include the emergence of legal pluralism (Tshuma 1999:91). In the context of impact and implementation of externally generated norms given the national context Sally Engle Merry observes that incorporation of international commitments into national practice necessarily involves a 'cultural translation' of 'legal transplants' into the local context (Merry 2006:134-135). In Merry's words

'[t]ranslation is the process of adjusting the rhetoric and structure of these programs or interventions to local circumstances. Appropriated

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<sup>9</sup> Haines herself only describes the phenomenon and acknowledges an anonymous referee for coining the term describing the phenomenon.

programs are not necessarily translated, but they are more likely to be popular if they are. On the other hand if they are translated so fully that they blend into existing power relationships completely, they lose their potential for social change' (Merry 2006:135-136)

Dubash and Morgan are of the view that 'rule based' institutional solutions may not be the best way forward for developing jurisdictions and that they may not have the desired effect (Dubash and Morgan 2013:279). They advocate the need to understand the regulatory state in developing country context as 'as positioned on a spectrum "between rules and deals"' (Dubash and Morgan 2013:279). According to them

'[t]oward the rules end of the spectrum, rational, technocratic rule-based regulation that rests on the separation of efficiency and distribution provides feasible and effective solutions to governance problems. Towards the deals end of the spectrum, rule-based regulation operated by independent regulators is unlikely to result in effective governance solutions. When rules are created, they are under stress because the underlying political pressures for deals remains in place, and institutional capacities and norms are insufficiently developed to resist these pressures' (Dubash and Morgan 2013:281).

This however does not mean that regulation becomes 'irrelevant', in their words, for the 'deals end of the spectrum, but instead that its function shifts from defining, monitoring, and enforcing rules, to shaping, constraining, and legitimating spaces for negotiation' (Dubash and Morgan 2013:281). To give effect to these arrangements they advocate the notion of 'embedded

autonomy', leaning on the literature of the development state, and advocate an 'embedded regulatory state' and proceduralisation involving deliberative politics (Dubash and Morgan 2013:289-293).

This thesis endorses Haines's (2003) view on the 'less than intended' effects of regulatory globalisation owing to a jurisdiction's unique regulatory attributes. It also endorses Dubash and Morgan's (2013) view that rule based regulation will not be able to bring about desired changes in developing jurisdictions as politics will always influence the implementation of the regulatory arrangements. The thesis however does not agree with Dubash and Morgan's view that a regulatory state is the way forward for developing countries in the Indian context as it argues that the Indian state's non-autonomous nature makes it impossible to institutionalise a particular normativity.

#### 2.4.3. Regulatory Globalisation and Legal Pluralism

Both the institutionalist notion of 'regulatory space' and the phenomenon of 'legal pluralism' rely on an analysis of relative power in the interaction between societal actors, necessarily implying a dispersal of power across the social spectrum as opposed to the notion of a state monopoly of regulatory power, which is the premise of legal centralism. Scott observes that the analytical construct of regulatory space complements the approach of legal pluralism by facilitating an analysis based on power relationships within the social sphere as opposed to portraying law and legal processes as being associated with the state alone (Scott 2001).

The emphasis of a spatial analysis on the unique social, economic and cultural attributes of a space (Hancher and Moran 1989; Haines 2003) has similarities

to the rejection of a normative vacuum by authors critical of the legal instrumentalist approach to regulatory change (Twining 2004; Griffiths 1986; 2003). It will be argued in the forthcoming chapters that incorporating a global regulatory model into domestic law or endeavouring to bring about normative change through legal instrumentalism, results in legal pluralism.

The thesis observes that the Bank's approach to regulatory change reflected a state-centric instrumentalist approach. This involved assuming a normative vacuum prior to the introduction of legislation. William Twining is of the view that an ideal type pertaining to legal diffusion only perceives a 'Blank slate' or a vacuum to be filled, ignoring social phenomena in the nature of 'struggle' and 'resistance' (Twining 2004: 17). John Griffiths voices a similar opinion; he argues that legal instrumentalism assumes a 'normative vacuum' in the process of communication of the legislative intent to the individual recipient (Griffiths 1986:33-34). Griffiths approaches legal instrumentalism from the perspective of legislative attempts, premised on a normative vacuum in a society, to reorder pre-existing societal relationships (Griffiths 1986; 2003). He argues that such a simplistic approach to state legal interventions results in legal pluralism. Griffiths's argument regarding the absence of a normative vacuum preceding the introduction of legislation is similar to Lange's observation that the interaction between state and economy cannot and does not take place in a 'vacuum' (Lange 2003:413). Griffiths notes that the absence of a vacuum is reflected in 'pre-existing societal relationships' (Griffiths 1986). This in turn is comparable to the notions of unique attributes of a particular space (Hancher and Moran 1989; Haines 2003). The regulatory space approach taken in the course of this thesis allows one to observe the way in

which legal interventions are influenced by 'pre-existing, societal relationships' culminating in the emergence of legal pluralism. The phenomenon of legal pluralism emanating as a result of regulatory interventions accompanying economic globalisation will be discussed in greater detail in Chapter 6.

## **2.5. Notion of Living Constitutions and Evolution of Unique Attributes of a Space**

### 2.5.1. Living Constitutions

A living constitution approach brings to focus the implications of judicial interpretation, political mandates and regulatory legislation to the constitutional scheme (Ackerman 2007).<sup>10</sup> As the thesis explores the role of state law in restraining the state's role in economic activity, this approach helps better understand the nature of the Indian state. Ackerman terms this historical understanding of the constitution, incorporating landmark statutes, judicial interpretation and political mandate, an 'organic approach' as opposed to a 'mechanical' one, i.e. an understanding relying on the text of the constitution. Ackerman however hastens to emphasise reliance on an 'organic approach' should not ignore the relevance of 'foundational machinery' i.e. the text of the constitution (Ackerman 2007: 1810).

A living constitution approach does not merely view a constitution as a document constituting a state, a polity, and economic activity therein, but views

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<sup>10</sup> Colin Scott, relying on Ackerman, states that 'it is frequently misleading to restrict the concept of constitution to those instruments because an array of accompanying norms and processes tend to spring up within constitutional practice which, together with the foundational documents, comprise the "living constitution". Indeed these additional elements of a living constitution are not restricted to judicial pronouncements interpreting constitutional texts, but extend also to actions and processes that engage the legislative and executive branches of government' (Scott 2010:25).

the relationship between them as being reflexive and responsive. It allows for an analysis of the influence of non-state processes and political developments on the constitution. A living constitution approach helps identify the true nature of the state in a jurisdictional context, transcending the limitations of the written word and acknowledging the role of non-state or informal processes and politics in shaping the nature of the state. The same makes an approach of living constitutions compatible with approaches of legal pluralism and regulatory space, which analyse actor relationships from the perspective of power dynamics as opposed to the notion of attributing hierarchical power and authority to a state and its agencies alone. More importantly, the living constitutions approach complements an exercise exploring the strengths and limitations of state law, and helps identify the plural legal processes by ascertaining the nature of the state and state law in India.<sup>11</sup>

There are three main characteristics of this approach. The first factor being the very role of constitutions which are the juridification of a particular political consensus (Grimm 2005: 447) of the role of the state vis a vis citizens and across every conceivable aspect of national life including economic activity. This also strengthens Hancher & Moran's and Fiona Haines's argument that the conceptualisation of the role of law in a community is closely tied with political, cultural and democratic expectations from the state (Hancher and Moran 1989:272; Haines 2003). The second factor is that a living constitution approach acknowledges the influence of both the internal and external factors in constitutional development. In the context of this thesis, it takes into account

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<sup>11</sup> The notion of 'living constitutions', for the purposes of this thesis, is assumed to subsume the concept of 'political constitutionalism'.

the role of global, national and State level dynamics in determining the role of the Indian state in economic activity. This becomes important in the present endeavour in gauging the impact of external regulatory influences. The third factor is that 'living constitutions' approach incorporate a simultaneous coevolution of the legal, political and economic aspects defining the nature and role of the state. This approach informs the examination of the dynamics of the regulatory space of the national state and the State of Andhra Pradesh in course of this thesis.

### 2.5.2. Regulatory Interventions and Living Constitutions

Richard Rawlings suggests that regulatory choices have constitutional implications and share a reflexive dynamic with the constitution (Rawlings 2010:9). This approach has been endorsed by Colin Scott (Scott 2010: 24), who is of the view that 'the routinisation within government of new mechanisms for monitoring and controlling such things as public expenditure and the promulgation of new regulatory rules also has the potential to fundamentally affect the stock of constitutional controls over the exercise of power.' In other words, it is not just judicial interpretation but executive and legislative actions that have the effect of altering a constitution (Scott 2010:25). As observed earlier the regulatory arrangements imposed by multilateral financial institutions and bilateral donors aim to restrain the state (Tshuma 1999; Faundez 2010) and therefore have constitutional ramifications. External developments in the nature of changing 'international economic environment' have been observed to have implications for domestic 'constitutionalism' (Schneiderman 2001:87). The thesis explores the impact of regulatory interventions undertaken at the Bank's insistence on India's constitutionalism.

### 2.5.3. Electoral Expectations and Living Constitutions

This thesis argues that constitutional dynamics, incorporating electoral expectations, impart a unique flavour to the role of the state in economic activity in India. This has also limited the efficacy of the reforms aimed at establishing a regulatory state in India, and this is evident in a study of the reforms in the State level electricity sector in Andhra Pradesh. Ackerman, emphasises the effects of ‘popular mandate’ (Ackerman 2007:1774) on the scope and content of a constitution.<sup>12</sup> Ackerman’s observation on the relationship between constitution and popular mandate in the context of an organic interpretation can be related to Neil Walker’s rejection of a strictly legal interpretation of the polity (in his words ‘Kelsenian’) and instead ‘to posit the mutual constitution of law and politics in a dynamic and ongoing process’ (Walker 2002:340).<sup>13</sup> This approach reinforced by Dieter Grimm’s view that constitutions should only juridify certain political expectations and not aim to

‘assert total juridification of the state. That would render politics impossible and ultimately dissolve it into a mere implementation of the constitution. The constitution is not to make politics superfluous but only to channel it, commit it to certain principles, and contain it within certain limits. It prescribes certain principles and procedures, not outcomes. But it is comprehensive insofar as no one who lacks constitutional

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<sup>12</sup> Ackerman in this context relies on the example of the U.S. Civil Rights Act of 1964.

<sup>13</sup> Neil Walker makes this observation in the context of developing his argument on constitutional pluralism given the limitations of a Westphalian model in a post-Westphalian order. Upon a reading of Neil Walker’s description of a Westphalian model as conceptualising the statist constitutional project post-French-revolution (Grimm 2005), it can be reasonably gathered that the model relies on a hierarchical organisation of control over the exercise of public power (made coextensive with state power) through the constituent document.

legitimation is entitled to exercise public power, and no act of rule can claim validity that is not consistent with constitutional requirements' (Grimm 2005: 452).

Hancher and Moran also visualise legal regulation as an expression of the popular will reflecting the shared conception of role of law in a particular community. To quote them,

'The exercise of public power, in other words, rests on legal authority, and this legal authority is made legitimate in turn by appeal to popular will. Of course by no means all economic regulation is cast in the form of legal rules, but the central importance of the principle of constitutionalism means that the range and form of regulation is deeply influenced by the particular conception of the scope and purpose of law which prevails in any particular community at any particular time' (Hancher and Moran 1989:272).

Haines endorses the centrality of politics alongside the geographical place of regulation when examining 'regulatory change' (Haines 2003:466). The thesis argues that the dynamics set in motion by the framers of the Indian Constitution associating the scope and content of the role of the state in economic activity with electoral expectations led to a reflexive relationship between the two.

## **2.6. Conclusion**

This thesis therefore takes the position that legislative arrangements regulating economic activity are not value neutral, but are informed by an underlying normativity associated with the role of the state in economic activity.

For the purposes of the present discussion of the role of the Indian state in economic activity, the chapter categorises these normativities into 'interventionist' and 'regulatory'. The thesis analyses the legal interventions through the framework of 'regulatory space', which argues that legal interventions are influenced by the social, economic and political dynamics unique to a particular jurisdiction. By endorsing a regulatory space approach, the thesis disagrees with the neoliberal notion that economic decision-making can be insulated from the larger political and social processes by means of institutions established in pursuance of state law. The notions of 'regulatory character' and the unique attributes of the regulatory space help identify the characteristics of the social and political processes. The thesis further takes the position that the so called apolitical legal reform is itself political in nature as it influences the allocation of resources, creating winners and losers. The notion of living constitutions helps contextualise the implications of the dynamics of regulatory space in terms of the state and state law. The living constitutions approach also becomes relevant in the Indian context where the framers of the Constitution made a conscious choice to not over juridify the role of the state in economic activity, but rather to link it with electoral expectations from the state. The next chapter tries to chart India's regulatory attributes in the context of the role of the state and state regulation in economic activity. It does so by tracing the co-evolution of the political, economic and the legal processes from 1947 till 2014. This will be undertaken within the context of the larger global shift from an interventionist state to a regulatory state.

### **3. Tensions in the Indian State and the Emergence of Unique Attributes of the Role of the State in Economic Activity**

#### **3.1. Introduction**

The chapter brings to the fore tensions in the Indian state (both national and State) arising from competing conceptualisations of its role in economic activity. These tensions arise owing to the state in India being susceptible to both external (global) and internal (societal) pressures from different interest groups. The presence of tensions associated with the role of the Indian state in economic activity also imply that the space between the state and society mediated through law is not a vacuum but comprises competing interests. It is argued that an understanding of the nature of these tensions helps establish the nation's regulatory attributes and that this helps predict the efficacy and limitation of state law and to devise responsive legal interventions. The tensions are traced on the basis of two broad self-projections of the Indian state in economic activity i.e. that of an interventionist state from 1948-1991 and a regulatory state from 1991-2014.

It is argued that an understanding of the national regulatory attributes is essential in the context of understanding the State level regulatory character of the electricity sector. This is because the constitutional scheme has bestowed increased power (i.e. executive, legislative and fiscal) on the national government. Such centralisation made many a commentator opine that India is a federation with a unitary bias. From a sectoral perspective, mapping of the national space and role of national state becomes important as electricity is in the 'concurrent' legislative list in the Constitution, allowing both national and State governments to participate in the sectoral economic

and regulatory activity.<sup>14</sup> Also, although the sectoral political dynamics came to be increasingly associated with the States, the States were dependent on the national state for sectoral investments. The national state also influenced the sectoral investments through national finance corporations and through its ability to channel private investments to the States. Subsequently in the mid-1990s, given the changing global perception of the role of the state in economic activity, the national government began persuading the States to withdraw from sectoral economic activity. This was sought to be implemented through legal instrumentalism, i.e. by changing the sectoral state law.

This chapter traces the emergence of unique regulatory attributes from the interventionist phase emanating from the political struggle against the colonial state. This was in keeping with the then post-war global consensus on the role of the state in economic activity. The chapter then traces the attempts by the national government to establish a regulatory state owing to the influence of international financial institutions, such as the Bank and IMF, and the democratic resistance to the same. The chapter concludes by identifying five unique regulatory attributes of the role of the Indian state in economic activity. These are, firstly, the influence of changing global notions of the role of the state in economic activity on the Indian state. Secondly, relative weakness of the Indian state vis-à-vis social forces. Third, the continued dominance of the state as an engine of economic activity and its ability to influence economic change. The fourth attribute being the entrenched interests of a 'heterogeneous' and 'dominant coalition' (Bardhan 1998). This coalition

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<sup>14</sup> Item 38 of the Concurrent List in Seventh Schedule to the Constitution of India. Article 246 of the Constitution of India titled 'Subject-matter of laws made by Parliament and by Legislatures of States' facilitates the concurrent exercise of legislative and executive powers.

comprises industrialists, rich farmers, career bureaucrats and the politicians who act as middle men to ensure continued privileged access to resources for these groups to the exclusion of other groups. The fifth attribute is the non-autonomous nature of the Indian state owing to the tensions generated by the groups vying for its resources, the intra-institutional tensions between the judiciary on the one hand and the executive and legislature on the other, and between the national state and the State level state.

The chapter adopts the spatial approach to regulation discussed in Chapter 2, whilst observing the actor interactions across the interventionist and regulatory state phases in India. It also relies on the living constitutions approach to trace the co-evolution of the political, economic, legal and societal developments contributing to the emergence of the unique regulatory attributes of the Indian state.

### **3.2. Democratic Political Process and Role of the Indian State in Economic Activity**

India achieved independence from the United Kingdom in 1947, after the Second World War, and the Indian Constitution came into force on 26<sup>th</sup> January 1950 because of the efforts of an elected Constituent Assembly. The framers of the Constitution, whilst emphasising interventionism, did not deem it appropriate to juridify a particular ideology regarding the role of the Indian state (national and State) in economic activity. They considered it appropriate that the role of the state in economic activity be determined through the electoral processes, thereby moulding the state's role to dynamic political expectations. This section discusses the constitutional origins of the same.

### 3.2.1. The Freedom Movement, Political Expectations and Role of the State in Economic Activity

Electoral politics in India can trace their origins to the Government of India Act of 1935 of the British Parliament (Austin 1972:17). There was a gradual evolution of representative politics and enfranchisement of Indians in British India (Austin 1972:40). Many members of the Constituent Assembly, which was an elected body, were part of the electoral process in 1937 and 1946 (Austin 1972:40).<sup>15</sup> The long struggle for freedom, the slow process of transfer of power to the Indian political leaders and the commitment to democratic values of the political establishment gave rise to a culture of democracy in India (Krishna 1995:166). The freedom struggle, in addition to giving rise to national political consciousness, also helped formulate a critique of the economic policies of the colonial state. The 1931 Karachi session of the Congress declared that the Indian state shall own and manage key industries, and economic planning was seen as a means to promote development (Chandra et al 2008:30). This can be seen as a very early indication of the developing linkage between political expectations and the role of the state in economic activity in the Indian regulatory space. This required an expansion of the Indian state from what Sudipta Kaviraj describes as the marginality of the colonial state, as reflected in its 'limited public sphere' (Kaviraj 2000:43-46). The next section discusses how the framers of the Indian Constitution

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<sup>15</sup> Universal adult suffrage was introduced through Article 326 of the Constitution in 1950.

endeavoured to link the role of the state in economic activity with the democratic expectations from the state.

### 3.2.2. The Role of the State in Economic Activity in the Indian Constitution as Juridification of Political Expectations from the State

Constitutions are considered to be the ‘foundation of legal order’ and as ‘providing the basis of the legitimacy of legality’ (Loughlin 2010:50).<sup>16</sup> The moment of constitution making or, to borrow Upendra Baxi’s phrase, ‘constituent time’ (Baxi 2014: xiii) is an ‘attempt to open a new chapter in the nation’s political development’ (Loughlin 2010:48). As evidenced in the illustration of American and French revolutions, constitutions are formulated at crucial junctures of a nation’s history and promote a ‘particular theory of government’ (Loughlin 2010:48). It is however argued that the notion of ‘constituent time’ itself signifies a culmination of the political developments preceding it, rather than being merely a solitary moment in a nation’s history. This is because written constitutions are also an ‘ideological response to the societal conditions and consensus prevailing during the period of their formulation’ (Sah & Daintith 1993:471). In relation to the role of the state in economic activity, constitutions can be broadly divided into two types: those empowering the state and foreseeing a greater role for the state in the economy, and those which aim to restrain the power exercised by the state.

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<sup>16</sup> Grimm refers to the concept of the adoption of constitutions as ‘constitutionalism’ (Grimm 2005: 453). Schneiderman uses the term more as a spirit and flavour of the constitutional scheme (Schneiderman 2001). Martin Loughlin (Loughlin 2010:55-56) views constitutionalism as the theory of limited government, which requires ‘accepting the authority of the Constitution’ and putting into action institutional arrangements to run the government as per the constitutional goals. Hereinafter unless otherwise specified, the term ‘constitutionalism’ will be used to describe a particular spirit or flavour of the constitutional mandate for the state.

These two broad categories correspond with notions of an interventionist state on the one hand and the neoliberal notion of a regulatory state on the other.

Sah and Daintith are of the view that some constitutions codify the 'political ideology of the economic role of the State' (Sah & Daintith 1993:471). They observe that some 'constitutional systems' are not economically neutral and give the examples of the socialist constitutions of the erstwhile Soviet Union, the Peoples Republic of China and Brazil (Sah & Daintith 1993:465). On the other hand, they categorise the unwritten constitution of United Kingdom as being economically neutral (Sah & Daintith 1993:465). Tony Prosser, in his comparative analysis of the privatisation process in United Kingdom and France (Prosser 1990), notes that, though the privatisation of public enterprises were undertaken in both jurisdictions with similar political motivations, the entrenchment of principles of public ownership in the constitutional scheme generated greater deliberations and judicial pronouncements around the privatisation process in France. The framers of the Indian Constitution foresaw an interventionist role for the state in economic activity, however left its scope and extent to be determined by the democratic political process. The entrenchment of the notion of an interventionist state in the public consciousness, and its percolation into the political processes as evidenced in the electoral expectations from the state, led to popular resistance to the introduction of the regulatory state.

### 3.2.3. Debates in the Constituent Assembly on the Role of the State in Economic Activity and the Directive Principles of State Policy

Granville Austin observes that the members of the Constituent Assembly did not work in a 'vacuum' (Austin 1972: xviii). A deep understanding of the

societal conditions and an accommodative approach dominated the proceedings (Austin 1972: xviii; Chandra et al 2008: 36). The Congress Party's 'long-standing affinity with the Irish nationalist movement made the example of constitutional socialism expressed in the Irish Directive Principles of Social Policy especially attractive to a wide range of Assembly members' (Austin 1972:76). The incorporation of the Irish Directives can be viewed as an instance of the influence of the global on the national constitutional development. The Directives Principles of State Policy (hereinafter Directives) prescribe an interventionist or proactive role for the Indian state (national and States) in economic activity. The Constitution declares the Directives to be 'fundamental in the governance of the country'.<sup>17</sup> The Indian state is duty bound to apply these principles in the course of making laws.<sup>18</sup>

The Directives require the state to reduce inequalities, be they individual, vocational, societal, group or geographical in nature.<sup>19</sup> They require the state to ensure that the distribution of the community's resources serves the 'common good'<sup>20</sup> and that the economic activity does not lead to concentration of wealth and means of production, to the 'common detriment'.<sup>21</sup> At an individual level, the Directives mandate the state to promote equality of access to facilities and opportunities,<sup>22</sup> to promote adequate means of livelihood irrespective of gender;<sup>23</sup> to ensure a living wage, a decent standard of life, full

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<sup>17</sup> Article 37 of the Constitution of India.

<sup>18</sup> Article 37 of the Constitution of India.

<sup>19</sup> Article 38(2) of the Constitution of India.

<sup>20</sup> Article 39(b) of the Constitution of India.

<sup>21</sup> Article 39 (c) of the Constitution of India.

<sup>22</sup> Article 38 of the Constitution of India, titled 'State to secure a social order for the promotion of welfare of people'.

<sup>23</sup> Article 39(a) of the Constitution of India, requires the State to direct its policy towards securing, 'that the citizens, men and women equally, have the right to an adequate means of livelihood'.

enjoyment of leisure and social and cultural opportunities;<sup>24</sup> to promote childhood education,<sup>25</sup> educational and economic interests of the scheduled castes, scheduled tribes and other weaker sections; and to improve standards of living and improve public health.<sup>26</sup> The Directives therefore, very early on, emphasise the relationship between individual capabilities and economic growth, and the role of a redistributionist state in achieving the same.<sup>27</sup> The Directives were not adopted by consensus and their scope and applicability were fiercely debated in the Constituent Assembly. As will be demonstrated in the following discussion, both their enforceability and scope i.e. extent of state intervention, was left to the operation of the democratic electoral processes.

#### 3.2.4. Debates Pertaining to Legal Enforceability of the Directives

The Directives adopted by the Constituent Assembly, though fundamental to the governance of the country, are not enforceable in a court of law.<sup>28</sup> Some members of the Constituent Assembly opined that the Directives would remain meaningless if they were unenforceable and that there was a need to have a specific timeline to make them enforceable (7 C.A.D.:474). Members defending the non-enforceable nature of the Directives were of the view that a court of law may not be able to enforce them even if made enforceable, given their very nature, i.e. involving resource constraints of the state. It was argued

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<sup>24</sup> Article 43 of the Constitution of India, titled 'Living wage, etc., for workers'.

<sup>25</sup> Article 45 of the Constitution of India, titled 'Provision of early childhood care and education to children below the age of six years'.

<sup>26</sup> Article 47 of the Constitution of India, titled 'Duty of State to raise the level of nutrition and the standard of living and to improve public health'.

<sup>27</sup> Amartya Sen points to the complementarity between individual capabilities and economic growth (Sen 2000).

<sup>28</sup> These debates occurred in the Constituent Assembly in the context of adopting the present Article 37 of the Constitution of India. The draft article stated that the Directives are not enforceable in a court of law, but are 'nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws'.

that 'public opinion', as expressed through the cyclical electoral process, will make the government act on their enforcement (7 C.A.D.:475). It is argued that the constituent text, by assigning a proactive role for the state in economic activity and testing its delivery through the political processes, endeavoured to generate a reflexive relationship between state action (including legal intervention), political power and electoral expectations. Since these principles needed to be applied in the law making process, law was to reflect this constitutionally generated reflexivity<sup>29</sup> making the Constitution a living document.<sup>30</sup> As will be argued in course of this thesis, this constitutionally generated reflexivity ensured that electoral expectations determined the role of the state in economic activity.

### 3.2.5. Debates Pertaining to Juridifying a Particular Economic Ideology – A 'Changing Constitution' Approach

The debates pertaining to juridifying a particular economic ideology and its enforceability took place in the course of discussing the scope of Articles 38 and Article 39(b) and 39(c) of the Constitution.<sup>31</sup> It appears that the Constituent Assembly resolved the debate involving choices to be made regarding the normative framework by adopting a procedural solution reflective of the political aspirations from the Indian state, rather than a substantive solution or juridification of the ideological role of the Indian state in economic activity.

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<sup>29</sup> 'Reflexivity' is used to denote the mutually constitutive nature of constitutional law and politics as opined by Neil Walker (2002).

<sup>30</sup> The phrase is used in the context of the notion of a living constitution (Ackerman 2007).

<sup>31</sup> Article 39(b) of the Constitution of India, in its present form, requires the state to direct its policy towards securing 'that the ownership and control of the material resources of the community are so distributed as best to subserve the common good'. Article 39(c) of the Constitution of India requires the state to direct its policy towards securing 'that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment'.

Article 38 (1) mandates that the '[s]tate shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life'.

Quite a few members had objections to this 'vague' phraseology (7 C.A.D.:487). As Damodar Swarup Seth, a member of the Socialist party put it, it 'does not convey any clear indication as to the economic nature of the social order to be established' (7 C.A.D.:487). K. Hanumanthaiya, opined that different perceptions of the role of the state occupied the imagination of governments over a period of time (7 C.A.D.:489-490). He was of the view that, whereas it was laissez faire in the immediate past, it was apparent that socialism held its sway as the preferred mode of governance at the time of the Constituent Assembly debates (7 C.A.D.:489-490). This intervention can be seen as an acknowledgement of the global shifts regarding the role of the state in economic activity. This opinion of K. Hanumanthaiya would turn out to be prophetic with the global turn towards a rollback of the state in economic activity in the 1980s and 1990s.

In the ensuing discussion, it was felt that the phraseology of the Constitution must allow flexibility for all party ideologies to be implemented through it. B.R. Ambedkar, opposing the amendment proposed by Damodar Swarup Seth, which aimed at juridifying the role of the state in economic activity, was of the view that the Constitution endeavoured to promote both political and economic democracy. He was of the opinion that the phraseology of the Constitution must accommodate multiple paths to economic democracy be it individualistic, socialist or communist (7 C.A.D.:494). The phraseology, therefore, aimed at

what Ambedkar termed a 'changing constitution' approach to accommodate different political perspectives, leaving people to make an appropriate democratic choice to be implemented by the elected government (7 C.A.D.:494-495).<sup>32</sup> In other words, the opinion of Ambedkar and others at the Constituent Assembly appear to be in accord with Dieter Grimm's view that constitutions should only juridify certain political expectations and not aim to 'assert total juridification of the state' (Grimm 2005:452).<sup>33</sup> It is argued that though the Indian Constitution is not ideologically explicit, to borrow the words of Martin Loughlin, in its 'theory of government' (Loughlin 2010:48), it envisages a proactive or interventionist role for the state in economic activity, whose economic policy will be reflexive to political expectations.

### **3.3. Practice of Democratic Politics and Rising Expectations from the State – The Nehru Era (1947 - 1966)**

The Nehru era, immediately after independence, laid the foundation for institutionalising democratic processes in India and therefore helped in

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<sup>32</sup> K.T.Shah proposed an alternate phraseology for Article 39 clause (b) and (c) so as to incorporate an explicit 'socialist' mandate within the Constitution. Sibban Lal Saksena, supporting Shah's amendment was of the view that the word 'socialist' must be incorporated in the Preamble to the Constitution (7 C.A.D.: 515-516). He was of the view that the Constitution must explicitly provide for nationalisation of all key industries and that the same must be mentioned in Art.39 (b) of the Constitution (7 C.A.D.: 515-516). Responding to the proposed amendments, Ambedkar was of the view that, he would have considered Shah's amendment if he could be satisfied that the general language of the provision would not be able to address the requirements of Shah's particular use of phraseology. In Ambedkar's words, 'I think the language that has been used in the Draft is a much more extensive language which also includes the particular propositions which have been moved by Professor Shah, and I therefore do not see the necessity for substituting these limited particular clauses for the clauses which have been drafted in general language deliberately for a set purpose' (7 C.A.D.:518-519).

<sup>33</sup> Further Grimm is of the view that juridification of the state 'would render politics impossible and ultimately dissolve it into a mere implementation of the Constitution. The Constitution is not to make politics superfluous but only to channel it, commit it to certain principles, and contain it within certain limits. It prescribes certain principles and procedures, not outcomes. But it is comprehensive insofar as no one who lacks constitutional legitimation is entitled to exercise public power, and no act or rule can claim validity that is not consistent with constitutional requirements' (Grimm 2005:452).

creating a public sphere (Kaviraj 2000: 47; Krishna 1995:170-171). The practice of democratic politics also made the 'electoral cycle' the 'iron law' of politics in India, linking governmental performances with citizen expectations (Nandy 2000:77). With the growth of the role of the state, the Nehruvian era also witnessed growing expectations from the state. Development soon became 'a huge state-centred project of social change', right from promoting development, to eradicating untouchability, to achieving social justice (Kaviraj 2000:47). The Nehruvian vision of state led development did help India emerge from the grip of neo-colonial pressures and to develop a good base in 'capital goods' and a 'diversified economy' based on the principle of self-reliance (Kaviraj 2000:48). Correspondingly, the adoption of a mixed economy<sup>34</sup> enabled greater flexibility in the operation between politics and 'economic system' (Kaviraj 2000:48). It is argued that the mixed economy model was in keeping with the larger national endeavour to accommodate the interests of various groups and generate a consensus regarding the scope and content of economic development. A Congress party resolution in 1955 sought to establish a 'socialistic pattern of society' through the implementation of a social order encompassing social, economic and political justice (Chandra *et al* 2008:181, 446).<sup>35</sup> This vision was subsequently incorporated in the second and third five year plans and the Industrial Policy Resolution of 1956 (Chandra *et al* 2008:181, 446). Economic planning as a policy was adopted from the former Soviet Union.

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<sup>34</sup> The term 'mixed economy' denotes the compromise between private business activity and the role of the Indian state in economic activity arrived at after independence. Where certain infrastructure and key sectors were reserved for the state and the other sectors were open for private participation. This was prominently reflected in the Industrial Policy Resolution of 1956.

<sup>35</sup> It must be noted that this was a political party decision and not a constitutional requirement.

Nehru's death in 1964 saw Lal Bahadur Shastri of Congress assume the reins of leadership. Nehru's demise also witnessed the rise of the syndicate i.e. a group of regional leaders with political clout as key decision makers within the party (Chandra *et al* 2008:275). Lal Bahadur Shastri's demise in 1966 witnessed internal divisions within the Congress. The Congress Parliamentary Party ultimately elected Nehru's daughter, Indira Gandhi as its leader and Prime Minister. The then consensus in the 'syndicate'<sup>36</sup> was to make Indira Gandhi a transitional Prime Minister till the 1967 general elections (Austin 1999:175).

#### **3.4. From Socialism to State Ownership - Indira Gandhi (1966-1980)**

By the mid-1960s increased state expenditure through the first three five year plans led to an increasing dependence on foreign aid. The country was also dependent on foreign aid owing to an increase in food imports and a precarious balance of payments situation (Chandra *et al* 2008:457). The United States used this to leverage and arm twist India and its foreign policy, especially to tone down its opposition to the Vietnam war and undertake economic reforms (Chandra *et al* 2008:281-282). This led to India giving in to the combined pressure of the United States, the World Bank and the International Monetary Fund (IMF) and undertaking economic measures prescribed by them (Chandra *et al* 2008:458). Indira Gandhi's government devalued the rupee with disastrous consequences for the economy and faced accusations that the government had given in to foreign pressure (Chandra *et al* 2008:282). India was also reliant on food aid from the United States of

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<sup>36</sup> The 'syndicate' was the name given to a grouping of State level Congress leaders who collectively controlled the party after Nehru's death.

America, and this further escalated India's perception of vulnerability (Zanini 2001:10). To make matters worse, the promised aid was not dispatched and the food imports were released in a piecemeal manner to keep a tab on India's stand on Vietnam (Chandra *et al* 2008: 282). This 'ship-to-mouth' approach was humiliating and resented (Chandra *et al* 2008:282).

The ruling Congress party, under the leadership of Indira Gandhi, faced electoral losses in the ensuing 1967 parliamentary elections as a result of implementing unpopular economic policies at the behest of the Bank (Kapur *et al.* 1997:465; Zanini 2001:10; Chandra *et al* 2008:286-287). Accepting policy linked aid, therefore, became associated with political disaster (Kapur *et al.* 1997:466). In contrast to its previous electoral performances, the Congress did not fare well in the 1967 elections, winning only 283 out of 516 seats, which just about constituted a bare majority in the house (Panagariya 2011). Also, the promised aid in lieu of devaluation could not be secured by the donor community and the insiders within the national government who had backed the reforms felt let down. As a consequence, India decided to reduce its reliance on foreign aid and started building its foreign exchange reserves (Zanini 2001:10; Kapur *et al.* 1997:466).

The coercive tactics of the donors made India realise the need to be self-sufficient (Chandra *et al* 2008: 462). This drive intensified in the course of the green revolution era, which aimed at increasing agricultural productivity and reducing reliance on foreign aid (Dreze & Sen 2014:27). The push for a green revolution coincided with the oil shock of 1973. A nation facing balance of payments constraints could literally no longer 'fuel' the green revolution with diesel pumps, and attention turned to electricity as the preferred source of

power for irrigation pumps (World Bank 1979:1). India chose to rely on electricity generated by coal, abundantly available within the country, to power the irrigation pumps necessary for achieving food security, this also made India increasingly rely on electricity as a primary source of energy (World Bank 1979:1). The focus on rural electrification to enhance agricultural productivity can also be correlated with Amartya Sen's observation that in a democracy famines become a 'political disaster' as it generates public debate and protest against the government (Sen 2010:343). Greater state investments in the electricity sector and expansion of rural electrification can thus be directly correlated with external factors like oil shocks and condition laden foreign aid coupled with the politics associated with famines in a democracy. Electricity is an input for increasing agricultural productivity, therefore is closely connected with the notion of 'political disaster' (Sen 2010:343) associated with famines in a democracy. The centrality of the electricity sector for the state driven project of economic growth shall be further discussed in Chapter 4.

#### 3.4.1. Declining Congress Dominance and Emergence of Politics of Resource Disbursal

Politics has always influenced economic decision-making in India (Kohli 2011:502). However, the Indira Gandhi era was known for a more intense influence of politics on the economy both in terms of the distributive politics of the 1970s and the 'pro-business' politics of the early 1980s (Kohli 2011:502). The present form of distributive politics can trace their origin to Indira Gandhi in 1967 when Congress began losing power in the States, which had a corresponding impact on its national performance in the parliamentary elections (Chhibber 1995:78-79). The politics of the opposition to Congress,

which was in power in the States, was not ideologically different from that of the Congress, but the electoral politics revolved around access to the state and its resources. This resulted in competitive politics of resource disbursement to garner votes.

Correspondingly, the Congress Party, which was in power in the national government, engaged in a strategy of mobilizing national government resources so as to counter the groups vying for power in the States (Chhibber 1995:79). It increased the allocation of food grains, intervened in the agriculture sector, established public sector utilities and the flow of private investment in States so as to influence electoral outcomes (Chhibber 1995:80-87). The findings of a study based on panel data from 15 States comprising 95% of India's population for the time period 1972 to 1998, indicated that States ruled by the party in power in the national government had a higher deficit spending given the national government's ability to provide access to 'subsidized credit from financial markets' it controlled (Khemani 2007:693). State level deficits are financed both through loans from the national government, which constitutes 60% of deficit financing, and the remainder through borrowing from the financial markets, which primarily consists of public sector banks controlled by the national government. Therefore, the national government has an important role to play in deficit financing not only through direct loans 'but also indirectly through regulation of market loans and bailouts of state-owned enterprises' (Khemani 2007:697). The study concludes that mere delegation of fiscal disciplining power to the national government does not result in the national party enforcing fiscal discipline when it comes to State's spending. Though there could be a disciplinary impact on the States

governed by other political parties, there is no incentive for the party in power to promote fiscal discipline in the States governed by it (Khemani 2007:707).

The Congress national government also intervened politically in the States through increased use of the tool of President's rule.<sup>37</sup> As Rudolph and Rudolph (2008) observe, the pre-1991 economy and politics were characterized by national control of the economy and polity. This was made possible economically through disbursement of national resources to the States and the dominance of the Congress Party in both the national and State legislatures.

#### 3.4.2. Redistributionist State and Pro-Property Rights Court

As discussed, after independence the Congress Party enjoyed majorities in both the houses of the national parliament and State legislatures (Sathe 2002:7). This tilted the balance of power in favour of the executive and legislature (Sathe 2002:7). In many ways the 1967 case of *L.C.Golaknath v. State of Punjab* (hereinafter the *Golaknath case*)<sup>38</sup> can be seen as the beginning of the inter-institutional tensions concerning the interpretation of the Constitution. The case was filed challenging the land reform legislation, which limited the quantum of land that can be held by individuals, with the aim of redistributing the excess amongst the landless. The petitioners claimed that the said legislation infringed their fundamental right to property and freedom

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37 The Constitution of India establishes a federal structure which vests 'autonomy' in the States in the constitutionally delineated areas (Chandra et al. 2008). The term President's Rule denotes the national government taking over the governance of a particular State or States despite an elected government being in place citing breakdown of constitutional machinery under Article 356 of the Constitution. As Chandra and others observe this provision was 'frequently used in the 1970s to dismiss inconvenient Opposition-ruled state governments or to discipline the state units of the ruling party' (Chandra et al. 2008:679).

38 *L.C.Golaknath v. State of Punjab*, AIR 1967 SC 1643.

to practice a profession of their choice. The Supreme Court held that the legislature could not take away or abridge fundamental rights. S.P.Sathe, an eminent Indian constitutional expert, rightly observed that for the judiciary to rule in such a manner, was very unsettling at that time (Sathe 2002:7).

After electoral victory of 1967, Indira Gandhi was keen to assert her role in the party, it is however noted that 'she lacked the necessary political base' (Panagariya 2011). It will be pertinent to note that Indira Gandhi never used the word 'socialist' in the course of the 1967 election. It was only in 1969 that she leant towards the socialists within the party so as to upstage the 'syndicate'. Indira Gandhi's tilt towards the socialists within the party for support led to interpreting the redistributionist constitutional mandate in the Directives as greater state ownership, nationalisation of private businesses and curtailment of the right to property. This was followed by Indira Gandhi announcing bank nationalisation and abolition of privy purses, i.e. allowances given to erstwhile rulers in return for surrendering their sovereignty to the Indian republic, in a bid to widen her political base (Panagariya 2011).

The Supreme Court set aside the move to nationalise the banks as the same did not involve 'just and equivalent compensation' in 1970.<sup>39</sup> It also set aside the abolition of privy purses in 1971.<sup>40</sup> Indira Gandhi perceived these decisions of the Court as political interventions supporting the views of her opponents, namely 'the old guard of the Congress Party and the right wing parties such as Swatantra and Jan Sangh' (Sathe 2002:68). This interpretation of the

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<sup>39</sup> *Rustom Cavasjee Cooper v. Union of India*, AIR 1970 SC 564.

<sup>40</sup> *His Highness Madhav Rao Jivaji Rao Scindia V. Union of India* , AIR 1971 SC 530.

redistributionist mandate amongst others led to increasing tension between the judiciary on one hand and the executive and legislature on the other.

### 3.4.3. Contest to Interpret the Constitution and the Role of the State in Economic Activity

Political power play by the Indira Gandhi led Congress resulted in the interpretation of the Constitution's redistributionist mandate as emphasising state ownership, with the amendment of its written word where required. The political manoeuvring also eroded the constitutional guarantees of autonomy for the civil services, resulting in greater political control over the bureaucrats. The elections in the 1970's set the stage for the politics of populism with the help of 'committed bureaucrats' or bureaucrats loyal to Indira Gandhi (Nandy 2000:78). This was contrary to the constitutional endeavour to insulate bureaucracy from political influence. The stage-managed politics also led to media houses, journalists and academicians raising the expectations from the state exponentially (Nandy 2000:78). The 1971 general election to the parliament, amongst other issues, was fought on making fundamental amendments to the Constitution (Sathe 2002:68). Sathe opines that the 2/3rds majority in the Parliament for the Indira Gandhi led Congress Party could be seen as an indication of a mandate to amend the Constitution (Sathe 2002:68). The electoral win was also attributed to the campaign slogan 'garibi hatao' i.e. 'eradicate poverty' which gave an overwhelming majority to Indira Gandhi led Congress Party (Austin 1999:236).

After the elections (1971) Indira Gandhi's government introduced the 24<sup>th</sup> Constitutional Amendment (Govt of India 1971a) reasserting Parliament's 'unqualified' power to amend the Constitution (Sathe 2002:68). The

amendment's statement of objectives pointed out that its purpose was to reverse the finding in the (land reform) *Golaknath* case.<sup>41</sup> The amendment allowed the Parliament to curtail fundamental rights, which at that time included the right to property, in order to give effect to the redistributive Directives. The subsequent 25<sup>th</sup> Amendment aimed to reverse the decision of the Court in the Bank Nationalisation case (Govt of India 1971b). The 26<sup>th</sup> Amendment aimed at undoing the Supreme Court's decision in the privy purses case and expressly abolished privy purses (Govt of India 1971c).

The case of *Kesavananda Bharathi v. State of Kerala* (hereinafter Keshavananda case) questioned the validity of the 24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> amendments.<sup>42</sup> In the Keshavananda case, the Supreme Court, whilst agreeing that the Parliament had the power to amend the Constitution, qualified the same by stating that the Parliament, through amendment, could not alter the basic structure of the Constitution (Suresh & Narain 2014:7). The basic structure, according to the court, comprised certain unalterable aspects of the Constitution and included democracy, federalism, supremacy of the Constitution, the principle of separation of powers, etc.

### **3.5. Interventionist State and Pranab Bardhan's Observation of a 'Heterogeneous Dominant Coalition'**

The state control of resources led to competition between interest groups for access to these resources. Pranab Bardhan identifies 'industrial bourgeoisie', 'rich farmers', whom he describes as '*numerously* most important', and the

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<sup>41</sup> *L.C.Golak Nath v. State of Punjab*, AIR 1967 SC 1643.

<sup>42</sup> *His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr*, AIR 1973 SC 1461.

'professional class', which included both the professionals in the public sector and the bureaucrats, as the 'heterogeneous dominant coalition' that competed with one another for the resources of the state (Bardhan 1998:40-61). Bardhan, however, notes that 'conflicts' persist between the constituents of the 'dominant coalition'. That these tensions emerge between the 'urban industrial and professional classes' and the 'rural hegemonic class of rich farmers' (Bardhan 1998: 54), and that 'conflicts' also persist between the 'professional classes' and the industrialists who seek access to state's resources and licenses (Bardhan 1998: 54). No one class amongst the dominant classes can assert total control over the Indian state because 'the ethnic and regional diversity of Indian society militate against the emergence of a single dominant class whose writ can be enforced throughout the country' (Bardhan 1998:61). Bardhan argues that the different interests associated with the dominant coalition pull the state in 'different directions' and that the Indian state tries to pacify them through resource allocation which leads to 'reduction in available surplus for public capital formation' (Bardhan 1998:61). Varshney endorses Bardhan's view and opines that 'resources that could have gone towards investment were frittered away in grants and subsidies' (Varshney 2013:295). The sectoral dynamics in the State of Andhra Pradesh as will be discussed in Chapter 7, reflect the entrenched interests of the constituents of the 'dominant coalition'. As discussed in Chapter 2, the neoliberal critique of the interventionist state questioned the role of the state as 'a guardian of public interest' (Chang 1999:183). They portrayed it 'as an organization controlled by interest groups, politicians, or bureaucrats who utilize it for their own self interests, producing socially undesirable outcomes' (Chang 1999:184). The

resource disbursing Indian state appears to have fallen into this trap of dominant interests laying siege to its resources and influence.

### 3.5.1. Emergence of 'Professional Politicians' Appealing to 'Particularistic Interests'

In addition to the three classes of the dominant coalition, Bardhan identifies the politicians as 'brokers, who act as agents for different bargaining interest groups, and, of course, take a cut for themselves for services rendered' (Bardhan 1998:66). Kaviraj observes that the aggregation of the resources with the state and the notion of the redistributionist state also created a new class of 'professional politicians' (Kaviraj 2000:53). He defines this class as individuals whose only vocation is politics and who look to popular support as a means to garner a share of the resources of the state (Kaviraj 2000:53). This new cohort of politicians also appealed to 'particularistic interests' so as to stay in power and correspondingly directed the distribution of the aggregated resources at the state's disposal to their constituencies (Kaviraj 2000:54).

### 3.5.2. Ability of Rich Farmers to Influence Agricultural Voting Preferences

The electoral competition in the 1960's also saw the newly emergent farmers' lobby renegotiate the dispersal of state resources at the State level with the Congress under Indira Gandhi (Kaviraj 2000:54). Bardhan also voices a similar opinion regarding the rising political clout of the rich farmers who, though scattered across the nation, had strength in numbers (Bardhan 1998:57). Such was the influence of rich land lords that they effectively frustrated the implementation of land redistribution legislation (Bardhan 1998:49). The rich farmers also exerted considerable influence on the landless 'agricultural wage

labourers', who were both employees and debtors to the rich farmers (Bardhan 1998:47). The middle income farmers threw their lot in with the rich farmers for the state's resources (Bardhan 1998:47-48). Therefore, there was a consolidation of agricultural voting preferences under the leadership of influential rich farmers.

### 3.5.3. Growing Power of the Bureaucrats and Bureaucrat-Politician Nexus

The burgeoning bureaucracy, in keeping with the enhanced role of the state in economic activity, became an interested party, deriving its power to allow or disallow an activity in a system tightly regulated by the state (Kaviraj 2000:53; Varshney 2013:295). With particular reference to state led industrialisation, the public sector was supervised by the bureaucracy. This scenario of supervision of the bureaucracy by the bureaucracy was ultimately to the benefit of the bureaucracy (Kaviraj 2000: 54). During the Indira Gandhi era, the role of the bureaucrats was politicised, culminating in the notion of 'committed bureaucracy' (Chandra *et al* 2008:82). As former bureaucrat Vittal notes '[b]ut the commitment that was elicited during the Emergency appeared to border on the brink of becoming a 'loyalty test', implying that 'if you are not committed, you are omitted'. On the other hand, some officials exploited the idea of a committed civil service as 'a means of rapid professional advancement' (Vithal 1997:223). Reciprocally when Indira Gandhi was ousted from power after the emergency, the bureaucrats loyal to her were sent into administrative oblivion (Chandra *et al* 2008:82).

The Indian Administrative Service (hereinafter IAS) is the successor of the colonial Indian Civil Service and occupies the topmost position in the hierarchy

of the organisation of civil services (Vithal 1997:209). It is the only service 'which has direct working acquaintance with the politician at the state level' (Vithal 1997:214). Iyer and Mani note that the IAS 'staff the most important positions in district administration, state and central government secretariats, and state-owned enterprises' (Iyer and Mani 2008:5). The Constitution provides safeguards from political interference through provisions regulating their appointment and removal.<sup>43</sup> They are appointed by the President of India and cannot be removed by 'state-level elected representatives' (Iyer and Mani 2008:6). The elected representatives at the State level however can influence the job postings or departmental assignment of the IAS officers (Iyer and Mani 2008).

Iyer and Mani argue that this ability to transfer bureaucrats between what the bureaucracy considers as desirable and less desirable postings allows State politicians to influence bureaucratic behaviour (Iyer and Mani 2008:1). This is because bureaucrats 'define career success by the importance of the posts that they are assigned to' (Iyer and Mani 2008:9). IAS officers can be reassigned or transferred between postings by the Chief Secretary, the top bureaucrat within the State who reports to the Chief Minister, a role equivalent to the Prime Minister at the State level in India (Iyer and Mani 2008:7). Iyer and Mani's study involves information on the career histories of all IAS officers serving as of October 2005. The study focuses on 4047 officers posted in 19 States constituting 96% of the nation's population (Iyer and Mani 2008:13).

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<sup>43</sup> Articles 310 and 311 of the Constitution of India.

They observe that there is a significant rise in intra-State transfers whenever a new Chief Minister assumes office (Iyer and Mani 2008:17).

Though the phenomenon of the politician-bureaucrat nexus is not that rampant at the national level, bureaucrats clamouring for political favours at the State level has led to an enhanced 'politician – official nexus' (Chandra *et al* 2008:82). This is more prominent in States where parties with caste as a political base came to power, with such elected leaders giving preference to bureaucrats of their castes or communities (Chandra *et al* 2008:82). As will be evident in the analysis of the implementation of the Bank's model for sectoral reform in Andhra Pradesh, the three interest groups, namely the rich farmers, politicians and career bureaucrats, including sectoral technocrats, come to represent the sectoral dominant coalition and play an important role in allocation of electricity.

### **3.6. Expansion of the Indian State's 'Public Sphere' and Judicial Interpretation**

The expansion of the role of the state in economic activity also witnessed the judicial expansion of the notion of 'state' operating through different instrumentalities. The Constitution assigns a broad definition to the word 'state'. In the words of the noted commentator D.D. Basu, '[f]ar from restricting the concept of State it enlarges the scope to embrace of all authorities under the control of Government' (Basu 2011:57). Article 12 of the Constitution defines the 'state' in the context of enforceability of fundamental rights restraining the power of the state in Part III of the Constitution enumerating civil and political rights. This definition of 'state' is equally applicable to Part IV

of the Constitution which prescribes the Directives.<sup>44</sup> Article 12 of the Constitution defines the 'state' as follows:

'In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the other authorities within the territory of India or under the control of the Government of India.'

The Court has over the years expanded the scope of the phrase 'other authorities' in Article 12 of the Constitution to address the issues of state power exercised through statutory corporations and other entities constituted under statute in pursuance of the idea of an interventionist state. The case of *Rajasthan State Electricity Board v. Mohan Lal and Ors* decided in 1967 (hereinafter the SEB case) set the tone for the interpretation of the phrase 'other authorities' under the Constitution.<sup>45</sup> The decision is important given the fact that it pertains to the State Electricity Boards (SEBs), which were the institutional mechanism through which the interventionist state sought to coordinate and encourage economic activity, build individual capabilities and bridge regional disparities. The decision recognised that, 'all constitutional or statutory authorities on whom powers are conferred by law' fall within the ambit of the category 'other authorities'. The Supreme Court observed that the nature of the duty being discharged by the State Electricity Board was in pursuance of the Directives, which requires the state to take special care to promote the educational and economic interests of the weaker sections.<sup>46</sup> The Supreme

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<sup>44</sup> Article 36 of the Constitution of India titled 'Definition' states that, '[i]n this part, unless the context otherwise requires, "the State" has the same meaning as in Part III'.

<sup>45</sup> *Rajasthan State Electricity Board, Jaipur V. Mohan Lal and Ors*, [1967] 3 SCR 377.

<sup>46</sup> The Supreme Court in this respect was referring to Article 46 of the Constitution of India.

Court therefore concluded that the definition of state would include bodies created to discharge this constitutional mandate. It held that the Constitution vests in the state the power to carry on any trade or business,<sup>47</sup> therefore, despite the Board undertaking commercial activity, it was still categorised as a 'state'.

In the subsequent case of *Sukhdev Singh v. Bhagat Ram* (hereinafter the Statutory Corporations case),<sup>48</sup> the Court observed that concept of state had undergone a sea-change over the years and that it had to be viewed from the perspective of 'service corporation'.<sup>49</sup> Justice Matthew's, reasoning in the Statutory Corporations case, explores the possibility of the expansion of the concept of 'other authorities' from a narrow definition of constitutional or statutory corporations with the power to pass regulations having the power of law, to that of 'instrumentality of the state'. In *Ramana Dayaram Shetty v. International Airport Authority of India and Ors*, the Supreme Court endorsed Justice Mathew's observation in the Statutory Corporations case, i.e. that the instrumentality of the public corporation was established given the bureaucratic inability to address a multiplicity of tasks of a welfare state.<sup>50</sup> As a consequence it observed that statutory corporations fall within the purview of 'other authorities' and therefore qualify to be categorised as 'state'.

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<sup>47</sup> Article 298 of the Constitution of India, titled 'Power to carry on trade, etc'.

<sup>48</sup> *Sukhdev Singh, Oil & Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations V. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation*, [1975] 3 SCR 619.

<sup>49</sup> *Sukhdev Singh, Oil & Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations V. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation* [1975] 3 SCR 619, Para 80.

<sup>50</sup> *Ramana Dayaram Shetty V. International Airport Authority of India and Ors*, (1979)3SCC489.

The next case was that of *Ajay Hasia and Ors v. Khalid Mujib Sehravardi and Ors* (hereinafter Educational Society case).<sup>51</sup> The issue before the Court was whether a society constituted under the Societies Registration Act, 1860 can be categorised as an 'other authority'. The most significant contribution of the Educational Society case was a clear enunciation of principles to determine whether a corporation or other instrumentalities were to be an instrumentality of agency of the government i.e. 'other authorities'. The prerequisite criteria can be used either individually or collectively to determine whether an agency or instrumentality can be categorised as a state. The criteria amongst others includes that the entire share capital of the corporation must be owned by the government, and that there has to be substantial financial assistance for the entire expenditure of the corporation from the government.<sup>52</sup> The Supreme Court also clarified that it was no longer relevant whether a corporation was created by statute or under a statute. The line of reasoning in these cases emerging out of the expanding scope of the interventionist state has been upheld by the Supreme Court in subsequent decisions.<sup>53</sup> The decisions of the Supreme Court ensured that behaviour of the state instrumentalities was in conformity with the standards imposed on the core state i.e. the state departments.

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<sup>51</sup> *Pradeep Kumar Biswas and Ors V. Indian Institute of Chemical Biology and Ors*, (2002) 5 SCC 111, Para 25.

<sup>52</sup> The other criteria formulated by the court in the case include the monopoly or state protected status of the corporation, and the presence of deep and pervasive state control over the activities of the corporation. If the functions of the corporation are public in nature or are related to governmental functions, and if a government department has been transferred to the corporation, then the same makes a strong case for the corporation to be categorised as an agency or instrumentality of the state.

<sup>53</sup> *Pradeep Kumar Biswas and Ors V. Indian Institute of Chemical Biology and Ors*, (2002) 5 SCC 111.

### **3.7. Imposition of Emergency by Indira Gandhi (June 1975-March 1977)**

In 1975 the High Court of the State of Uttar Pradesh set aside Indira Gandhi's election to the Parliament for violation of the electoral laws. Indira Gandhi declared a 'State of Emergency' (hereinafter 'the Emergency'). Though the declaration of emergency was made under Article 352 of the Constitution of India to protect the security of the nation, it was evident that it was invoked by Indira Gandhi to save her Prime Ministership. This allowed the national government to suspend civil liberties and fundamental rights and interfere with the administration in the States (Chandra et al. 2008:321). As Chandra and others observe, 'the Emergency concentrated unlimited state and party power in the hands of prime minister to be exercised through a small coterie of politicians and bureaucrats around her' (Chandra et al. 2008:322). The period during which Emergency was imposed also witnesses suppression of political dissent and imprisonment of opposition and protestors. The Emergency lasted from 25 June 1975 till 21 March 1977. During the Emergency, the Indira Gandhi-led government tried to curtail the Supreme Court's powers and asserted the power of the national government at the expense of the States and the judiciary through constitutional amendments (November 1976) (Suresh & Narain 2014:8). The 42<sup>nd</sup> Amendment to the Constitution enacted at the behest of the Indira Gandhi administration aimed at further reducing the powers of the judiciary whilst attempting to make the Constitution 'Socialist' by explicit inclusion of the word in the Preamble (Govt of India 1976).

One of the direct repercussions of the 42<sup>nd</sup> constitutional amendment to the right to property was that the legislative measures implementing the redistributionist Directives could not be questioned as being violative of

fundamental rights under Articles 14, 19 or 31.<sup>54</sup> Shortly after the passage of the amendment, elections were called by Indira Gandhi's government and the Congress Party lost power for the first time since independence. The first non-Congress Party government, headed by the Janata Party, set about undoing the amendments. The Janata Party-led government undid most of the 42<sup>nd</sup> Amendment (Govt of India 1976) through the 44<sup>th</sup> Amendment (Govt of India 1978). It however did not undo the amendment relegating the right to property from a fundamental right to a mere constitutional right.

### **3.8. Indira Gandhi and Rajiv Gandhi in 1980s – India as a 'Pro-Business' State**

As discussed in the previous chapter, the 1980s witnessed a global change in perception of the role of the state in economic activity from interventionism to that of restraint. Indira Gandhi's return to power after the January 1980 election saw a decisive shift from her pro-poor socialist and redistributionist approach to a more pro-business and growth oriented approach (Kohli 2010:152,158,161). The slow economic growth in the 1970's, the inefficient public sector when contrasted with the success of the green revolution, premised on governmental encouragement to private farming activity through appropriate inputs, was one of the reasons for the change in Indira Gandhi's economic policy (Kohli 2010:153). The 1980s also made a marked shift as to the economic objectives of the Indian state from being redistributonalist to being a facilitator of economic growth (Kohli 2010:153-154, 158,161).

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<sup>54</sup> Previously this was restricted to legislations enacted in pursuance of Art 39 Clauses (b) and (c) only.

The 1980s saw the Indian state change its position from being anti-capitalist to relying on the constituency to encourage economic growth (Kohli 2010:142). Kohli argues that the Indian state after 1980s assumed a 'pro-business' as opposed to a 'pro-market' approach. He defines a 'pro-market' approach as giving the market forces a free hand much in line with the 'Washington Consensus'. This includes a withdrawal of the Indian state from economic activity, disinvestment and privatisation of the state owned utilities, a rollback of subsidies etc. (Kohli 2010:144-145). For a 'pro-business' approach he gives the example of the developmental states, which made it easier for the private businesses to conduct business through favourable labour regulations, taxation, access to finance and other business related concessions and protectionist strategies (Kohli 2010:146). In the 1980s, the Indian state moved towards adopting the East Asian developmental state model (Kohli 2010:147). This was followed by appropriate amendments made to the Monopolies and Restrictive Trade Practices Act, allowing business expansion, easing access to credit and legislation, and disciplining labour unions and their activities (Kohli 2010:155-56). This however did not see a corresponding cut in public expenditure despite India obtaining a loan from the IMF to stave off a potential balance of payments crisis (Kohli 2010:157). Indira Gandhi's son Rajiv Gandhi continued the reforms initiated by his mother with a decisive state push towards greater private business activity reasserting the shift in state priorities from redistributionist socialism to enhancing economic growth (Kohli 2010:159).

### **3.9. Can a Pro-business Indian State be categorised as a Developmental State?**

As discussed, Kohli views the Indian State's 'pro-business' tilt to be comparable with the East Asian Developmental State (Kohli 2010). This view has however been challenged. Mukherji argues that India cannot be characterised as a developmental state (Mukherji 2016:217). He relies on Peter Evans characterisation of a development state as one displaying 'Embedded Autonomy' (Mukherji 2016:219). Mukherji describes the notion of 'Embedded Autonomy' as follows, '[i]t was embedded in the sense that the state maintained very important ties to capital. But the state was also autonomous of capital. This autonomy from capital enabled the East Asian state to discipline capital in a manner that made it competitive in the world economy...' (Mukherji 2016:219-220). Mukherji observes that the Indian state on the other hand 'is so penetrated by social actors' that it does not display the requisite autonomy like a development state (Mukherji 2016:219-220). Mukherji concludes with the observation that 'India is not a classic "developmental state" that can easily discipline social actors ranged against it. This is due to the fact that it cohabits a rather powerful society around a relatively weak state and a democratic political system' (Mukherji 2016:219-233). This makes '[s]ociety-centered' approaches to analysis particularly relevant to the Indian context (Mukherji 2016: 220).

Bardhan notes that the relative autonomy of the state from politics, as evidenced in the context of Korea and Japan, is not possible in the Indian context (Bardhan 1998: 72-73). In his words

‘But in a polyglot and vastly more heterogeneous and fragmented society like that of India, this insulation has been difficult to achieve and maintain alongside a pluralist open polity. In the initial years after Independence, the stature and special legitimacy of the Indian leadership allowed it some leeway in this insulation process. But with the increasing plurality of contending interests in the dominant coalition and with the complexity of their mutual interaction often resulting in log-rolling arrangements, the public economy became increasingly exposed’ (Bardhan 1998: 73).

This thesis endorses Bardhan’s (1998) and Mukherji’s (2016) view of the Indian state as one that is contested and captured by various interests as opposed to Kohli’s (2010) assertion of the Indian state is gravitating towards a developmental state model. This is because of the very nature of the Indian state and its highly-contested role in economic activity. This makes the Indian state a hybrid embodiment of the varying expectations of the different societal strata and interests. The same is in keeping with the core argument of this chapter, i.e. that the tensions in the state give rise to its unique regulatory attributes. The Indian state, as Sally Falk Moore puts it in the context of changing nature of the state, ‘acknowledges diverse social fields within society and represents itself ideologically and organizationally in relation to them’ (Moore 2001:107). Chapter 8 of this thesis argues that this trait leads to alternate institutional organisation and the emergence of legal pluralism in state law.

### **3.10. Preparing for the Opportune Time to Liberalise**

As discussed, India sought aid from the Bank and the IMF in 1991 to tide over an external balance of payments crisis and internal fiscal deficits. This aid was conditional upon the country undertaking reforms ushering in a regulatory state. Kohli is of the view that the assertion of 1991 as the date of India's market liberalisation is a kind of misnomer, as the move to the right began in the early 1980s (Kohli 2010:141-143). Mukherji is in agreement with this view of a slow build-up of consensus culminating in the final move to liberalise in 1991 (Mukherji 2016). Advisors to Indira Gandhi and Rajiv Gandhi included Montek Singh Ahluwalia and Manmohan Singh, who played an important role through the period of reforms initiated in 1991 (Kohli 2010:159). Nevertheless, it becomes evident that there was a substantial internal lobby and mood waiting for an opportune time to make a 'political decision' to break from the past, though the reforms were very much underway, Kohli opines that the 1991 balance of payments crisis, aggravated by fiscal deficits owing to increased state expenditure, produced this opportunity (Kohli 2010:160-163). 1991 was also important given the change in external circumstances, i.e. the fall of the Soviet Union, India's political and military ally, which forced India to break from the socialist model and engage with the United States (Kohli 2010:167; Nayar 2007:30). This change in the national state's policy can be attributed to what Chang observes to be a larger global shift towards rollback of the interventionist state in the 1980s and 1990s (Chang 2003:1). This is also indicative of the fact that the Indian state's role in economic activity is influenced by the corresponding dominant global consensus regarding the role of the state in economic activity.

### **3.11. Inter-Institutional Tensions after Emergency – Populist Pro-Poor Court and a Pro-Business State**

Aditya Nigam observes that after the Emergency the judiciary appeared to take a cue from Indira Gandhi's populism (Nigam 2014:24). This period is termed as that of 'judicial activism' when the court realised that 'its elitist social image would not make it strong enough to withstand the future onslaught of a powerful political establishment' (Sathe 2002:107). Opinions vary about the posturing of the court between that of Upendra Baxi, who termed the phenomenon as the 'Supreme Court of India becoming the Supreme Court for Indians' (Baxi 1985:289) to a more cautious S.P.Sathe, who viewed it as institutional posturing aimed at self-legitimation (Sathe 2002:107). It is, however, opined that the truth is somewhere in between. Judicial opportunism from an institutional perspective could only happen because of the weakening of the previously powerful executive and legislature. This increase in relative power allowed judges like P.N.Bhagawathi and Krishna Iyer to give a redistributionist and interventionist interpretation to the constitutional provisions. This, coupled with the deference to precedents in a common law jurisdiction like India, helped mould judicial interpretation of the role of the state in economic activity. As will be observed, the court in this context interpreted the redistributionist mandate of the state far more vociferously long after Indira Gandhi herself abandoned it, with a decisive shift towards encouraging private activity after 1980.

Perhaps the most notable case in this context, emerging out of the nationalisation endorsing the redistributive aspects of state ownership is that

of *State of Karnataka V. Ranganatha Reddy*<sup>55</sup> (hereinafter the Road Transport Nationalisation case). This case involved a challenge to the enactment fixing compensation for acquisition of private transport businesses by the statutory State Transport Corporation. It was argued that the acquisition would not result in the material resources of the community being distributed for the common good.<sup>56</sup> Justice Krishna Iyer held that constitutional interpretation cannot be undertaken in a vacuum and had to take into account socio-economic realities. The court in this case observed that nationalisation has a direct connection with distribution and that 'material resources' include both public and private resources of the community.<sup>57</sup>

The next case dealing with the redistributive mandate enshrined in Art.39 (b) involved nationalisation of coal mines (hereinafter the Coal Mine Nationalisation case).<sup>58</sup> Amongst other issues, it was argued that neither coal nor coking coal mines and plants owned by private players were material resources of the community. It was submitted that they would become material resources of the community only after they were acquired by the state.<sup>59</sup> The Supreme Court was not in agreement with such a narrow interpretation of the phrase 'material resources of the community'. It favoured a wider approach

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<sup>55</sup> *The State of Karnataka and Anr V. Ranganatha Reddy and Anr* (1977) 4 SCC 471.

<sup>56</sup> Article 39(b) of the Constitution of India.

<sup>57</sup> *The State of Karnataka and Anr V. Ranganatha Reddy and Anr*, (1977) 4 SCC 471, Para 97. Cosmo Graham (Graham 2000: 3) refers to Tony Prosser's observations in the context of public ownership and nationalisation in the United Kingdom after World War II being justified as being in the 'public interest'. He voices Tony Prosser's concern with the use of the phrase 'public interest' as the same was not defined. In the Indian context, however, there appears to be a more definitive justification for nationalisation i.e. 'distribution'.

<sup>58</sup> *Sanjeev Coke Manufacturing Company V. Bharat Coking Coal Limited and Anr. AND Bharat Coking Coal Limited and Anr. V. Sanjeev Coke Manufacturing Company*, (1983) 1 SCC 147.

<sup>59</sup> *Sanjeev Coke Manufacturing Company V. Bharat Coking Coal Limited and Anr. AND Bharat Coking Coal Limited and Anr. V. Sanjeev Coke Manufacturing Company*, (1983) 1 SCC 147, Para 19.

and held that the scope of the phrase 'material resources of the community' was not restricted to natural resources and publicly owned resources but applied to all resources, be they natural or manmade, public or privately owned. These cases, which linked state interventionism with the redistributive mandate of the Constitution, were decided at the same time when the Indian state began taking a pro-business approach in response to the global shift towards a regulatory state. This rekindled tensions between the judiciary and the other branches of the state.

The question of whether electricity was a material resource of the community under Article 39(b) of the Constitution came up before the Supreme Court in cases involving nationalisation of private electricity companies by the governments of the States of Assam and Maharashtra.<sup>60</sup> In the Assam case, it was contended by the private electricity provider that the legislation effecting nationalisation of the electricity companies under the pretext of complying with Article 39(b), was a questionable exercise.<sup>61</sup> It was contended that the State government aimed to deny them appropriate compensation by enacting nationalisation legislation instead of a straightforward commercial transaction. It was argued that the legislation was enacted to take advantage of Article 31C of the Constitution, which granted certain Directives immunity from judicial review. In this context, the Supreme Court held that 'electricity' is a material resource of the community.<sup>62</sup> It relied on the decision in the Coal Mines

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<sup>60</sup> *Tinsukhia Electric Supply Co. Ltd V. State of Assam and Ors*, (1989) 3 SCC 709; *Maharashtra State Electricity Board V. Thane Electric Supply Co. & Ors*, (1989) 3 SCC 616.

<sup>61</sup> *Tinsukhia Electric Supply Co. Ltd V. State of Assam and Ors*, (1989) 3 SCC 709.

<sup>62</sup> *Tinsukhia Electric Supply Co.Ltd V. State of Assam and Ors*, (1989) 3 SCC 709, Para 27. The court gave a similar verdict in a similar case dealing with the determination of the quantum of compensation for the nationalisation of the electricity service provider. See, *Maharashtra State Electricity Board V. Thane Electric Supply Co.* (1989) 3 SCC 616.

Nationalisation case, where privately owned resources were construed to be included within the scope of the phrase 'material resources of the community'.<sup>63</sup>

In a similar case, legislation altering the quantum of compensation paid by the State of Maharashtra to a nationalised power utility was held to be immune from judicial review, as it proposed to further the objectives of Article 39(b) of the Constitution of India.<sup>64</sup> In this matter, the Supreme Court referred to the Assam nationalisation case.<sup>65</sup> The Supreme Court reiterated that electricity was a material resource of the community. It further clarified that the idea of nationalisation was closely associated with the concept of distribution of the community's resources under Article 39(b). Consequently, it held that the legislation altering the quantum of compensation was immune from judicial review. It would be pertinent to note that the decisions endorsing the distributive aspect of nationalisation or state participation in the electricity sector were given in 1989. It would be barely two years before the economic liberalisation by the executive and legislature in 1991, and four years before the national government endorsed the Bank's 1993 sectoral policy aimed at a withdrawal of the state from economic activity.

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<sup>63</sup> *Sanjeev Coke Manufacturing Company V. Bharat Coking Coal Limited and Anr. AND Bharat Coking Coal Limited and Anr V. Sanjeev Coke Manufacturing Company*, (1983) 1 SCC147.

<sup>64</sup> *Maharashtra State Electricity Board V. Thane Electric Supply Co. & Ors.*, (1989) 3 SCC 616

<sup>65</sup> Both decisions were delivered on the same day and by the same bench.

### **3.12. Indian Regulatory Space – From Liberalisation until Today**

#### 3.12.1. 1991 Crisis & Reform by Stealth

The 1991 fiscal crisis was attributed to an increased expenditure on subsidies by the national government (Chhibber 1995:75). Kohli is of the view that in 1990's the Indian capitalists took differing political positions between those who preferred greater liberalisation and protectionism creating the right atmosphere for the 'technocratic elite' to bring about policy change (Kohli 2010:167-169). The balance of payments crisis of 1991 gave the narrow constituency of political leadership, technocrats and certain segments of the industry the opportunity to embrace the IMF's conditionality as a means to bring about their desired internal reforms (Kohli 2010:169). Despite a very active democracy the economic changes were brought about by a small and elite group and by 'stealth' (Kohli 2010:169; Nayar 2007:33). For example, many reforms were introduced by executive announcements rather than through parliamentary resolutions; similarly, key interventions in the nature of the withdrawal of subsidies were announced at a time when parliament was not in session (Kohli 2010:169).

According to Varshney,

'Elite politics is typically expressed in debates and struggles within the institutionalised settings of a bureaucracy, a parliament, a cabinet. Mass politics takes place primarily on the streets. Touched off by issues that unleash citizen passions and emotions, the characteristic forms of mass politics include large-scale agitations, demonstrations, and civil disobedience... The more direct the effect of a policy, the more people

are affected by it, and the more organised they are, the greater the potential for mass politics' (Varshney 2007:147).

Economic reforms were primarily the domain of elite politics, whereas '[e]thnic conflict and identity politics' were the drivers of India's mass politics. The then prevailing atmosphere of communal strife and polarised politics gave the minority government headed by Congress political room to usher in the 1991 reforms, the agenda of which included exchange rates, foreign investment and encouraging the growth of capital markets (Varshney 2013:282). The reason for the success of the 1991 reforms was because they were not politically sensitive (Varshney 2013:282). While Varshney's analysis is with regard to national politics, it is also arguably applicable to the electricity sector at the State level. In Andhra Pradesh, the withdrawal of the State level state from sectoral economic activity in order to usher in a regulatory state, at the insistence of the national state triggered mass political unrest as roll back of subsidies and tariff increase directly affected the common man. This will be discussed in Chapter 7.

### 3.12.2. The 1990's – Developments After Liberalisation

Between 1991 and 1996, the national government only implemented policies concerned with elite politics, avoiding reforms which may attract mass mobilisation and protests (Varshney 2013:306). In the 1990s, the national state could not privatise the public sector nor bring about labour reforms; the deficits, though much smaller, continued to reflect the need for state expenditure (Kohli 2010:173). In other words, the reforms had to be more tempered to play to a diverse gallery of democratic expectations.

From 1995 the United Front, a coalition government with a left leaning ideology, was in power at the national level for nearly two years (Nayar 2007:33). The United Front coalition did not, however, reverse the measures of liberalisation initiated in 1991 (Nayar 2007:33). After the United Front coalition, the BJP led National Democratic Alliance (NDA) was in power from 1998-2004. Despite its support for liberalisation, the NDA only focussed on public sector reforms after encountering resistance to the policy of disinvestment of public sector enterprises (Nayar 2007:36). In fact, it went to poll in 2004 on a development and growth plank, with its campaign slogan 'India Shining' demonstrating its role in enhancing economic growth (Nayar 2007:35). However, the irrelevance of the growth maximising strategy to the larger polity was demonstrated by NDA's defeat in the elections.<sup>66</sup> There was also widespread public perception that the reforms only favoured the rich and the privileged (Varshney 2013:306). Varshney observes from the results of the National Election Study 2004 and 2009 that, the lower one descended the social ladder, the larger the perceived inequity of the reform process (Varshney 2013:306). The socio-economically challenged sections of Indian society, including Muslims, Dalits (the lowest caste in the Hindu caste hierarchy) and the backward castes, believed that the reforms favoured the privileged (Varshney 2013:307).

In the 2004 elections, the Congress and its allies, i.e. the United Progressive Alliance (UPA), rallied around the issues of the poor, projecting the NDA as a coalition of the rich (Nayar 2007:37). The slogan of 'Aam Admi', i.e. 'common

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<sup>66</sup> Also, the Chief Ministers who actively wanted to roll back the state in the States S.M.Krishna of Congress in Karnataka and Chadrababu Naidu of Telugu Desam Party in Andhra Pradesh lost power (Varshney 2013:306).

man', galvanised electoral support. Nayar however observes that the UPA, led by the Congress, did not have an economic ideology of its own and in its attempt to keep the NDA at bay effectively became hostage to a left leaning ideology and was not able to infuse speed into the reform process (Nayar 2007:37). Nayar attributes Congress led UPA's tilt to the left to supporters of left ideology within the Congress itself (Nayar 2007:37,41). As a result, the public sector remained untouched and subsidies were expanded (Nayar 2007:37,41).

UPA – I (2004-2009) and UPA – II (2009-2014) which boasted a line-up of reformers, including Manmohan Singh, the Prime Minister, and Montek Singh Ahluwalia, as the Deputy Chairman of the Planning Commission, had to explore redistributionary policies to quell this growing discontent (Varshney 2013:308). The need to make reforms inclusionary was now accepted across political ideologies, in fact the then opposition, the NDA led by BJP, did not oppose legislation promoting the right to work, food and education (Varshney 2013:310).<sup>67</sup>

The present Bharatiya Janata Party (BJP) led National Democratic Alliance (NDA), which came to power in May 2014, appears to have continued the economic philosophy of the Congress led UPA, in terms of ongoing sectoral liberalisation, whilst continuing the welfare schemes which owe their existence to the positive mandate of the Directives. However, the present government's public position appears to be more neo-liberal, reminiscent of the Congress

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<sup>67</sup> These include the Mahatma Gandhi National Rural Employment Guarantee Act, 2005, The Right of Children to Free and Compulsory Education Act, 2009 and The National Food Security Act, 2013.

after announcing economic liberalisation in 1991 and NDA's own India Shining campaign in 2004. Though the period after June 2014 is not part of the present analysis, it is opined that it is but a matter of time before the government will be forced to reconcile with its interventionist and pro-welfare role. In this context, it is pertinent to refer to Pranab Bardhan's epilogue to his essay on 'The Political Economy of Development in India', titled 'Epilogue on the Political Economy of Reform in India' (Bardhan 1998). There, Bardhan dismisses the claims of those supporting market reforms, i.e. that the state in India is on the retreat and that his thesis on the 'heterogeneous' 'dominant coalition' no longer rings true (Bardhan 1998). In Bardhan's words

'Many economists assume that market liberalism and competition is the natural order of things, and its unfolding in India has been blocked all these years only by our intellectual elites' socialist infatuation. It is not usually appreciated that Indian political culture may have a dominant anti-market streak that will not easily disappear, even if that supposedly imported infatuation fades away. Our collective passion for group equity, for group rather than individual rights, and the deep suspicion of competition in which the larger economic interests are given an opportunity to gobble up the small, work against the forces of market and allocational efficiency.....Major strands in the Indian political culture thus provide a none-too-hospitable climate for market reforms, and, contrary to the wishful thinking of many economists and journalists of the Indian 'pink press', the process of economic reforms is not likely to be smooth sailing for quite some time to come. The prospects for more

reforms are not bleak, but one should not underestimate the scale and nature of opposition' (Bardhan 1998:136-137).

### **3.13. Liberalisation and Interpretation of Distributive Role of State in Economic Activity**

The Supreme Court has consistently taken the position that the phrase 'distribute' is to be given a broad interpretation.<sup>68</sup> A more recent discussion on the scope of the phrase 'distribute' took place in the 2012 decision in *Centre for Public Interest Litigation & Ors V. Union of India and Ors* (hereinafter 2G Spectrum Allocation case).<sup>69</sup> It involved the telecommunications sector that was owned and managed by the national state, but eventually liberalised by successive governments after 1991. The Petitioners were of the view that the recommendation of the Telecom Regulator to the Licensor/Government to grant licences in 2007 on the basis of an entry fee determined in 2001 was arbitrary.<sup>70</sup> The Supreme Court observed that spectrum was a scarce resource that has to be used efficiently. It observed that it had always given an 'expansive interpretation of the concept of natural resources' relying on the Directives.<sup>71</sup> It was of the view that, '[l]ike any other State action, constitutionalism must be reflected at every stage of distribution of natural resources'.<sup>72</sup> The Court was of the view that, though the Telecom Regulator was an expert statutory body in the field of telecommunications, it could not make recommendations in violation of the fundamental constitutional

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<sup>68</sup> *State of Tamil Nadu V. L. Abu Kavur Bai*, (1984) 1 SCC 515.

<sup>69</sup> *Centre for Public Interest Litigation & Ors V. Union of India and Ors*, (2012) 3 SCC 1.

<sup>70</sup> *Centre for Public Interest Litigation & Ors V. Union of India and Ors*, (2012) 3 SCC 1, Para 48.

<sup>71</sup> *Centre for Public Interest Litigation & Ors V. Union of India and Ors*, (2012) 3 SCC 1, Para 66.

<sup>72</sup> *Centre for Public Interest Litigation & Ors V. Union of India and Ors*, (2012) 3 SCC 1, Para 63.

principles.<sup>73</sup> It held that the tacit approval of the continuation of entry fee, determined in the year 2001, in the year 2007 was wholly unrealistic and did not reflect the prevalent dynamic market conditions.<sup>74</sup> The Supreme Court, therefore, observed that regulators, though statutorily empowered to administer the sector, were subject to constitutional limitations in terms of their actions. The Supreme Court's insistence that the constitutional parameters enumerated under Article 39(b), were the sole determinants of the disposal of natural resources helps establish the relevance of constitutional tenets to the functioning of sectoral regulatory authorities and regulation as an activity per se.<sup>75</sup> The Supreme Court in this case held that auction, and not the principle of first come first served adopted by the Government, was the only mode of allocation of natural resources.

The insistence of the Supreme Court on auction as the only mechanism consistent with the Constitution to allocate spectrum resulted in a Presidential Reference case (also in 2012).<sup>76</sup> It determined that the term 'distribution' cannot be construed to mean auction alone,<sup>77</sup> but all the methods available to 'subserve the common good'. The Supreme Court held that the word

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<sup>73</sup> Colin Scott opines that regulation by statutory regulators amounts to a delegation of public power (Scott 2010:16). Therefore, the delegation of this public power is one of the important aspects of examination of regulatory arrangements from a constitutionalism point of view. The decision in the 2G Spectrum Allocation case appears to be in agreement with this view of Colin Scott.

<sup>74</sup> *Centre for Public Interest Litigation & Ors V. Union of India and Ors*, (2012) 3 SCC 1, Para 75.

<sup>75</sup> In the context of exploring the accountability of regulators in the constitutional scheme, Cosmo Graham is of the view that constitutions perform two important functions, namely vesting powers in public institutions and defining their relationship inter se, and, secondly, enumerating the modes of 'exercise of public power' (Graham 2000:2). Referring to I. Harden, Cosmo Graham states that a constitution has to be seen as a 'map of public power' (Graham 2000:2). The interfacing between constitution and regulatory bodies occurs in the context of their location in the 'map of public power' and the individual expectation in terms of welfare (Graham 2000:3).

<sup>76</sup> *In Re: Special Reference No.1 of 2012*. (2012) 10 SCC 1.

<sup>77</sup> *In Re: Special Reference No.1 of 2012*. (2012) 10 SCC 1, Para 112.

'distribute' had 'wide amplitude and encompasses all manners and methods of distribution, which would include classes, industries, regions, private and public sections, etc'.<sup>78</sup> It further noted that 'a narrower concept of equality', bestowed under the right to equality under Article 14 may frustrate the broader conception of equality under Article 39(b) of the Constitution of India if the word 'distribute' were to be given a narrow interpretation. Citing the case of *Bennett Coleman and Co. and Ors V. Union of India and Ors*,<sup>79</sup> it determined that the norm for distribution has to be that which achieves 'common good' and that the phrase 'common good' was 'elastic' and will depend on the 'economic and political philosophy of the government'.

It further observed that, even applying 'economic logic', auction could not be seen as the only means to 'subserve common good'. It further stated that in matters where 'revenue maximisation' was not an objective of the distribution, 'developmental considerations' could be prioritised. In fact, in the Presidential Reference Case,<sup>80</sup> the Supreme Court explored the scope of the word distribute in the context of the illustration of the Section 11A of the Mines and Minerals (Regulation and Development) Act, 1957. Section 11A provides for preferential allotment of coal blocks (creating an exception to auction purchase) if the beneficiary were to be engaged in electricity generation.<sup>81</sup> The Supreme Court in this context observed that what appeared as a cost-free allocation was, in fact, an inherent condition to provide electricity at a lower tariff and was, therefore, in compliance with the state's constitutional mandate

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<sup>78</sup> *In Re: Special Reference No.1 of 2012*. (2012) 10 SCC 1, Para 115.

<sup>79</sup> *Bennett Coleman and Co. and Ors. V. Union of India and Ors*, (1972) 2 SCC 788.

<sup>80</sup> *In Re: Special Reference No.1 of 2012*. (2012) 10 SCC 1.

<sup>81</sup> *In Re: Special Reference No.1 of 2012*. (2012) 10 SCC 1, Para 162.

to ensure distribution of material resources so as to subserve the common good under Article 39(b). Therefore, the Supreme Court's decision can be viewed as not requiring an immediate or direct nexus between allocation or creation of rights and distribution, but the ultimate aim of distribution has to serve the 'common good' which also includes consequential downstream distributive benefits. More importantly, in the context of provision of electricity, the decision can also be seen as a tacit acknowledgement of the obligation to provide electricity at lower tariffs.

Therefore, be it in the paradigm of an interventionist state or the gradual ushering in of the regulatory state, the Supreme Court has consistently held that the Indian state has an interventionist and distributive function in terms of the allocation of the material resources of the country. This approach seems to be in conflict with that of the executive and legislature, which appear to have taken a neoliberal posture in certain aspects of economic activity.

### **3.14. The Growing Centrality of the Indian State to Economic Activity**

Probably the biggest influence of the Nehru initiated process of making the state more visible was an expansion of the public space associated with the state. The state, owing to popular politics and increasing participation in economic activity, came to occupy a prominent place in the public imagination as opposed to its marginal, elite and colonial avatar (Kaviraj 2000:55).<sup>82</sup> As

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<sup>82</sup> Kaviraj succinctly describes this phenomenon as follows, '[f]rom an agency which was spectacular, mysterious and distant, the state has become something vast, overextended, extremely familiar at least in its sordid everyday structures – the panchayat, the revenue department, the local courts, the post office, railways, public-sector industries, and above all the elections, an ambiguous combination of serious decision making, social festival and farce. Nevertheless, it seems that its domination of Indian society, in some form or other, is historically irreversible. The policies of the government may veer from interventionism to free market. Even the structure of the state may be relatively large or thin; under liberalization, it may shed some of its present responsibilities. But its general title to legislation, forming rules

Nandy points out the 'most prominent feature of Indian political culture in recent years has been the emergence of the nation state as the hegemonic actor in the public realm' with no resistance from other actors in the public realm (Nandy 2000:64). However, as Mukherji (2016) observes, despite having a domineering presence and being able to influence economic activity, the Indian state remains susceptible to societal pressures.

It is argued that it was the constitutionally engineered reflexivity making the state responsive to political aspirations that has nurtured and sustained the pre-eminence of the Indian state. Nigam says that there is a consensus between the mainstream political parties regarding economic liberalisation, or what he terms 'neo-liberal reforms' after 1991 (Nigam 2014:32). However, it is also observed that there appears to be consensus and continuity regarding the redistributive role of the state. In fact, there is a clear link between the economic growth after liberalisation leading to an expansion of the Indian state's tax base and the economic feasibility of the Indian state to make the unenforceable Directives a reality, by granting them the status of legislative entitlements. Writing in 2014, Jean Dreze and Amartya Sen observe that the gross tax revenues of the national government have increased fourfold in real terms from what they were two decades back (Dreze & Sen 2014:270). They argue that this provides the state an opportunity 'to make good use of public revenue for enhancing living conditions through public services and support' (Dreze & Sen 2014:270). The legislative and policy initiatives aimed at realising the Directives are reflective of the growing involvement of the Indian

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which society has to live by, cannot be contested. Even to impose self-denial, or curtailment of its apparatus, it must exercise sovereignty' (Kaviraj 2000: 56).

state in economic activity. Despite the legislature and executive taking a neoliberal stand in certain sectors of economic activity, judicial interpretation of the constitutional mandate and political expectations appear to be exercising counter pressures. These dynamics nevertheless generate tensions within the state. However, as Mukherji (2016) observes though 'penetrated' by social forces the Indian state continues to be an important driver of change.

### **3.15. Conclusion**

B.R. Ambedkar was of the opinion that inclusion of the word 'socialist' in the Directives with explicit state ownership would choke politics. However, this does not imply that the Constitution is neutral in terms of its economic philosophy. The reflexive relationship between political expectations from the state which dictate the enforceability and scope of state intervention in economic activity ensures that the state's role continues to be that of an interventionist one in the economy. Similarly, it is argued that when one analyses the decisions of the Indian Supreme Court on the role of the state in economic activity, one sees a varying interpretation of the constitutional mandate. Such varying interpretation of the constitutional scheme was made possible by the Constituent Assembly's intent, borrowing Grimm's words, to avoid 'total juridification of the state' (Grimm 2005:452). This has also given rise to intra-institutional tensions between the judiciary, on one hand, and the executive and legislature, on the other, through the regulatory and welfare state phases.

Economic policy moved towards greater liberalisation from 1985 onwards and culminated in the initiation of reforms in 1991. More than 25 years later the

political expectations of the masses from the state remains the same. The Indian state (both national and State) appears to maintain a very delicate balance between private economic activity and issues pertaining to foreign direct investment and regulation of financial markets on the one hand, and provision of basic necessities in the nature of electricity, food or access to employment on the other. The state is torn between the tensions generated by 'elite politics' and 'mass politics' (Varshney 2007), and the competing notions of the developmental state, welfare state and regulatory state. The state in India after liberalisation appears to be constantly negotiating with and influenced by diverse interests so as to accommodate and manage these tensions.

The foregoing narrative also establishes that the role of the Indian state in economic activity has always been influenced by changing global perceptions. This is reflected in the state taking an interventionist approach after the Second World War, a pro-market approach in the 1980s and a drift towards a regulatory state in the 1990s. However, the procedural solution tying the scope of the interventionist state with the political expectations has ensured that the external influences have always been internalised by the Indian state in a manner reflective of the dynamics of the larger political processes. In other words, the influence of the external on the internal dynamics of the Indian polity and state has always been what Fiona Haines terms as 'less than intended' (Haines 2003:482).

On the basis of the preceding historical analysis, it is argued that five unique attributes of the Indian regulatory space influence the implementation of any regulatory intervention. These are firstly the evident influence of the dominant

global consensus of the role of the state in economic activity, be it during the interventionist phase or the present regulatory state phase. Secondly, the continued dominance of the Indian state (both national and State) as a participant and driver of economic activity. This is reflected in the continuous renewal of state participation in the economic life of the nation through democratic processes. The interventionist role of the state was also reiterated by the judiciary at a time when the executive contemplated ushering in a regulatory state. The reluctance of the framers of the Constitution to juridify the role of the state in economic activity allowed for renewal of the interventionist role of the Indian state through electoral mandates and judicial interpretation. The third feature of the Indian regulatory space associated with the role of the state in the economy is the entrenched interest of groups associated with state led development. These groups are the industrialist bureaucrats, the rich farmers and the politicians who mediate between them. The fourth being, though occupying a prominent role in the nation's regulatory space, the state in India itself is relatively weak when compared to societal forces (Mukherji 2016). The state in India is proliferated and influenced by societal forces and societal tensions are reflected in the nature and functioning of the state. This brings us to the fifth and final attribute of the non-autonomous nature of the state in India. This calls for a visualisation of the Indian state as being in a constant flux, which is indicative of the tensions it is trying to accommodate and mediate. This attribute results in the institutional reorganisation of the state in response to pressures both internal and external, and results in legal pluralism in state law, as will be discussed in the Chapter 8. The next chapter traces the emergence of these five attributes associated

with the regulatory space in the State level electricity sector in India. It argues that the presence of these attributes makes the sector a microcosm in which to observe the implementation of legislations aiming to redefine the role of the state in economic activity in India.

## **4. An Interventionist Role for the State in Economic Activity & the Electricity (Supply) Act 1948**

### **4.1. Introduction**

This chapter traces the role of the Indian state in economic activity, using the electricity sector as a case study. It takes the approach of tracing the sectoral developments through the co-evolution of the social, economic, political and legal at local, national and global levels in influencing attributes of a regulatory space. This chapter endeavours to highlight the relationship between state law and the state's role in sectoral economic activity during the interventionist phase i.e. from the late 1940s to the late 1980s. As argued earlier, state law mirrors the state's posturing in sectoral economic activity and is reflective of the ability of the state to intervene in the economy and regulate the behaviour of participants in economic activity. Accordingly, this chapter explores the relationship between the constitutionally assigned interventionist role, whose scope and content are determined by the electoral expectations from the state, and sectoral legislation. It explores this with reference to the legislative endeavours associated with the changing global conceptualisation of the role of the state in economic activity. It argues that state law in India is reflective of the state's posturing in economic activity. This chapter considers the enactment of the Electricity (Supply) Act 1948, which leaned towards state intervention in economic activity. Chapter 5 discusses the Electricity Act 2003, which endorsed a rollback of the state from economic activity in keeping with the corresponding global trends to establish a regulatory state.

The presence of tensions in the Indian state and the susceptibility of the state to societal influences (Mukherjee 2016), as discussed in the previous chapter,

necessarily implies that state law in India does not operate in a vacuum but must encounter, resist and co-opt societal tensions and that the state is in turn also influenced by counter expectations from the societal processes. Mukherji's observation that the Indian state is 'penetrated by social actors' (Mukherji 2016:219-220) and does not have the requisite autonomy of a developmental state becomes relevant in the electricity sector and the reflexivity between state posturing and societal expectations. As will be discussed in Chapter 6, Sally Falk Moore observes the phenomenon of the state organising itself in response to societal expectations and the tensions within the state as reasons for the emergence of semi-autonomous social fields and legal pluralism (Moore 2001:107). The following narrative of the dynamics in the electricity sector in the Indian state's interventionist phase brings to light the emergence of tensions associated with the role of the state in sectoral economic activity and the phenomenon of the susceptibility of the state to societal influences.

The chapter demonstrates the centrality of the sector to the state driven project of economic development. It then discusses the facilitative role of electricity in realising the objectives of the Directives, and its contribution to individual welfare and economic growth. The section on the role of intergovernmental financial organisations, like the Bank and the ADB in the sector, reflects their lending priorities in the light of the larger global consensus on state led provision of utilities during the interventionist phase. It also describes the national government's reluctance to bring about regulatory change given the popular backlash against accepting the Bank's and IMF's policy advice in the late 1960s as discussed in Chapter 3. It is argued that five decades of the

operation of the 1948 Act, coupled with politics of resource distribution, led to the evolution of sectoral regulatory attributes similar to the national regulatory attributes discussed in Chapter 3. It is further argued that the same makes the sector a microcosm to study the role of the Indian state in economic activity and legal interventions aimed at redefining it.

#### **4.2. Role of Electricity in Enhancing Individual Capabilities and Promoting Economic Growth**

The following discussion endeavours to contextualise the electoral appeal of electricity provision from the perspective of its role in enhancing individual capabilities and promoting economic growth. The provision of electricity helps reduce poverty by creating jobs and means of livelihood. UNDP has urged governments to promote universal access to energy (including electricity) as a 'political priority' (UNDP 2011). Electricity 'is desired not for its own sake, but for its ability along with appliances, to produce goods and services that are more directly desired' (Nouni et al. 2008:1188). Provision of infrastructure has a direct relationship with growth in 'low income countries' (Cook 2011:305). Electricity enhances economic activity and thereby helps generate income and improve livelihoods (Cook 2011:308). It is an essential prerequisite for economic development, as an infrastructural input for agricultural and industrial development (Nouni et al. 2008:1188; Oda & Tsujita 2011:3086).

The UNDP observes that, 'collecting fuel, pounding grain and hauling water is drudgery that denies poor women and children time for education or paid work' (UNDP 2010). It notes that provision of electricity helps empower women by reducing the time involved in performing domestic chores and 'freeing time' for educational and economic pursuits (UNDP 2011; Kanagawa & Nakata

2008:2018). In India, it was observed that access to electricity improved the condition of women in low-income groups more significantly when compared to similarly situated households with no access (Pereira et al. 2011:1435). This was because it reduced the time involved in tasks such as cooking and gathering fuel and water.

Inadequate lighting has a negative impact on the lives of people, and reliance on kerosene lamps is not only relatively expensive but is also 'inefficient, unhealthy and dangerous' (Agooramoorthy & Hsu 2009:513). Electricity, when compared to traditional forms of energy like kerosene or candles, has proved to be beneficial in terms of luminosity, convenience and health (IEA 2010:13). In South Africa and China, it was observed that the provision of electricity reduced household pollution levels by replacing the use of kerosene lamps and candles (Pereira et al. 2011:1431, 1433).

Electricity enables better lightning, allowing an extended period of study at home and access to information through usage of radios, televisions and information communication technologies (Kanagawa & Nakata 2008:2019). A study by Kanagawa and Nakata in the State of Assam in India demonstrated that the provision of electricity had a positive impact on 'educational attainment' or the literacy rate of children over the age of six (Kanagawa and Nakata 2008:2020).<sup>83</sup> This study was conducted to demonstrate the interrelationship between the provision of electricity and education, which is a foundational element in social and economic development.

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<sup>83</sup> The primary assumption of the study was that illiteracy prevents people from participating in economic activity (Kanagawa & Nakata 2008:2020).

Access to electricity has significant implications for the socio-economic welfare of people living in rural areas (Kanagawa and Nakata 2008:2017). It enhances opportunities for income generation, facilitates completion of tasks with relative ease and makes more leisure time available (Kanagawa and Nakata 2008:2018). The extension of electricity infrastructure is a means to integrate far-flung populations into the national economy (Cook 2011:305). The availability of electricity also encourages the dispersal of industries in search of 'low cost regions' (Cook 2011:305). In Brazil, the provision of electricity brought to light the linkages between rural electrification and the reversal of migration from urban areas owing to the possibility of a comfortable lifestyle and facilities in rural areas (Pereira et al. 2011:1438-39).

Access to electricity facilitates 'social integration and accessibility of other equally essential services' (Pereira et al. 2011:1428). Because of its benefits, rural electrification is a priority of governments in developing countries (Oda & Tsujita 2011:3086). An evaluation of the impact of state-sponsored rural electrification projects in South Africa, Brazil, India and China by Pereira and others demonstrates the benefits of its provision (Pereira et al. 2011). The study observes that the provision of electricity helps the economic and social development of populations who did not previously have access to the energy source (Pereira et al. 2011:1440). The study also established that access has enhanced the leisure time available for residents in rural areas (Pereira et al. 2011:1433).<sup>84</sup>

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<sup>84</sup> The authors note that the figures suggest that the increase was also in absolute terms i.e. as opposed to non-availability of any time at all for leisure previously.

### **4.3. The Interventionist State & Electricity (Supply) Act, 1948**

The statement of the objects and reasons of the 1948 Act assigns a prominent role for the state in sectoral development. This is unsurprising as the 1948 Act was enacted by the same Constituent Assembly that drafted the Constitution of India in its capacity as Constituent Assembly Legislature.<sup>85</sup> It further notes that the existing colonial Indian Electricity Act, 1910 could not facilitate active state participation in the sector. The 1948 Act facilitated state participation in the sector through the institution of the statutory State Electricity Board. The statement also establishes a clear link with the then global consensus regarding the interventionist role of the state in economic activity, especially the British welfare state and the importance of the public sector in post war reconstruction and development. It stated that the 1948 Act was moulded on the United Kingdom's Electricity (Supply) Act, 1926. Given the 1948 Act's geographical focus i.e. State level implementation, it can be seen as a clear example of an external model reflective of the then prevalent global consensus regarding the role of the state in economic activity, adopted by the national government and operationalised at the State level. This process is similar to India's national government adopting the World Bank's 1993 Policy prescription advocating a sectoral regulatory state and attempting to operationalise the same at the State level (World Bank 1993a). This will be discussed in Chapter 5.

The statement of objects notes that there was a need to extend electricity to semi-urban and rural areas as electrification was an urban phenomenon at the

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<sup>85</sup> Section 8, Proviso (e), of the Indian Independence Act, 1947.

time of independence. It envisaged the creation of State Electricity Boards (SEB) as the institutional apparatus for giving effect to the interventionist role of the Indian state in the sector. As discussed in Chapter 2, this corresponds with Majone's (1994) notion of regulation in a welfare state, which has multiple objectives and not just economic ones. In Majone's words 'the purpose of public ownership was not simply to regulate prices, conditions of entry and quality of service, but also to pursue many other goals, including economic development, technical innovation, employment, regional income redistribution, and national security' (Majone 1994:79).

The SEBs were vertically integrated entities combining the functions of generation, transmission and distribution. They were service providers and to a certain extent sectoral regulators (Ramachandra 2003:134). The 1948 Act did not prohibit the then existing private players, licensed under the earlier sectoral enactment, i.e. the Electricity Act 1910, from operating in the market. However, the Industrial Policy Resolution of 1956 (Govt of India 1956) saw a greater role for the 'Public Sector' in the provision of utilities. The Industrial Policy Resolution 1956 reserved all further activity in terms of generation and distribution of electricity for State level public utilities.<sup>86</sup> This can be attributed to the Nehru led vision of the Congress party to establish a 'socialistic pattern of society' as discussed in Chapter 3 (Chandra et al 2008:181, 446). The expansion of the public sector, i.e. SEBs, saw the private sector role in generation and distribution decline. Also, quite a few private enterprises in the sector were acquired by the States and integrated into the SEBs, either after the expiry of their initial license or by enacting nationalisation legislation (ASCI

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<sup>86</sup> Item 17 of Schedule A of Industrial Policy Resolution 1956 (Govt of India 1956).

2002:22; World Bank 1979:5). As discussed in Chapter 3, judicial interpretation of the Constitution endorsed sectoral nationalisation as promoting the redistributionist mandate of the state.<sup>87</sup>

The 1948 Act, assigned a coordinating role to the national government through the Central Electricity Authority, limiting the national government's influence on the sector.<sup>88</sup> Only two actors mattered at the State level, i.e. the State government and the SEB, and most regulatory decisions were taken between them. In all respects, the SEBs (despite apparent statutory autonomy) were extensions of the State government. As will be evident in the course of this chapter, the SEBs were increasingly administered as extended bureaucracies of the State government. The politics associated with the sector were restricted to the States, consequently access and affordability became electoral issues at the State level.

#### **4.4. Statutory Scheme of the Electricity (Supply) Act, 1948**

##### **4.4.1. State Electricity Board – Statutory Structure and Functions**

The 1948 Act vested in the State government the power to establish the SEBs.<sup>89</sup> It stipulated that the board of the SEB shall consist of no less than three and no more than seven members.<sup>90</sup> Amongst the members, it required three members of the board to have experience in commercial and

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<sup>87</sup> *Tinsukhia Electric Supply Co. Ltd V. State of Assam and Ors*, (1989) 3 SCC 709 and *Maharashtra State Electricity Board V. Thane Electric Supply Co. & Ors*, (1989) 3 SCC 616.

<sup>88</sup> Sections 3 to 4C of the Electricity Supply Act, 1948 provide for its establishment and functions. The Central Electricity Authority was envisaged as a technical institution in charge of developing the national power policy (ASCI 2002:21). It was required to resolve disputes between the State government and the SEBs and private licensees, and to advise the national government on matters pertaining to the sector. It was further required to provide training to the sectoral personnel and to facilitate supply of electricity (ASCI 2002:21: World Bank 1979:4).

<sup>89</sup> Section 5 (1) of The Electricity (Supply) Act, 1948.

<sup>90</sup> Section 5 (2) of The Electricity (Supply) Act, 1948.

administrative matters, electrical engineering and accounting, and financial matters in a public utility, preferably an electricity undertaking.<sup>91</sup> One of the three members with the said qualifications could be appointed by the State government as the Chairman of the SEB.<sup>92</sup> The SEB had the power to appoint staff and employees to carry out its functions.<sup>93</sup> The SEB was required to undertake and coordinate the activity of generation, transmission and distribution in an economical and efficient manner, and to give particular attention to areas that are not electrified or adequately supplied.<sup>94</sup>

#### 4.4.2. Nature of State Financial Control over the SEB

The State government determined both the structure and supply of capital to the SEB.<sup>95</sup> The SEB was required to submit an annual financial statement to the State government detailing estimated capital expenditure and revenue receipts for the forthcoming year, which would be laid before the State legislature.<sup>96</sup> Barring a few exceptions, the 1948 Act prohibited the SEB from incurring any unbudgeted expenditure.<sup>97</sup> The State government could provide aid or grants<sup>98</sup> and loan moneys to the SEB.<sup>99</sup> The State government also had the power to convert the loans advanced to the SEB into capital of the SEB.<sup>100</sup> The SEB could only borrow externally with the prior permission of the State government,<sup>101</sup> and the State government was empowered to guarantee the

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<sup>91</sup> Section 5 (4) of The Electricity (Supply) Act, 1948.

<sup>92</sup> Section 5 (5) of The Electricity (Supply) Act, 1948.

<sup>93</sup> Section 15 of The Electricity (Supply) Act, 1948.

<sup>94</sup> Section 18(a) & (d) of The Electricity (Supply) Act, 1948.

<sup>95</sup> Section 12A of The Electricity (Supply) Act, 1948.

<sup>96</sup> Section 61 of The Electricity (Supply) Act, 1948.

<sup>97</sup> Section 62 of The Electricity (Supply) Act, 1948.

<sup>98</sup> Section 63 of The Electricity (Supply) Act, 1948.

<sup>99</sup> Section 64 of The Electricity (Supply) Act, 1948.

<sup>100</sup> Section 66A of The Electricity (Supply) Act, 1948.

<sup>101</sup> Section 65 of The Electricity (Supply) Act, 1948.

SEB's loans.<sup>102</sup> Therefore, the ability of the SEB's to raise moneys from the market was severely curtailed.

At this point it becomes pertinent to mention that the statutory scheme of the 1948 Act and the Industrial Policy of 1956 required the State government to invest in the sector. However, as discussed in Chapter 3, fiscal division under the constitutional scheme vested more powers to raise revenues in the national government with the mandate to distribute them amongst the States. The State governments relied on the national government for monetary resources for sectoral investments. These resources were primarily allocated to the States through the planning process by the national government. The planned spending allocation for the electricity sector was larger than any other sector (Kale 2015:26). In its 1979 report the Bank observes that certain big states, like Andhra Pradesh, Maharashtra and Madhya Pradesh, were allocating nearly 40 per cent of their planned expenditure towards the sector (World Bank 1979:36). As will be evident in the forthcoming discussion, the emergence of redistributionist politics increased the dependency of the States on national government funds as the SEBs were no longer profitable. This created tensions between the national government and the States.

#### **4.5. Electricity Led Growth & Emergence of the SEB as the Dominant Sectoral Organisation**

Much of India's planned economic growth after independence was associated with industries which were electricity intensive (Dubash & Rajan 2001:3369; World Bank 1979:19). Industrial policy encouraged the establishment of

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<sup>102</sup> Section 66 of The Electricity (Supply) Act, 1948.

industries in segments of aluminium, fertilizers, cement, and iron and steel considered essential for the nation's development (World Bank 1979:19-20). As discussed earlier in this chapter, the provision of electricity prior to independence was restricted to urban areas, therefore the state invested in rural electrification.

Though traditionally dependent on erratic rainfall, governmental interventions in the nature of canal irrigation and pump sets, led to an increase in the area under cultivation and multiple crops could be harvested annually (Dubash & Rajan 2001:3369). This drive intensified during the implementation of the programme of the green revolution aimed at increasing agricultural productivity. The drive to increase agricultural productivity was, in turn, to avert famines which generate public debate against the government (Sen 2010:343). As discussed in Chapter 3, the Indian government decided to substitute oil with electricity generated through domestically available coal after the 1973 oil crisis. This led to a move from the diesel pump sets to electrical pump sets in the rural areas (World Bank 1979:1). This resulted in an increasing reliance on electricity as the predominant source of energy across sectors. Thus, it can be argued that electricity became a major input in the nation's economic activity.

The institutional arrangements of the 1948 Act made the SEB and State government inseparable. As discussed earlier, the 1948 Act defined the SEB's institutional role as that of a quasi-sectoral regulator, combining the functions of generation, transmission and distribution, and as an engine of the state to secure sectoral development. As a result, the SEB emerged as the most prominent sectoral organisation at the State level. By 1990, SEBs were

functioning in 19 of the then 25 States in India and electricity was being provided through State departments in 6 other States (Sharma et al. 2005:564).<sup>103</sup> Around the same time, the SEBs were serving almost 95% of all consumers and contributed to 70% of the country's electricity generation (Chong 2004:111).

#### **4.6. State Provision of Electricity, Politics of Resource Mobilisation and Sectoral Losses**

As evidenced in the above discussion, provision of electricity has a direct bearing on individual welfare and larger economic growth. Over the years, the supply led growth,<sup>104</sup> i.e. the spread of state sponsored irrigation programmes and the growing dependence of agriculture on the electric pump sets, raised the expectations of the electorate on the basis of these facilities being extended by the state (Dubash & Rajan 2001:3369). This can be seen as a sectoral reflection of the larger phenomenon, described by Sudipta Kaviraj, of politicians appealing to 'particularistic interests' distributing the aggregated resources at the state's disposal to their constituencies (Kaviraj 2000:54). This led to the emergence of the farmers' lobby renegotiating the resource dispersal at State level from the 1960s under Indira Gandhi (Kaviraj 2000:54). The politicisation of distribution and allocation of electricity can also be viewed as what Chhibber describes as the phenomenon of the emergence of distributive politics from 1967 when Congress began losing power in the States, which

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<sup>103</sup> India presently has 29 States. The number of States has increased over a period of time owing to regional movements for separate statehood. The State of Andhra Pradesh was bifurcated in pursuance of one such movement for statehood for the Telangana region in the State in June 2016.

<sup>104</sup> Dr.Usha Ramachandra is of the view that the state in India actively encouraged the switch to electricity as a source of energy. She gives the illustration in the State of Karnataka in the initial days of extension of supply, when consumers were encouraged to consume more and avail discounts for higher units consumed (Ramachandra 2014a).

had a corresponding impact on its national performance in the parliamentary elections (Chhibber 1995:78-79). The dominant Congress party, which was in power in the national government and States for nearly twenty-five years after independence, was competing for electoral power with several other national, regional and State level parties from the mid-1970s (Khemani 2007:695). Political manifestos increasingly promised subsidised or even free power (Dubash & Rajan 2001:3369).

#### 4.6.1. Politics of Resource Disbursal and Sectoral Losses

The politics of resource disbursal generated popular expectations for the provision of public goods by the State governments, which are responsible for their provision under the Indian Constitution. A sample survey was conducted in 2001 in 18 States comprising of 97% of the country's population, so as to ascertain which public goods were important for a citizen's day to day living (Chhibber et al 2004:341). The majority of participants in the survey indicated drinking water, electricity, roads, education and medical facilities were essential (Chhibber et al 2004:343). The survey on citizen expectations also indicated that the citizens are of the view that the state is responsible for providing the said public goods (Chhibber et al 2004:346). Chhibber and others observe that, '[g]iven the historically large role played by the Indian state, it is no surprise that most respondents looked to the state to address issues related to electricity supply, the construction of roads, the provision of clean drinking water, education, and medical facilities' (Chhibber et al 2004:348). In fact, 80% of the respondents were of the view that the State government (as opposed to the national and local/municipal government) was responsible for the provision of the public services (Chhibber et al 2004:352).

State level political fortunes were tied to the provision of electricity. Political considerations influenced decisions in the nature of extension of transmission lines as opposed to technical and efficiency requirements (Dubash & Rajan 2001:3370). Joel Ruet rightly observes that SEB's did not function on commercial lines like firms but were 'administered' and that it was this 'administrative nature' that was the reason for them being inefficient (Ruet 2003:26). The nature of political intervention was not restricted to macro advice as to the nature of investments but percolated to every small detail of functioning in the nature of 'political strongholds' that needed to be prioritised (Ruet 2003:27). Often the same led to commissioning simultaneous projects before elections so as to demonstrate results rather than prioritise scarce resources (Ruet 2003:27-28). This overstretching of resources led to delays and overburdened the existing transmission infrastructure beyond technical capacity (Ruet 2003:27-28). All the higher appointments, including the chairman and members of the SEB's Board, were political in nature (Ruet 2003:28). Political interference also extended to recruitment and promotion of staff, officers and unskilled workers to please political constituencies (Ruet 2003:28). In this context, Joel Ruet quotes Rajiv Gandhi, the former Indian Prime Minister who termed SEBs as 'State Employment Boards' (Ruet 2003:28).

A number of State governments interfered with the tariff fixation process of their SEBs (ASCI 2002:34). As per one account, the politics and policies associated with subsidised or free electricity have their origin in the South Indian State of Karnataka (ASCI 2002:34). In 1975 there was a farmer's agitation in Karnataka for subsidised agricultural electricity so that the cost of

irrigation was on par with the farmers being supplied through surface irrigation projects in the nature of canals (ASCI 2002:34). The low revenues compared to the transaction costs of monitoring was one of the reasons for the non-installation of meters and the non-monitoring of consumption (Dubash & Rajan 2001:3369).

Heavy subsidies to the domestic and agricultural sector, theft and pilferage and high transmission and distribution losses were the hallmarks of the sector (Sharma et al 2005:565). Distribution losses in some states were as high as 40 percent in the early 1990s and by 1996 the burden of subsidies to agricultural and domestic consumers was nearly 1.5% of the nation's GDP (World Bank 1999b:vi). This adversely affected the SEB's ability to invest in new generation capacities. On the generation front, approximately 53.9% of the thermal generation capacity was unused (Sharma et al. 2005: 565), with high transmission and distribution losses, further capacity additions could do little to increase the availability of power.

#### 4.6.2. Early Attempts at Reducing Sectoral Losses

When one examines the statutory scheme of the 1948 Act it becomes apparent that the enactment never intended to make SEBs function as profit seeking commercial entities. Apart from a broad mandate to exercise fiscal prudence, i.e. to 'supply electricity in the most economical and efficient manner possible', the 1948 Act was silent as to the possibility of the SEBs functioning profitably. Section 67 of the 1948 Act stipulated that 'provision for depreciation and interest on government loans need be met by SEBs only when surplus funds were available' (Ganesh 2001:102). In fact, the financial worries of the

SEBs were becoming evident in the 1960s itself, when the national government constituted the Venkatraman Committee which submitted its report in 1964. The Venkatraman Committee stated that the SEBs ought to plan their finances in such a way that 'their total revenues are adequate to meet all their expenses and also make a 3% return' (ASCI 2002:34). The 1948 Act was amended in 1978, requiring the SEBs to generate a surplus as required by the State government, but the quantum of surplus was still not specific (i.e. 3% as was recommended by the Venkatraman Committee) and the same was at the discretion of the State government (Ganesh 2001:102). It was only a subsequent amendment in 1983 that explicitly prescribed that the SEBs have to generate a surplus of not less than 3% of their net fixed assets. The amendment further stated that the State governments were at liberty to fix a higher level of surplus. It should, however, be noted that no State government ever fixed a surplus higher than the statutory minimum (Ganesh 2001:103). This evidences the reluctance of the State governments to run the SEBs on a commercial basis. It also indicates that from the very onset of the politics of redistribution, the sector has been a financial drain on the State government's budgets. However, as observed by Stuti Khemani (2007), the national government was both complicit in the politics of resource disbursement and desirous to fiscally discipline the States. Such a contradiction was reflective of the influence of different interest groups and the susceptibility of the Indian state to societal influences.

In fact, it has been observed that the mandatory statutory 3% rate of return prescribed in the financial interest of the SEBs actually did great damage to the SEBs (ASCI 2002:34). The requirement of a 3% rate of return led to greater

State government interference in the tariff setting process of the SEB on the pretext that the State would be bearing the burden of the loss sustained (ASCI 2002:34). In reality, SEBs were always undercompensated, leading to further deterioration of their financial fortunes (ASCI 2002:34). Even Ruet observes that compensation for the subsidy received by the SEBs was not proportionate to the costs incurred and led to further deterioration of their financial position (Ruet 2003:30). By the 1980s, the SEBs were only recovering 77% of their costs (Chong 2004:111).

Low energy prices led to 'high consumption and excessive investment to support this consumption' (World Bank 1999b:vi). With a high proportion of consumption not being metered owing to low revenues compared to the cost of monitoring (Dubash and Rajan 2001: 3369), it was no longer possible to determine the exact amount of electricity being consumed. This unmetered electricity in turn was projected as transmission and distribution losses (Dubash & Rajan 2001: 3369). Though the State governments continued to subsidise the SEBs, the same did not prevent their downward spiral into bankruptcy. Another means adopted by the SEBs to counter the losses in agriculture was to cross-subsidise the agricultural consumption with industrial consumption. The high costs of electricity supplied to the industry resulted in industry investing in captive generation facilities (Dubash and Rajan 2001:3370). Captive generation resulted in a fall in the proportion of industrial consumption from approximately 67% in the 1960s to 40% in 1991 (Dubash and Rajan 2001:3370). As a consequence, the cross subsidization strategy could not counter the losses on the agricultural front (Dubash & Rajan 2001:3370). The sectoral dynamics therefore demonstrate that different

societal interests were influencing the state for access to the resource being generated, transmitted and distributed by it. It is in fact reflective of Bardhan's observation of the 'heterogeneous' 'dominant coalition' that has laid siege to the resources at the command of the state to the exclusion of other societal groups (Bardhan 1998).

#### **4.7. Interventionist State and International and Bilateral Financing Options**

##### 4.7.1. World Bank & India 1947-1991

From 1948 until 1991, the Bank aligned its lending priorities with that of the national government's state led sectoral development. This corresponded with the global consensus concerning the role of the interventionist state in promoting economic development for the corresponding period. It funded rural electrification initiatives, programmes associated with the green revolution and the SEBs. As will be discussed, India was a very important client for the Bank, and the Bank was careful not to jeopardise its relationship with it. It continued supporting the SEBs in the 1980's despite advocating structural adjustment elsewhere in the world (Zanini 2001:9-10).

As discussed earlier, by 1990 the Bank had provided a total funding of \$35.3 billion to the sector. This amounted to 15% of the Bank's lending to the electricity sector world wide and 60% of India's external borrowing (Chong 2004:114). Accepting the Bank's policy advice led to a political backlash in the 1960s. The relationship began to improve only in the late 1960s and early 1970s (Zanini 2001:10). Assistance was initially provided to the agricultural sector towards technology transfer for a programme aimed at enhancing

national agricultural productivity to attain self-sufficiency through the 'green revolution'. This involved increasing inputs in the nature of fertilizers and high yielding varieties. The expansion of rural electrification and the provision of electricity driven pump sets were part of this initiative (Dubash & Rajan 2002:51). Wary of the Bank's propensity to foray into policy issues that were 'politically sensitive', the national government declined Bank support for its poverty eradication programmes (Zanini 2001:10). In turn, focus was on exploring areas of convergence between the Bank's programmes and government's policies. The Bank avoided making use of conditionality through the 1970s. The 1979 report of the Bank titled 'India – Economic Issues in the Power Sector', reflects this approach of coordinating sectoral financing with national policy priorities (World Bank 1979). The Bank's lending to the electricity sector was in keeping with the policy priorities of the national government through the 1980s till the release of its new 1993 Policy (World Bank 1999b).

The Bank, for its part, pursued a policy of engagement with India during the 1980s, and did not put pressure on India to undertake structural reforms, which was its then standard prescription the world over (Zanini 2001:11). Policy talk was carefully avoided 'for fear of jeopardizing a strong lending relationship with a sensitive client' (Zanini 2001:11). The Bank continued to finance projects whose outcomes conflicted with its own economic and sectoral policies (Zanini 2001:12). This included financing state owned enterprises involved in the manufacture of cement, fertilizers, steel and, more importantly in the context of this thesis, the SEBs. The Bank continued financing the SEBs despite being aware that they were inefficient and loss making and, in its opinion, the main

culprits behind the financial troubles of the States (Zanini 2001:11). The financing of the SEBs in the 1980s, can be inferred as being part of the Bank's strategy of relationship lending. Owing to political sensitivities, the Bank could not venture into poverty reduction and social sectors of education and health, even up until 1990 (Zanini 2001:11).

#### 4.7.2. Sectoral Financing and the role of the World Bank, Asian Development Bank and Bilateral Donors

Given India's defiant position regarding policy advice, the Bank focussed its programmes on the operational, managerial and financial performance of the SEBs in the 1970s and 1980s. However, the Bank in the course of its engagement with SEBs in transmission and rural electrification projects in the 1970s could not persuade them to review their tariff fixation strategy (World Bank 1999b:2). From 1979 onwards the Bank focussed on its association with the national government which was making inroads into electricity generation.<sup>105</sup> In its view, supporting national participation would benchmark good institutional practices in the power sector, which in turn would be followed by the SEBs. This was also in line with its sectoral approach (mirroring its national approach), i.e. to toe the national government's line in areas of convergence of views. With this in mind, the Bank directed its lending towards National Public Sector Undertakings owned by the national government, which, as per its evaluation, performed satisfactorily and efficiently, achieving 'least cost power development' (World Bank 1999b:2).

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<sup>105</sup> This was made possible through an amendment to The Electricity (Supply) Act, 1948 in 1976. The amendment enabled the national government, amongst other things, to enter the electricity generation segment.

ADB synchronised its activities in the electricity sector with that of the Bank,<sup>106</sup> in terms of co-execution of projects, State wise demarcation and engaging the national government (ADB 2007:27). Both the Bank and ADB funded the National Public Sector Undertakings such as the Power Finance Corporation (PFC) in the area of financing the power sector (World Bank 1999b:5), the Power Grid Corporation of India Limited (Powergrid) in the area of transmission, and the National Thermal Power Corporation (NTPC) in the area of generation (ADB 2000:8; ADB 2001:10). The Bank worked along with the Central Electricity Authority and the national government so as to impose 'financial discipline' on the SEBs through the national government entities like NTPC, PFC and Powergrid (World Bank 1999b:2). In fact, by 2001, NTPC was the largest worldwide client of the Bank (ADB 2000:7).

ADB acknowledges that it 'leveraged' its lending to the PFC and the Powergrid with an aim to use these National Public Sector Undertakings as the means to promote reforms of the client SEBs (ADB 2000:9; ADB 2001:12). The ADB's loan to Powergrid restricted onward lending to only those SEBs with a good performance record, and required Powergrid to suspend supply to non-compliant SEBs (ADB2001:6). PFC also received sizable support from bilateral donor agencies, like the United Kingdom's Department for International Development (DFID) and the United States Agency for International Development (USAID) (World Bank 1996:4). As a result, PFC's lending conditionality allowed it to advance loans to those SEBs which undertook to improve their performance through 'Operational and Financial

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<sup>106</sup> ADB also terms it as 'division of labour' (ADB 2007:27).

Action Plans', which were in turn vouched for by the State governments (Chong 2004:113). It was through this conduit that the national government tried to bring about institutional change at the State level but most State governments decided against availing the condition laden loans (Chong 2004:114). This generated further tensions between the national government and the State governments.

The Bank's lending to the National Public Sector Undertakings did bring about an increase in the generation capacity, yet it was not able to bring about the necessary changes at the State level, i.e. the SEBs (World Bank 1999b:8). The fact remained that the distribution business, with its consumer interface, was vested with the State governments. As a consequence, the good practices of the National Public Sector Undertakings did not have the expected reforming effect on the SEBs, where it was business as usual. Therefore, towards the mid-1980s, the Bank once again directed its attention to institutional reforms at the SEB level (Chong 2004:93). Its reform programme in 1980 included, 'financial restructuring, tariff adjustments to meet financial objectives, improved metering and collections, and shifting resources from supply expansion to focus on improving distribution efficiency' (World Bank 1999b:19). The reform undertaken at the level of the SEBs was considered 'incremental' in the States of Maharashtra and Kerala (World Bank 1999b:19). At times, the reform process was reversed when a new government came to power as evidenced in the States of Karnataka and Uttar Pradesh (World Bank 1999b:19). It was this reversal of governmental policy after the elections that subsequently prompted the Bank (and later ADB) to adopt the legislative solution in the 1990s. Enactment of legislation, in their opinion, would make

the reforms 'irreversible' and the reform process predictable (World Bank 1999a:10; ADB 2008:14). The introduction of a legislative solution to remedy the policy reversals will be discussed in Chapter 5.

#### **4.8. Conclusion**

The 1948 Act incorporated the then global consensus on the role of the state in economic activity. The SEBs were the institutional conduit through which this interventionist role of the state in sectoral activity was operationalised. As discussed, the SEB's day to day operations catered to sustain the politics of resource distribution driven by the 'dominant coalition' (Bardhan 1998). For the period from 1948 until 1991 it is evident that the State level sectoral regulatory space mirrors the attributes of the national state. This is reflected in the dominant role of the state in sectoral economic activity and the increasing politicisation of the issues of provision and allocation of the resource. This resulted in tensions owing to different societal groups laying claim to the resource being generated, transmitted and distributed by the state. The national government too had a role in the politics of resource disbursement as the provider of resources and controller of financial markets.

Intergovernmental financial institutions, like the Bank and ADB, were associated with the sector throughout the period of politicisation. The Bank's sectoral lending was in keeping with the policy priorities of the national government through the 1980's (World Bank 1999b), even when it was insisting on structural reforms elsewhere (Zanini 2001:11). The Bank continued to finance the SEBs, notwithstanding its view that the SEBs were the main culprits behind the State government's financial troubles and whose

functioning conflicted with the Bank's economic and sectoral policies (Zanini 2001:11-12). The politics of resource mobilisation itself created tremendous financial pressures on both the State and national governments. The national government as the primary disburser of resources tried to restrain the State's sectoral expenditure through managerial and administrative reforms assisted by the Bank and the ADB. These reforms were more internal in nature and endeavoured to bring about greater efficiency within the SEB's operations. The Bank's, ADB's and bilateral donor's association with tariff and managerial reforms in the 1970s and 1980s bring to light the resistance to reordering the societal dynamics. This necessarily implied that the Indian state's sectoral posturing of an interventionist state remained unchanged. The next chapter discusses the processes and mechanisms through which an attempt was made to change the Indian state's sectoral posturing from an interventionist state to a regulatory state through state law.

## **Chapter 5 – Regulatory State & the Enactment of the Electricity Act 2003**

### **5.1. Introduction**

This chapter discusses changes in Indian state's economic policy and practice from an interventionist to a regulatory state after the initiation of reforms in 1991. This change in the state's posturing reflected the larger global shift in the role of the state in economic activity. This change in the state's posturing in the electricity sector was sought to be achieved by changing the state law (national state and States). This involved replacing the 1948 Act with the Electricity Act 2003, which ushered in a regulatory state. There was wide ranging popular political consensus regarding the need to change the state's posture from a laissez faire to an interventionist state after independence. However, as discussed in Chapter 3 and as will be demonstrated in the present chapter, the move to establish a regulatory state was at the behest of an elite consensus at the national and State level.

As discussed in Chapter 2, the term 'regulatory state' is essentially an analytical construct. However, neoliberal scholars have given it a normative flavour to mean 'minimal state intervention for the purpose of correcting market failure' (Yeung 2010:71). Yeung summarises the features of a regulatory state as entailing a 'separation' between state's policy making functions and service delivery, a decline in hierarchical state control of economic activity, a 'reliance' on institutional arrangements of a regulatory agency and the need to 'shift areas of economic life perceived as 'high politics' into the realm of 'low politics' (Yeung 2010:75). This chapter explores the changing conceptualisation of the role of the Indian state in economic activity, brought about through an elite

consensus at the national level and implemented at the State level. It illustrates the processes and actors who facilitated the legislative reform aimed at depoliticising the role of the Indian state in sectoral economic activity. By focussing on the reform period and the processes through which reform was undertaken, this chapter demonstrates that the regulatory reforms in the electricity sector at the behest of international financial institutions and bilateral donors were undertaken without paying attention to the sectoral regulatory attributes. It argues that the same resulted in legal pluralism in sectoral state law, a phenomenon that will be explored in Chapter 8.

This chapter firstly discusses the processes whereby the national government consented to undertake policy reforms in exchange for the Bank's financing. It then explores the introduction of the Bank's regulatory reform model in India, in light of the Bank's role as 'globaliser' of regulatory models (Woods 2006:2).<sup>107</sup> The chapter then discusses the reform experience of Orissa, the first Indian State to adopt the Bank's global reform model. The section on Orissa<sup>108</sup> illustrates the inter-organisational linkages between the Bank, ADB, bilateral donors and consultants.<sup>109</sup> The chapter thereafter discusses the attempts by the national government to achieve a national sectoral consensus across the States, culminating in the Electricity Act, 2003.

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<sup>107</sup> Ngaire Woods describes the Bank and the IMF as globalisers as 'they have integrated a large number of countries into the world economy by requiring governments to open up to global trade, investment and capital' (Woods 2006: 2-3).

<sup>108</sup> The official name of the State of Orissa was changed to Odisha. This thesis, however, uses the name 'Orissa' as the State's name was 'Orissa' during the reform period.

<sup>109</sup> The consultants and bilateral aid agencies did not have a direct impact at the national level, though the elements of the reform model developed by them was upscaled to the national level.

### 5.1.1. Methodology of Principles Actors and Mechanisms

The chapter relies on the methodology of ‘principles, actors and mechanisms’ devised by Braithwaite and Drahos to trace the pathways of regulatory globalisation (Braithwaite and Drahos 2000). Braithwaite and Drahos are of the view that the processes of globalisation can be best traced if explored as a dynamic evolving out of interaction between principles, actors and mechanisms (Braithwaite and Drahos 2000:15). ‘Actors’ in regulatory globalisation include international organisation of states, non-governmental organisations, individual actors, states, epistemic communities etc. For them, principles ‘constitute an agreed standard of conduct’ (Braithwaite and Drahos 2000:18). Principles have an instrumental function and ‘propel action in a certain direction’ (Braithwaite and Drahos 2000:18-19). Given the inherently abstract nature of principles, an agreement on them paves the way for subsequent negotiations on more detailed rules and legislation. Mechanisms are processes that enhance the propensity of certain forms of regulation to be replicated in other parts of the world. These processes include coercion, systems of reward, modelling, capacity building, etc. (Braithwaite and Drahos 2000:17). Braithwaite and Drahos illustrate the interaction between actors, principles and mechanisms with the example of United States of America utilising the mechanism of economic coercion (sanctions) to enforce the principle of national treatment to promote compliance with intellectual property rights in other jurisdictions (Braithwaite and Drahos 2000:19). The chapter’s narrative explores the relationship between the mechanisms and principles through the actions and responses of actors. These actors in the Indian context range from international ones (i.e. intergovernmental financial

organisations), bilateral donors, the Indian state (both national and State), politicians, consultants and individuals.

## **5.2. The 1991 Financial Crisis and Policy Linked Financing**

The year 1991 saw a change in the national government's attitude towards the Bank and the Bank's posturing towards India. As discussed in Chapter 3, despite having an active democracy economic changes were brought about by a small and elite group by 'stealth' (Kohli 2010:169; Nayar 2007:33). While India had obtained IMF loans on earlier occasions, and was one of the biggest borrowers in the developing world from the Bank, these institutions were not able to foray into policy based lending owing to governmental resistance. The 1991 balance of payments crisis was different. Segments of the bureaucracy and intelligentsia, including the then newly elected national government represented by the then Finance Minister Dr Manmohan Singh,<sup>110</sup> were willing to follow the economic policy prescription of the Bank and IMF (Chong 2004:115). It was the presence of these actors, described as 'eager pupils' (Chong 2004:115) and 'sympathetic interlocutors' (Woods 2006:73), in the Indian bureaucracy, the political establishment and intelligentsia that helped the Bank secure the crucial linkage between project financing and policy reform.<sup>111</sup>

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<sup>110</sup> Manmohan Singh subsequently served as India's Prime Minister from 2004 to 2014. Manmohan Singh was a strong critic of India's economic policies and yet a governmental insider. His Ph.D. thesis at the University of Oxford, which was subsequently published as a book entitled *India's Export Trends and Prospects for Self-Sustained Growth*, was a critique of the inward-looking trade policies. He had held important positions in what Woods terms the crucial ministries (Woods 2006:77). He was Deputy Chairman Planning Commission of India and Chief Economic Advisor to the Ministry of Finance and had been the Governor of the country's central bank, i.e. the Reserve Bank of India (Prime Minister's Office 2017).

<sup>111</sup> As discussed in Chapter 3, the 1991 crisis was preceded by political instability, i.e. a series of short term coalition governments at the national level. Even the 1991 government was a minority government with external support. As was observed in similar circumstances, in other

The regulatory reforms in the electricity sector at the State level ought to be contextualized in the light of this ‘historical timing’ (Hancher & Moran 1989:295), marked by a ‘sense of crisis’ (Hancher & Moran 1989:284, Woods 2006) at the national level. In order to appreciate the regulatory arrangements of the 2003 Act, it becomes essential to appreciate what Hancher and Moran term the historical context in which the reforms were undertaken (Hancher & Moran 1989:285), i.e. when the Bank wielded a tremendous ‘power to persuade’ (Woods 2006:65-83).

### **5.3. Contextualising State Level Sectoral Reforms**

Between 1989 and 1993, the Bank and International Finance Corporation, in line with the new national governmental policy of allowing private investment in generation, helped the existing private sector operators increase their generation capacity.<sup>112</sup> As discussed in Chapter 3, this corresponds with the push of the Indian national state towards encouraging the private sector in the 1980s. This in turn generated tensions between the judiciary on one hand and the executive and legislature on the other. Established before the adoption of the 1956 Industrial Policy Resolution (Govt of India 1956), these private companies were the last bastions of private ownership in the country (ASCI 2002). Some of these companies under the Bank’s tutelage would subsequently play an important role in attempts at privatization of the electricity distribution business at State level. The national government also decided to

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jurisdictions by Woods (Woods 2006:71), the prevailing sense of economic crisis and political uncertainty, coupled with the presence of sympathetic interlocutors, greatly strengthened the Bank and the IMF’s leverage.

<sup>112</sup> This was made possible through an enhanced access to finance, ‘[b]etween 1989 and 1994, IFC committed \$256 million (loan plus equity) and syndicated an additional \$85 million in loans for power generation and systems expansion in India’s private integrated entities’ (World Bank 1999b:3).

enhance electricity generation capacity by relaxing the foreign direct investment (FDI) restrictions in electricity generation (Chong 2004:113). These entities with substantial FDI were popularly referred to as Independent Power Producers (IPPs). From a sectoral perspective 1989 was also the year in which the Supreme Court interpreted electricity sector nationalisation as in keeping with the redistributive mandate of the Indian state.<sup>113</sup>

The IPPs, however, were not willing to do business with the SEBs that held the transmission and distribution businesses at State level, owing to the latter's deteriorating financial health. The Bank expressed its concerns about the sustainability of the private initiatives given the shaky finances of SEBs, who were the ultimate purchasers of power (World Bank 1996:6). As a consequence, the national government stepped in to underwrite agreements between the SEBs and IPPs. However, the SEBs and the States were not in a position to guarantee the investment of the IPPs, and the national government was not in a position to persuade the States to revamp their SEBs so as to make them financially viable (World Bank 1999b:2). The SEBs were also not able to honour the power purchase tariffs owed to the National Public Sector Undertakings, threatening their financial viability (Govt of India 2001b:3; Planning Commission 2001:6). National Public Sector Undertakings like NTPC, NHPC and Powergrid were affected by SEB defaults (ADB 2000:3; ADB 2001:6). In fact, NTPC had taken over certain State owned generation facilities in lieu of dues owed to it (ADB 2001:6). In 1993, cumulative SEB losses had reached nearly rupees 1.8 billion or \$US 30,774,227 which

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<sup>113</sup> *Tinsukhia Electric Supply Co. Ltd V. State of Assam and Ors*, (1989) 3 SCC 709 and *Maharashtra State Electricity Board V. Thane Electric Supply Co. & Ors*, (1989) 3 SCC 616.

amounted to nearly 0.5% of GDP (Chong 2004:114).<sup>114</sup> The electricity sector had become the focal point for the financial restructuring programme aimed at reducing budgetary deficits (Chong 2004:114).

As discussed, the Bank's previous efforts to bring about change at the SEB level were unsuccessful. This made the Bank conclude that the, 'SEBs could not be revitalised within the political structure in which they operated in India' (World Bank 1999b:10). The Bank was of the view that State government control of the sector would continue to dampen the progress made by national government's initiatives at sectoral reform. In its view, increased political interference meant that tariff, operational and managerial reforms could not be carried out. This view of the Bank corresponds with the neoliberal attack on politics as observed by Chang (Chang 1999: 190). As discussed, in the Indian context, politicisation has led to the resource being controlled by the 'dominant coalition' (Bardhan 1998) to the exclusion of other social groups. Redistributive politics also resulted in continued reliance of the States on national funds for sectoral investment and expansion (World Bank 1999b:10). Given the national government's fiscal crisis these funds were on the decline in the early 1990s (World Bank 1999b:10). The late 1980s and the early 1990s also saw the national government running into budgetary deficits, this limited the national government's ability to leverage sectoral financing as a means to ensure the financial discipline of SEBs (Chong 2004). This decline in the national government's financial capacity and the presence of 'sympathetic

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<sup>114</sup> As per the currency conversion rates on 19 May 2014.

interlocutors' (Woods 2006:73), strengthened the Bank's position vis-à-vis the national government.

#### **5.4. The 1993 Policy Paper**

The World Bank's policy paper, 'The World Bank's Role in the Electric Power Sector: Policies for Effective Institutional, Regulatory and Financial Reform', (hereinafter the 1993 Policy/1993 Policy Paper) reviewed the Bank's lending to the electricity sector worldwide (World Bank 1993a). The Bank notes that, in 1991-92, lending to the electricity sector constituted nearly 15% of its lending to developing countries (World Bank 1993a:11-12). The Bank observes that there has been a decline in the power tariffs of the publicly owned utilities in developing countries in real terms between 1979-1988 (World Bank 1993a:12). It notes that, whereas earlier sectoral lending focused on governments, viewing electricity as a 'publicly-provided good', a cumulative review demonstrated, 'a declining trend in the sector's pricing, financial, technical and institutional performance, mainly due to governmental failure to address the sector's fundamental structural problems' (World Bank 1993a:12). This included the non-increase and politicisation of tariffs coupled with sectoral inefficiencies in the nature of transmission and distribution losses and inefficient utility management across the developing jurisdictions, which were recipients of sectoral funding (World Bank 1993a:12). The policy paper describes the maladies associated with the publicly owned electricity sector across developing jurisdictions and these correspond with the sectoral shortcomings in India, discussed in Chapter 4.

The 1993 Policy Paper notes that the electricity sector spending had a direct impact on macroeconomic stability and increased public debt in developing countries, a trend evidenced in the sectoral spending and budgetary deficits (World Bank 1993a:12).<sup>115</sup> The 1993 Policy proposes to address what the Bank viewed as the interconnected issues of institutional, i.e. at the level of the enterprise, regulatory arrangements and financial reform so as to improve the functioning of public sector (World Bank 1993a:11-13). In other words, the regulatory reform accompanying sectoral restructuring was primarily aimed at reining in public expenditure, which was threatening the state's fiscal stability.

The 1993 Policy Paper (World Bank 1993a) reflects a change in the global sectoral consensus from public to private ownership (Chong 2004:94-96). This was in keeping with the wider international mood to privatize and liberalize, symbolised by the fall of the Soviet Union and the rise of the 'Washington Consensus' (Woods 2006:47-52; Stiglitz 2002).<sup>116</sup> The regulatory model in the 1993 Policy Paper owes its origin to the regulatory arrangements of the United States, a country that has a dominant influence on the Bank's operations. This reinforces Hancher and Moran's suggestion that 'models emanating from countries exercising great economic and political power are most likely to be the objects of emulation' (Hancher & Moran 1989:285).<sup>117</sup> The Bank has played

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<sup>115</sup> The 1993 Policy Paper notes that, though governments had used power sector spending as a means to ensure 'social equity', the desired results had not always been achieved. It observes that excessive sectoral allocation has burdened the public exchequer with an over dependence on general taxes, leading to budgetary deficits. It moots the need to address issues of 'social equity' through mechanisms other than subsidies. This concept of fungibility in terms of the reallocation of resources would be reiterated in all subsequent State level sectoral restructuring documents of both the ADB and the Bank.

<sup>116</sup> The 1993 Policy Paper also documented similar Bank sponsored restructuring exercises being undertaken worldwide in Latin American countries, i.e. Chile and Argentina, developed nations like the United Kingdom, Australia and New Zealand, and Asian economies like the Philippines and Malaysia (World Bank 1993a:13, 42, 51, 70 & 75).

<sup>117</sup> Boaventura deSousa Santos terms this phenomenon 'globalised localism' (Santos 2002).

a significant part in this regulatory diffusion, with its new found institutional mandate aptly described by Ngaire Woods as that of being a 'globaliser' (Woods 2006:2).

The 1993 Policy Paper required incorporation of the principles of transparent regulation, importation of services, commercialisation and corporatisation, commitment lending and private investment, in the sectoral restructuring exercise. The principle of transparent regulation makes all further sectoral lending contingent on the 'establishment of a legal framework and regulatory processes satisfactory to the Bank' (World Bank 1993a:14). Any country seeking sectoral financing needed to enact laws and establish a legal/regulatory framework to the Bank's satisfaction. Therefore, reform of state law was the pre-requisite for availing any further financial assistance from the Bank.

As Faundez observes legal reform measures proposed by the Bank reflected the Washington Consensus (Faundez 2010:183-184). Similarly, the regulatory arrangements imposed by multilateral financial institutions and bilateral donors endeavour to restrain the state (Tshuma 1999; Faundez 2010). As discussed earlier, regulatory choices have constitutional implications (Rawlings 2010:9). The template for legislative reform aimed at imposing constitution-like restraints on the state. This corresponds with David Schneiderman's notion of neo-liberal constitutionalism which aims to give precedence to the economic over the political by imposing constitution-like restraints on the state (Schneiderman 2001:85).

The Bank's Policy required the regulatory framework to mention the 'reform objectives, including tariff policies', to ensure 'transparency and openness', and to establish 'a legal structure that clearly defines the rules and procedures for reducing the level of government involvement and increasing the autonomy and accountability of enterprise directors and managers' (World Bank 1993a:14). The Policy Paper further states that '[t]he dual role of the government as operator and owner of utilities has drawn governments into day-to-day interventions in power sector operations. There is therefore a need to set up some form of regulatory body as part of a broader governmental effort to redefine the respective roles of government, utility, and consumers' (World Bank 1993a:14). It is in this context that the 1993 Policy Paper envisages the institution of the independent electricity sector regulator, i.e. a body that is independent from the government departments and the utilities. Under the new regulatory arrangements, the state would retain the power to decide the overall sectoral policy (World Bank 1993a:14). Therefore, the regulatory body becomes the institutional mechanism to monitor and enforce compliance with the sectoral arrangements of the regulatory state.

It may be recalled that the Bank had sponsored reforms aimed at improving the managerial capacity and commercial viability of the SEBs in the 1980s and 1990s, only to see them reversed with a change in government. The principle of commercialisation and corporatisation required the restructuring of State owned utilities into commercial organisations, working on commercial principles (World Bank 1993a:16). In this regard, the Policy Paper states as follows:

'The Bank will assist in developing power sector strategies to bring about commercialization. For power enterprises to operate on commercial principles, they must be treated like commercial enterprises. They should pay interest and taxes; earn commercially competitive rates of return on equity capital; and have the autonomy to manage their own budgets, borrowing, procurement, salaries, and conditions pertaining to staff' (World Bank 1993a:16).

The principle of commercialisation and corporatisation in the 1993 Policy therefore institutionally required the unbundling of the monolithic SEB into separate companies undertaking functions of generation, transmission and distribution. This step was the precursor to eventual privatisation.

The principle of importation of services refers to the Bank's assistance for management contracts to run the utilities and coordinatory arrangements with similar utilities in developed countries, and other services like 'plant maintenance, billing, revenue collection etc.', which essentially involve 'contracting out' certain areas of the utility's functioning to foreign service providers (World Bank 1993a:16). The principle of private investment means that the Bank will 'encourage private investment' in the sector (World Bank 1993a:18). The principle of commitment lending necessarily implies that it cannot be 'business as usual' anymore and that sectoral lending will be premised on the commitment to the principles in the 1993 Policy (World Bank 1993a:17).

The application of these principles is evident in the Bank's State level power sector restructuring projects in India. As Braithwaite & Drahos rightly observe,

once there is an agreement on principles, the norm setting process becomes easier, and norms adopting the principles become most influential when ‘they become institutionalized in a regime which functions to bring about desired effects, or at least some desired effects’ (Braithwaite & Drahos 2000:529).

### **5.5. Implementation of the 1993 Policy through Legislative Intervention**

In 1993, the Bank re-examined its India lending strategy owing to the failure of SEBs to bring about the necessary reforms. In the course of the next four years, the Bank cancelled loan commitments amounting to nearly \$2.3 billion for non-compliance with the covenants in the loan documents (World Bank 1999b:10). In the meantime, the commercial losses of SEBs reached US \$2.2 billion in the 1996 fiscal year, or about 0.8% of the GDP (World Bank 1996:1). The deficits in the SEB’s accounts were bridged by borrowing from the State’s tax revenues, which contributed to the budgetary deficits (World Bank 1996:3). In line with its policy paper, it suspended all financing from 1993, till such a time as the States were willing to embrace its sectoral restructuring prescription.

Co-organisation of conferences is an oft repeated strategy of the Bank’s to achieve consensus (Woods 2006:66). The national government, which had expressed its willingness to undertake sectoral reforms, co-organised conferences with the Bank.<sup>118</sup> The October 1993 conference in Jaipur (World Bank 1993b), formally launched the collaboration between the Bank and the national government in India. At the conference, the Bank reiterated its 1993

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<sup>118</sup> The willingness to cooperate with the Bank is evident in the letter written by the Joint-Secretary, Ministry of Power, Government of India, who wholly endorsed the Bank’s sectoral restructuring prescription (World Bank 1999b: Annex H).

Policy. The Bank also announced that it would no longer finance or guarantee power projects in States that do not restructure the sector along the lines of the 1993 Policy.<sup>119</sup>

However, the national government, which was battling its own budgetary deficits, was not able to persuade the States to undertake the necessary reforms. One of the reasons for the States not supporting the reforms has been attributed to the absence of a critical mass of elites at the State level (Chong 2004). The primary reason, however, was political (Dubash & Rajan 2001: 3369). The provision of electricity through the institutional conduit of the SEB, was perceived by the electorate as a democratic entitlement. Tshuma observes that contrary to the Bank's perception of legal reforms being 'technocratic and apolitical in character', law 'is an instrument of state power and its making and application involves gains and losses for different groups in society' (Tshuma 1999:83). Chang voices a similar concern, wondering if depoliticisation can ever be possible, and suggesting that it only results in disempowering certain sections of a society to the benefit of others (Chang 1999:190-191). This inherently political nature of legal reform will be discussed in greater detail in Chapter 7 with regard to experience of the State of Andhra Pradesh. The Bank restricted further sectoral lending and access to avenues of institutional finance through the National Public Sector Undertakings, and co-opted an indebted national government with 'sympathetic interlocutors' and 'eager pupils' into endorsing its approach (Woods 2006:72-76; Chong 2004:115-117). By making 'commitment lending' the norm (World Bank

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<sup>119</sup> This was followed by seminars on 'Competitive Bidding for Private Generation' in June 1994 in Hyderabad and 'Privatization of Power Distribution' in June 1995 in Bangalore (World Bank 1996:7).

1993a:17), the Bank waited for the States to express their 'willingness' to reform.

### **5.6. Contextualising SEB Reforms within the Context of the Bank's State Level Policy Reform Approach**

The State level sectoral reforms have to be contextualised from the perspective of selective State level policy based financing proposed by the Bank in the context of India's federal set-up and large size, which was considered too big for the Bank (Kirk 2011:47). The notion of selectivity also implied that 'policy-based lending should reward and encourage demonstrated reformers, rather than attempting to "buy" reform up front' (Kirk 2011:48). This policy was adopted by the Bank to selectively target countries in sub-Saharan Africa and was deployed at State level in India (Kirk 2011:48). The move towards direct engagement with the States also came in light of the Bank's own research findings, which indicated that the national government used to substitute its resource disbursement to the States with the monies advanced by the Bank (Kirk 2011:58). The Bank wanted to gain direct control over this channel of financing through policy based lending (Kirk 2011:58).

The policy linked lending was welcomed by technocrats like Montek Singh Ahluwalia, Shankar Acharya and Jairam Ramesh, who were associated with the national government (Kirk 2011:53). Edward Lim, Country Director of the Bank for India called upon the then Finance Minister P. Chidambaram proposing the strategy of direct policy linked lending to the States (Kirk 2011:53). Kirk observes that Chidambaram was aware of the need to go for what he terms 'second stage' reforms, wherein the State governments were required to take action within their constitutionally delineated areas of

competence (Kirk 2011:53). This included 'budgetary, institutional, and governance reforms' (Kirk 2011:53). However, Kirk observes that, along with ushering in liberalisation, 1991 was also associated with the beginning of coalition governments at the national level, with regional parties playing a very important role in national government formation and continuance (Kirk 2011). Chidambaram was the Finance Minister in one such coalition supported by regional parties, on whom the national government could not impose fiscal discipline in the name of fiscal prudence (Kirk 2011:59). Chidambaram also could not discriminate between States by rewarding performance by deviating from time honoured mechanisms of equitable and proportionate distribution of national funds (Kirk 2011:59). Chidambaram viewed Lim's offer of selective policy lending as a means to overcome both the constraints of coalition politics, i.e. the imposition of fiscal restraints, and to avoid allegations of favouritism in the resource transfer, as both can be now attributed to the Bank (Kirk 2011:59). Both Lim and Chidambaram were of the view that the approach of selectivity will have a 'demonstration effect' on other States to emulate the successful ones (Kirk 2011:59). This culminated in Country Assistance Strategy released in December 1997 announcing the shift to select State level policy lending (Kirk 2011:60). In this context, Andhra Pradesh emerged as the 'flagship focus state owing both to the volume of Bank assistance and to the high national and even international visibility of the state's chief minister' (Kirk 2011: 61).<sup>120</sup> The 2001 Country Assistance Strategy for the period 2001-2004 was even more focused on select State level intervention and mentioned

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<sup>120</sup> In India's Westminster model of federal legislative arrangements, the Chief Minister of the State occupies a position similar to the Prime Minister at the national level.

Andhra Pradesh, Karnataka and Uttar Pradesh as its focus States, with the possibility of including other States which display commitment to reforms (Kirk 2011:62). It would be wrong to think that the national government had given up all control over the Bank's engagement with the States; Chidambaram made it clear that the national government was in control (Kirk 2011:58). These coercive tactics on the part of the national government, as co-opted by the Bank, however, generated tensions between the national government and the States. Subsequently, between 1998 and 2003, the Bank had a 'focus states' approach, namely a direct lending relationship with States whose political establishment supported economic reforms (Kirk 2011:43). In that time period, the States of Andhra Pradesh, Karnataka and Uttar Pradesh received one third of the Bank's assistance to India (Kirk 2011:43).

### **5.7. Actors Associated with State Level Sectoral Reform**

This section discusses the role of the 'actors' such as the Chief Minister of the State and international consultants in adapting the reform model and the role of the 'mechanism' of technical assistance in formulating and replicating the model. It discusses the inter-organisational cooperation between the Bank, ADB and the bilateral donor agencies in the electricity sector. The 'principles' in the 1993 Policy were translated into 'norms', i.e. sectoral legislation, for the first time in the State of Orissa. The sectoral legislative model developed in Orissa was replicated across the States by the Bank and the ADB. Certain elements of the 'Orissa Model' (Haldea 2003:40) were subsequently scaled up to the national level through the Electricity Regulatory Commissions Act, 1998 and the Electricity Act, 2003. Though varying in scope, all the enactments endeavour to implement the principles of the 1993 Policy Paper ushering in a

sectoral regulatory state. The following discussion brings to light the roles of actors like the State's Chief Minister, international consultants, inter-governmental lenders and bilateral donor agencies in incorporating a global regulatory model at the State level.

#### 5.7.1. The Reformist Chief Minister

What made Orissa and, subsequently, Haryana and Andhra Pradesh approach the Bank, was not just the immediate fiscal deficit, but another important actor in the process of diffusion of the Bank's regulatory reform model, namely the Chief Minister. Whereas it was the intelligentsia and bureaucratic elite that ushered in reforms at the national level, it was willingness at the level of the Chief Minister, the Chief Secretary (top bureaucrat) and the head of the SEB (the Chief Engineer or technocrat) at the State level that paved the way for the reform process. This process replicated what Woods's identifies as the Bank's modus operandi of initiating reforms through a small insular group of policy makers or politicians in relative secrecy, rather than through democratic deliberation (Woods 2006:76). However, unlike the elite bureaucrats and technocrats at the national level, the Chief Minister was answerable to the State's electorate. Therefore, the initial mode of engagement set the tone for subsequent developments, i.e. limiting the reforms within what was politically feasible (Lal 2005:650). Political feasibility necessarily relied upon the links between affordable and accessible provision of electricity and democratic expectations.<sup>121</sup>

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<sup>121</sup> With the exception of the State of Orissa, where agricultural consumption constituted only 6% of the total electrical consumption at the time of reform, the Bank's reform model could not be implemented in its entirety in any other Indian State. This was owing to higher agricultural

The reform and restructuring project in Orissa attracted very little attention as the State had a low national profile (Dubash & Rajan 2001:3377). In Orissa, the reform process involved the application of the principles of 'commitment lending', which included the principles of 'technical assistance', 'transparent regulation', 'enterprise commercialization and corporatization' and 'private investment' and, to a lesser extent, the principle of 'importation of services'. The sectoral restructuring project in Orissa aimed to free resources previously set aside for investment in the power sector and sought to lower the State's fiscal deficit (World Bank 1996:31). The key impact of the reform process was to free the State from the burden of the power sector, so as to direct spending to other social sectors (World Bank 1996:31). This logic of 'fungibility' (Stiglitz 2002) and better allocation of resources in sectors like education and health, was the reason given to justify the proposed entry of the private sector.<sup>122</sup> This was the Bank's, and subsequently the ADB's, sectoral restructuring rationale for the States of Andhra Pradesh, Gujarat and Madhya Pradesh (ADB 2000:15; World Bank 2004a:2; ADB 2001:4). ADB's reform goals were similar to the Bank's, they sought to make the sector self-sufficient in terms of funds for investment, as opposed to its then heavy reliance on budgetary allocation (ADB 2001:5).

### 5.7.2. International Consultants

The process of adapting the 1993 Policy Prescription to Indian conditions was left to international consultants hired by the bilateral donor agencies. It was

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consumption in comparison with the total consumption in other States and associated electoral politics preventing the States from commodifying electricity.

<sup>122</sup> Joseph E Stiglitz uses this in relation to the IMF's prescription; it is, however, applicable to the Bank's economic logic as well.

these consultants, made available in the name of providing ‘technical assistance’, who conceptualised the way the new regulatory arrangements would work.<sup>123</sup> The Bank helped secure technical and financial assistance from the ADB and DIFD for drafting the reform legislation and establishing the regulator, which were the pre-conditions for the disbursement of the loan. The provision of technical assistance preceded the sanction of the loan towards utility unbundling and the passage of reform legislation.

In Orissa, the State government set up internal governmental committees to review the recommendations of the consultants, but little or no changes were made to the consultant’s proposals, given the limited experience of members of the committees about privatisation and liberalisation. To what extent the international consultants understood the Indian system in the short consultancy period was also debatable (Dubash & Rajan 2001: 3378). National consultants did question the international consultants and their understanding of the social and political implications of the proposed regulatory reforms. The national consultants believed that the international consultants only focused on the economic issues ignoring the social and political aspects of the reform (Dubash & Rajan 2001:3378). Wherever national consultants were engaged, they were engaged in a junior position to the international consultants, greatly diminishing their influence on the reform process (Dubash & Rajan 2001:3378). The senior role assigned to the international consultants also points to the lack of local ownership in the reform

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<sup>123</sup> The technical assistance provided to OSEB included ‘development and operational support, and distribution transaction advice’. DIFD extended its support to the tune of \$75 million towards the same (World Bank 2004b: 4).

process. International consultants in turn were influenced by the donor agencies and their perception of the issue of reforms as primarily financial in nature, and that privatisation was the only possible solution (Dubash & Rajan 2001: 3378).

As Ngaire Woods rightly observes, 'local knowledge' is neither valued nor is it taken into consideration when the Bank takes decisions (Woods 2006:55). Woods is of the opinion that ignoring local knowledge in the name of professionalism has proven disastrous for the Bank. In her words, 'in some cases the professionalism and coherence of the institutions can lead to a certain kind of blindness and over rigidity that leaves them unable to deploy their formidable expertise' (Woods 2006:55). The chain of command, i.e. hierarchies within the organisation, ensure that staff always toe the official line (Woods 2006:56) and the templates help the Bank to "stand above" local knowledge and to claim a universally applicable expertise, based squarely in the discipline of economics' (Woods 2006: 64).

The reform process in Orissa highlights the donor and Bank consensus about the nature of reforms to be undertaken. These donors also happen to be the majority shareholders of the Bank and utilise the Bank's financing to engage with the recipient country (Tan 2011). It is argued that giving due deference to local knowledge would have helped the international consultants understand the sectoral regulatory attributes, so as to engineer responsive regulatory interventions. The donors viewed the sectoral restructuring programme as a bankruptcy bailout (Dubash & Rajan 2001).<sup>124</sup> They approached sectoral

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<sup>124</sup> This perception of regulatory reform being akin to bankruptcy bailout recurs in the Bank's narrative of the reform process in Andhra Pradesh (World Bank 2004a:23).

restructuring with the aim of reducing budgetary deficits and enabling a more efficient private sector to take over the functioning of the utilities and bring in investments. It was evident that their ultimate goal was to ‘achieve consensus on a model rather than to evolve a model through consensus process’ (Dubash & Rajan 2001:3377).

### 5.7.3. Bilateral Aid Agencies and Technical Assistance

Consenting to the Bank’s terms of engagement, opened doors to aid from donors from the developed countries who effectively dictate the Bank’s agenda (Tan 2011:121). Orissa was also the State in which DFID and the Bank came together for electricity sector restructuring. Not only did the aid agencies prepare the necessary regulatory groundwork to initiate the reform process, they participated throughout the process of sectoral reorganisation and provided technical assistance for the reform process. It was these rules and regulations, framed in pursuance of the reform legislation, and the continued technical advice provided to the organisation institutionalising reform, i.e. the regulatory commission, which helped operationalize the legislative framework.

### **5.8. The Reform Process in Orissa and Institutional Mechanisms Giving Effect to the Regulatory State**

The Bank and the national government agreed that all State level projects would be formally sponsored by the national government, which would make loans to the States (World Bank 1997b:10).<sup>125</sup> All the State level power sector restructuring projects financed by the Bank and ADB, as evidenced in the cases of Orissa, Andhra Pradesh, Gujarat and Madhya Pradesh, were formally

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<sup>125</sup> Article 293 of the Constitution of India prohibits external borrowings by States.

sponsored by the national government (World Bank 1996:8; World Bank 1999a:14; ADB 2000; ADB 2001).

**Fig 1 – State of Orissa**



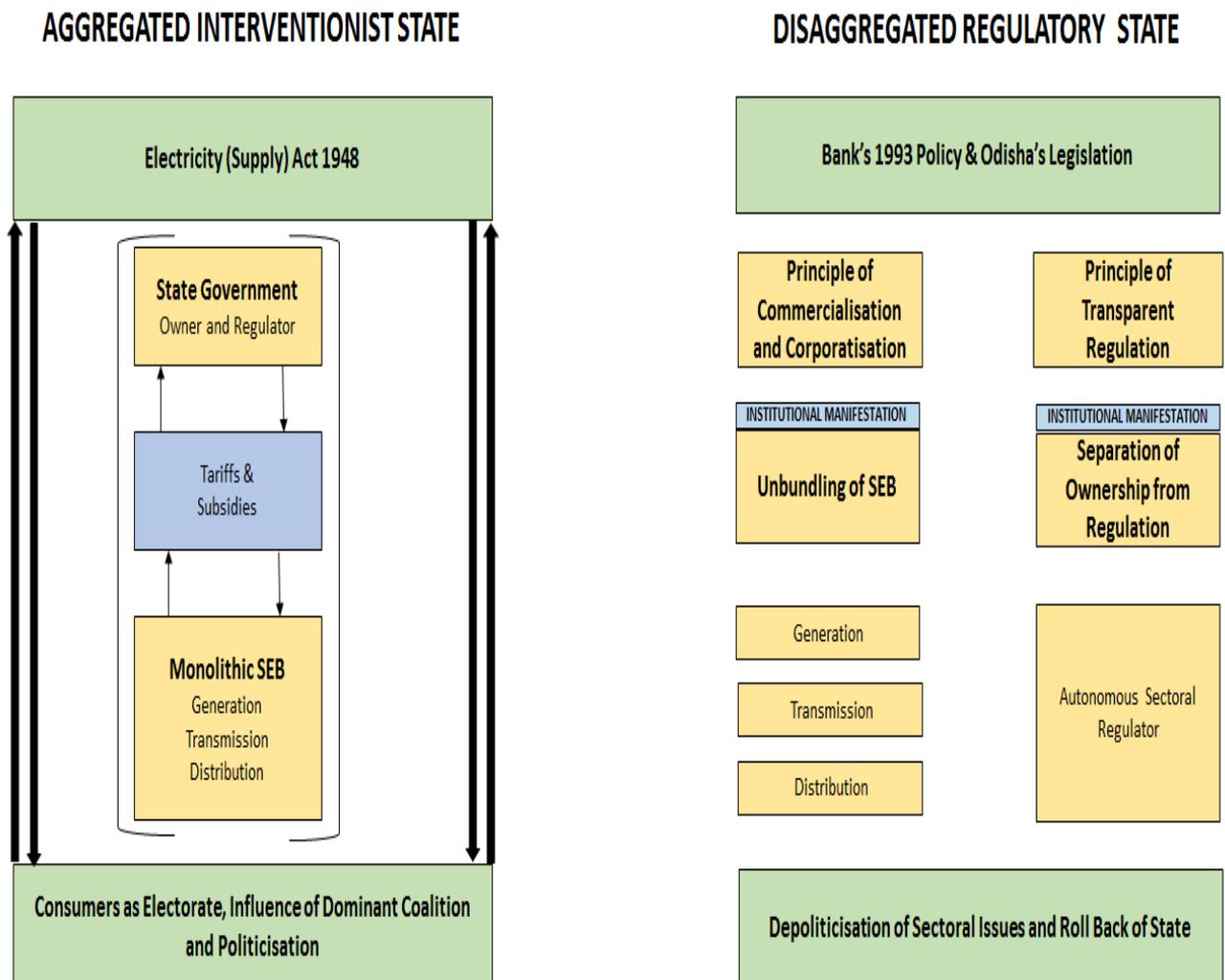
Orissa conveyed its willingness to undertake sectoral reforms along the lines of the 1993 Policy. The Orissa government's sectoral policy statement of April 1996 reiterates the principles of the 1993 Policy document

(World Bank 1996: Annexure 2.2, P.10). The Orissa Electricity Reform Act, 1995, came into effect in January 1996 (World Bank 2004b:5). The public nature of ownership, below cost tariffs and continued provision of subsidies were the primary issues that the reform package intended to remedy in order to reduce the public deficit. The principles of transparent regulation, commercialisation and corporatisation were incorporated into the Orissa Electricity Reform Act, 1995, through provisions establishing the sectoral regulator and those disaggregating the monolithic SEB.<sup>126</sup> The regulatory

<sup>126</sup> Chapters 2 and 7 of the Orissa Electricity Reform Act, 1995.

architecture and institutional arrangements formulated in Orissa were replicated in other States and upscaled as the national legislation, i.e. the Electricity Act, 2003, with some modifications. This institutional architecture, as discussed earlier, came to be known as the 'Orissa Model'. It is argued that the legislative endeavour to disaggregate the state giving effect to the normativity of the regulatory state in the Orissa Model is opposed to the aggregated state organisation of the interventionist state. This is represented below.

**Fig 2 – Sectoral Institutional Organisation of the Interventionist and Regulatory State**



The figure on the left depicts the aggregated sectoral institutional framework of the interventionist state under the 1948 Act. The 1948 Act envisaged a closer relationship between the state and state owned SEB. The figure on the right depicts the dis-aggregated institutional arrangements envisaged by the Orissa Electricity Reform Act, 1995, implementing the 1993 Policy of the Bank. The enactment endeavoured to disaggreg

ate the SEB into utilities undertaking the functions of generation, transmission and distribution. The 1995 Orissa enactment also established a sectoral regulator to insulate sectoral regulation from political and bureaucratic intervention.

Andhra Pradesh adopted the Orissa Model when undertaking sectoral reforms under the aegis of the Bank. As will be discussed, despite the legal instrumentalist attempt to disaggregate the SEB and establish an autonomous regulator, the state and disaggregated utilities in Andhra Pradesh reorganised themselves in response to the societal expectations of an interventionist state, mimicking the organisation of the SEB. As will be established in Chapter 8, the re-aggregation of the SEB was made possible by political necessity and corresponding self-organisation and resultant self-regulation between the bureaucrats and technocrats comprising the disaggregated SEB.

#### 5.8.1. Outcome of Reform Process in Orissa

Given that Orissa was the first State to embrace reform, the 1993 Policy was translated in its totality through upfront privatization of the unbundled SEB, outright withdrawal of sectoral subsidies and a steep increase in tariff (World

Bank 1996:14). The Bank's 'Implementation Completion Report' on the Orissa project notes that the execution of the project was 'unsatisfactory' with regard to the 'regulatory, institutional and tariff reforms' (World Bank 2004b:6). The Bank notes that the State level power sector reforms, being undertaken for the first time in Orissa, were akin to a journey into 'uncharted waters' (World Bank 2004b:3). It was disappointed with the outcomes and expressed concerns about the sustainability of the restructuring exercise (World Bank 2004b:5-6). In Orissa, where outright privatisation and withdrawal of subsidies were simultaneously undertaken, the privatised distribution companies were not financially sustainable. This was due to the high levels of pilferage, theft, transmission and distribution losses and non-recovery of payments for services (World Bank 2004b). The Bank apprehended that in the absence of revenues, the sector could plunge into the pre-reform scenario. It also blamed the State government for not displaying the requisite political will to crack down on theft (World Bank 2004b:14-16).

In 2004, when the Bank was reviewing the status of the reform implementation, CESCO, one of the privatised distribution companies, whose majority shares were owned by AES of the United States, was already under a statutory administrator. The Bank had actively encouraged AES to participate in the privatisation process in Orissa (World Bank 2004b:23). A contributing factor was that the 'retail tariffs' remained stagnant for three years (World Bank 2004b:14-16). The Bank acknowledged that the sudden stoppage of the subsidy at the initial stages of privatization was a mistake (World Bank 2004b:19). There was also not much progress on the rural

electrification front during the restructuring period and the agricultural sector suffered (Sharma et al. 2005: 574).

The Bank observed that the private players such as the AES Corporation of United States and Bombay Suburban Electricity Supply, owned by Reliance Energy, which purchased the majority stake in the state utilities were not at fault. It blamed the State of Orissa for not being able to create a congenial business environment. This, in its opinion was essential as 'private tolerance for losses is quite limited' (World Bank 2004b: 20). It noted that though 'de jure unbundling' of OSEB was not anticipated, the governmental entity may regroup into its previous structure if the private players found the sector unviable and exited (World Bank 2004b:14-16). This was a very pertinent early observation, symptomatic of the sectoral dynamics in response to the 2003 Act, which will be discussed in detail in the forthcoming chapters, in the context of State of Andhra Pradesh.

## **5.9. Attempts at Generating a National Consensus for Sectoral Reform**

Attempts at reforms at the State level were not yielding the desired results. Many States preferred to continue with the SEB model despite restricted access to sectoral financing. The national government, which had endorsed the 1993 Policy, coordinated the Bank's restructuring programmes at the State level and tried to generate a national level consensus for adoption of the 1993 Policy and the accompanying legislative reform template developed in Orissa.

### **5.9.1. Common Minimum National Action Plan for Power – 1996**

The deliberations at the Conferences of Chief Ministers organized by the national government's Ministry of Power, reflect the attempt to depoliticise the

sectoral issues. The first indication of in principle progress towards generation of a national consensus was the adoption of the 'Common Minimum National Action Plan for Power' in 1996 (Govt of India 1996). The Action Plan acknowledged the precarious finances of the SEBs and the limitations on public investment in the sector. Given the scarcity of 'public resources' it advocated encouraging private investment in generation, transmission and distribution (principle of private investment) (Govt of India 1996). SEB restructuring was to be undertaken within a definite time frame, while the SEBs were to be given maximum autonomy with immediate effect (Govt of India 1996). The Action Plan also recommended amendments to the Electricity Act, 1910, and the Electricity (Supply) Act, 1948, so as to set up a Central Electricity Regulatory Commission (CERC) for the Central government and the State Electricity Regulatory Commission (SERC) at the State level (Govt of India 1996). The primary role of the Commissions was tariff fixation, with provision of an appeal to the State High Courts. The role of the SERCs was to rationalize tariffs, to ensure that the SEBs earned the statutory 3% rate of return and to see that cross-subsidization did not excessively burden any one segment of consumers (Govt of India 1996). The action plan also agreed to have a 'package of incentives and disincentives' to promote tariff rationalisation at the State level (Govt of India 1996).

#### 5.9.2. Electricity Regulatory Commission's Act - 1998

The reforms proposed by the 'Action Plan' were still SEB-centric, and the States agreed to provide greater autonomy to the SEBs, which were to be subsequently corporatised and run on commercial principles. Given the complex national state and State dynamics of the federal polity, the progress

was extremely slow. The progress towards the enactment of the 2003 Act incorporating the architecture of the 1993 Policy into the national legislation was fiercely resisted by the States. As a consequence, the Electricity Regulatory Commissions Act 1998 which started as a draft endeavoring to repeal the 1910 and 1948 Acts and to replace them with legislation along the lines of the 1993 Policy could only be legislated as one establishing the CERC and requiring the States to establish SERCs (Upadhyay 2000: 1023). The sectoral dynamics at the State level remained pretty much unaltered. In fact, as one sectoral analyst put it, the resolutions passed at the Chief Ministers Conferences convened by the national government, were never taken seriously by the Chief Ministers once they returned to their home States (Ramachandra 2014a). As a consequence, these resolutions remained consensuses created on paper, and the political expectations within the State continued to determine the sectoral regulatory dynamic and the regulatory attributes.

The political coordination through the Chief Ministers Conferences continued at the national level. In 2001, the Chief Ministers Conference adopted a resolution on the power sector reforms (Govt of India 2001a). Paradoxically the decision of political heads of States aimed to 'depoliticise power sector reforms and speed up their implementation' (Govt of India 2001a:9). The need for an all-party consensus so as to depoliticise the sectoral decision-making was very much the Bank's priority, as reflected in its reporting of the State level reform process (World Bank 2004a:16). It was resolved that the States will encourage privatisation of the distribution business and that the national government will support the States promoting reforms (World Bank 2004a:10).

The 2001 Conference also agreed to appoint an 'Expert Group' under the Chairmanship of Montek Singh Ahluwalia to look into the outstanding payments of the SEBs to the National Public Sector Undertakings (Government of India 2001a:10).<sup>127</sup> The report of the Expert Group stated that, as of 28<sup>th</sup> February 2001, SEBs were indebted to the National Public Sector Undertakings to the tune of approximately \$US 7,002,027,600<sup>128</sup> (Planning Commission 2001:6). It was evident that the SEBs could not undergo reform with their debt burden. Therefore, the expert group recommended that part of the debts had to be waived by the National Public Sector Undertakings. Correspondingly, the State governments were required to take over the SEBs financial liability. This scheme was made available to States willing to undertake reforms (Planning Commission 2001).

### 5.9.3. Blue Print for Power Sector Development - 2001

The Ministry of Power of the national government in its 'Blueprint for Power Sector Development', endorsed the one-time settlement of debts as recommended by the Expert Group (Govt of India 2001b:35-36). In the Blueprint, the Ministry noted that it was working on a package to support States willing to undertake the necessary reforms. This was in pursuance of the assurance of sectoral support given by the Bank's President during his visit to

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<sup>127</sup>The then Member of Planning Commission of India and Deputy Chairman of the Planning Commission of India from 2004-2014, Mr. Montek Singh Ahluwalia, has had an interesting career path. Alternating in employment between the World Bank, Government of India and IMF. In 2001, he went on become the Director of Independent Evaluation Office at IMF which he headed till 2004, when he was appointed Deputy Chairman of the Planning Commission of India, a post that he held till May 2014 (the term of the Planning Commission is coterminous with the tenure of the Prime Minister). In more ways than one Mr. Ahluwalia falls within the category of an 'eager pupil' (Chong 2004:115) or 'sympathetic interlocutor' (Woods 2006: 73) of the Bank and the IMF.

<sup>128</sup> USD conversion as per exchange rate on 10 June 2014.

India in 2000 and included '[s]tructural adjustment assistance for reforming states' (Govt of India 2001b:35). Similarly, the States also entered into Memoranda of Understandings with the national government, so as to undertake reforms in a time bound manner with national assistance.<sup>129</sup> The Blueprint document reiterates the national government's commitment to enact sectoral legislation replacing the 1910, 1948 and 1998 Acts (Govt of India 2001b:36). The features of the then proposed legislation involved freeing generation from the requirements of licensing, the setting up of regulatory commissions with provision for dispute resolution and tariff setting, scaling down of cross-subsidies, theft deterrent provisions and restructuring the SEBs (Govt of India 2001b:36).

#### **5.10. Conclusion - The Electricity Act, 2003 and the Sectoral Regulatory State**

The national government's carrot and stick strategy, i.e. mechanisms of economic inducement (financial package for reform) and economic coercion (endorsing Bank policy and restricting sectoral finance options), culminated in the enactment of the 2003 Act. The 2003 Act was a comprehensive enactment. It repealed the 1910 and 1948 Acts and was broadly moulded on the principles of the 1993 Policy and the architecture of the 'Orissa Model'.<sup>130</sup> The 2003 Act, based on the principle of transparent regulation, laid the groundwork for a nationwide unbundling and corporatisation of the SEBs

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<sup>129</sup> The package suggested by the expert group was in many ways a bribe being offered to the States to undertake the sectoral reforms.

<sup>130</sup> One important departure of the 2003 Act from the Orissa Model and the the Electricity Regulatory Commissions Act 1998 was the appellate review process. Whereas appeals from the decisions of the regulatory commission were referred to the State's High Court in the previous enactments, the 2003 Act established a national appellate tribunal for the sector.

(principle of commercialisation) and the ushering in of an environment facilitative of private sector participation (principle of private investment). The statutory regulator was the institutional mechanism to enforce the new regulatory arrangements (independent regulation). It is argued that the enactment of the 2003 Act came to symbolize the state's shift in sectoral public posturing from an interventionist state to a regulatory state.

As discussed above, the process of introducing the new regulatory arrangements as traced through the methodology of 'principles, actors and mechanisms' (Braithwaite and Drahos 2000), did not pay adequate attention to the sectoral regulatory attributes. The arrangements sought to impose constitution like restraints on the role of the state in economic activity. They aimed to bring about three important changes in the sectoral dynamics through law informed by the rationale that technocratic sectoral decision making must be insulated from politics. These are: first, a separation of the state's power to make policy from the provision of services; second, the unbundling and eventual privatisation of the monolithic sectoral utility, which was divided into corporate entities specialising in generation, transmission and distribution, and run along commercial principles; and finally, the establishment of an independent sectoral regulator that was at arm's length from the state and the sectoral utilities. As discussed previously, 'regulatory character' has an inherent integrity that resists attempts at reorganisation which can lead to 'less than intended' consequences (Haines 2003). This thesis argues that all three attempted changes had 'less than intended' results. Tshuma, too, opines that legal interventions accompanying economic globalisation have 'unintended

consequences' which include the emergence of legal pluralism (Tshuma 1999:91).

This thesis argues that, in the Indian context, these less than intended consequences are manifested by the emergence of legal pluralism in the sectoral state law. This phenomenon shall be explored in Chapter 8 of the thesis in the context of the sectoral reform experience of the State of Andhra Pradesh. The next chapter discusses the theories associated with legal pluralism. In particular, it discusses theories associated with regulatory globalisation and legal pluralism. It discusses self-organisation and resultant self-regulation as a source of legal pluralism. This will be established in the case of the reaggregation of the disaggregated SEB and the resultant self-regulatory processes in the State of Andhra Pradesh in Chapter 8.

## **Chapter 6 - Regulatory Globalisation, Legal Instrumentalism and Legal Pluralism**

This chapter discusses the phenomenon of legal pluralism, i.e. the existence of multiple legal systems in society, as contrasted with legal centralism, which recognises singular state law as the only source of law. It discusses theories associated with legal pluralism and how the approach compliments the previous discussion pertaining to attributes of the regulatory space and 'less than intended' consequences of regulatory globalisation (Haines 2003). The theoretical discussion in this chapter helps contextualise the emergence of legal pluralism in sectoral state law in the State of Andhra Pradesh.

As discussed in the previous chapters, the conceptualisation of an interventionist role for the Indian state in economic activity was sought to be reversed through legislation in order to reflect the changing global consensus advocating a regulatory state. This resulted in legislative changes to the sectoral state law in the electricity sector at the insistence of the Bank, ADB and bilateral donor agencies. The Bank's non-consultative approach to regulatory change was evident in what Dubash and Rajan describe as the reform consultant's objective in Orissa to 'achieve consensus on a model rather than to evolve a model through consensus' (Dubash & Rajan 2001:3377). It is argued that the Bank's approach to regulatory dissemination was premised on the simplistic assumption of a vacuum in the space between state and society and therefore a linear relationship between legislations and outcomes. This is evident in the Bank's 1993 Policy which defines regulation as

'The supervision and control of the economic activities of private and arms-length public enterprises by government in the interest of economic efficiency, fairness, health and safety. Regulation may be imposed simply by enacting laws and leaving their supervision to the normal processes of the law, by setting up special regulatory agencies, or by encouraging self-regulation by recognizing, and in some cases delegating powers to, voluntary bodies' (World Bank 1993a).

The Bank's approach to regulation was therefore that of 'imposing' it through legislation. As will be discussed in Chapter 7, the Bank followed an approach similar to Orissa's, i.e. introducing sectoral reforms through legislative change in Andhra Pradesh. This thesis argues that the same led to the emergence of legal pluralism in sectoral state law in Andhra Pradesh. This chapter firstly discusses the notion of legal pluralism and thereafter the complementarity of the approach to a spatial analysis of regulatory dynamics in India. The Bank intended to reposition the Indian state in the electricity sector through legislative change in state law, both national and States. In this context, the chapter discusses the assumptions and limitations associated with legislative interventions through state law and the resultant pluralism. It thereafter discusses the role assigned to state law by different authors examining the phenomenon of legal pluralism. It then discusses Sally Falk Moore's notion of a Semi-Autonomous Social Field and how it is suited to observe the rise of legal pluralism given the Indian state's regulatory attributes.

## 6.1. Differing Notions of Legal Pluralism

According to Sally Engel Merry, legal pluralism is ‘a situation in which two or more legal systems coexist in the same social field’ (Merry 1988:870). Legal pluralism is a social reality and a social fact, and different legal systems have interacted throughout human history (Twining 2004:5; Twining 2010:516; Tamanaha 2008:375; Griffiths 1986:4). Twining states that viewing legal pluralism as a social fact helps emphasise the importance of local knowledge and ‘draws attention to the existence of normative orders that are generally ignored, overlooked, arcane or even invisible’ (Twining 2010:516). Merry argues that adopting an approach of legal pluralism helps shift the focus of the researcher from viewing law as a state centric phenomenon and draws ‘attention to other forms of ordering and their interaction with state law’ (Merry 1988:889). Examining scenarios from the perspective of legal pluralism helps understand ‘the cultural or ideological nature of law and systems of normative ordering’ (Merry 1988:889). Such an analysis helps shift the focus from examination of disputes to ‘analysis of ordering in non-dispute situations’ (Merry 1988:889-890). In the Indian context, this translates into an enquiry that goes beyond (but does not ignore) mere analysis of the decisions pertaining to implementation of statutory regulations. As will be demonstrated in this thesis, it includes observing how social, political and state actors accommodate or oppose a legislative intervention.

Tamanaha observes that multiple legal systems coexisted in Europe in the past 2000 years, both during the Roman Empire and after its decline, and also in medieval Europe till the rise of the states after the conclusion of the treaty of Westphalia (Tamanaha 2008: 376,379). This in his opinion occurred

because of '[c]onsolidation of law in the hands of the state was an essential aspect of state-building process' (Tamanaha 2008:376). The state in Europe was able to consolidate its hold over all other legal systems (Tamanaha 2011:14) as it emerged as the 'fundamental unit of political organization' (Griffiths 1986:3). However, just as the state was emerging as the sole source and enforcer of law in Europe, colonisation by European states led to a new wave of pluralism in the colonies governed by them (Tamanaha 2008:381-382). This phenomenon arose owing to the divergences between the law of the coloniser and that governing the societal relationships prior to the introduction of the colonial law (Tamanaha 2008:381-382). Writing in the late 1980s, Merry defines this phenomenon as 'classic legal pluralism' and speaks of the study of legal pluralism in 'non-colonised societies', especially in Europe and United States of America, and labels it 'new legal pluralism' (Merry 1988:872). New legal pluralism asserts that, 'plural normative orders are found in virtually all societies' (Merry 1988:873) and that the same are 'embedded in relations of unequal power' (Merry 1988:874).<sup>131</sup>

Tamanaha observes that the process of 'globalisation' in the late 20<sup>th</sup> century has given rise to 'another wave of legal pluralism' as the power of the state is

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<sup>131</sup>Gunther Teubner explores the phenomenon of pluralism attributable to the imposition of external law from a systems theory perspective. Teubner speaks about this in the context of law and society under the circumstances of the adoption of a legal system external to the social processes of the jurisdiction (Teubner 1998). He is of the view that an external law can never be fully internalised, but rather operates as an 'irritant' (Teubner 1998:12). In his words '[l]egal irritants' cannot be domesticated; they are not transformed from something alien to something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change' (Teubner 1998:12). In other words, Teubner suggests that the external influence operates through self-reflexive processing to provide change and this internalisation of the external in terms of the inherent systemic logic produces an interpretation different from what was intended and leads to the emergence of legal pluralism.

in decline (Tamanaha 2008:386). He gives as examples countries of the European Union surrendering some of their sovereign powers to the supranational organisation, the internal disaggregation of the states into smaller territories and the rise in movements for autonomy (Tamanaha 2008:386). As discussed earlier, Tshuma observes that legal interventions accompanying regulatory globalisation result in 'unintended consequences' which include the emergence of legal pluralism in the recipient jurisdiction (Tshuma 1999:91). Moore acknowledges the relationship between legal pluralism and globalisation, however she also examines the notion of pluralism from the perspective of the ongoing transformation of the 'state' itself (Moore 2001). She opines that

'pluralism' can refer to: (1) the way the state acknowledges diverse social fields within society and represents itself ideologically and organizationally in relation to them; (2) the internal diversity of state administration, the multiple directions in which its official sub parts struggle and compete for legal authority; (3) the ways in which the state itself competes with other states in larger arenas (the EU, for one instance), and with the world beyond that; (4) the way in which the state is interdigitated (internally and externally) with non-governmental, semi-autonomous social fields which generate their own (non-legal) obligatory norms to which they can induce or coerce compliance (see note 6); (5) the ways in which law may depend on the collaboration of non-state social fields for its implementation; and so on' (Moore 2001:107).

## **6.2. Relevance Legal Pluralism to the Spatial Approach Uncovering India's Regulatory Attributes**

Legal pluralism, like the spatial approach to regulation, argues that the space between the state and society is not a vacuum (Lange 2003:413). William Twining, who endorses the approach of legal pluralism, is critical of regulatory interventions based on 'simplistic assumptions' of a '[b]lank slate' or a vacuum to be filled ignoring social phenomena in the nature of 'struggle' and 'resistance' (Twining 2004:16-17). The ability to oppose or accommodate by social, political and state actors also indicates dispersal of regulatory power across the regulatory space as opposed to a hierarchical notion of state monopoly over regulation. Colin Scott observes that the analytical construct of regulatory space compliments the approach of legal pluralism by facilitating an analysis based on power relationships within the social sphere as opposed to portraying law and legal processes as being associated with the state alone (Scott 2001). Dispersal or fragmentation of power also necessarily implies that the nature of relationship between the actors in the regulatory space is defined by interdependence (Scott 2001:335). Scott argues that 'dispersed nature of resources between organisations' within the shared space make them interdependent and that the regulator 'lacks monopoly over formal and informal authority' (Scott 2001:330).

Twining disagrees with the simplistic assumption of diffusion of law and argues that it is a much more complex phenomenon (Twining 2004:16). He opines that ideology, culture and technology play an important role in the diffusion of law (Twining 2004: 17). In the context of domestic legislative interventions, Griffiths argues that legal instrumentalism assumes a 'normative vacuum' in

the process of communication of the legislative intent to the individual recipient (Griffiths 1986:33-34). Griffiths opines that the 'relationship between a rule and its social effects is conceived of in the instrumentalist paradigm as a straightforward causal one' (Griffiths 2003:13). He opines that instrumentalism is essentially a policy maker's perspective and ignores the social implications of the legal rules (Griffiths 2003:13). This is so because instrumentalism assumes that legislation produces 'desired results' as it describes 'actual behaviour' (Griffiths 2003:14). As discussed earlier, the Bank's simplistic approach to regulation endeavours to 'impose' it through legal instrumentalism, disregarding social and political dynamics. As discussed, the space between state and society in India is not a vacuum and is highly contested. The Indian state is therefore continuously trying to engage and accommodate the resultant tensions. The discussion in the foregoing chapters has also established that the regulatory space associated with the role of the state in economic activity is captured by entrenched interests of rich farmers, industrialists and bureaucrats. The discussion also established that the constitutional dynamics associating the role of the state in economic activity with electoral expectations made the Indian state responsive to electoral and societal expectations. The state in India is proliferated and influenced by societal forces, and societal tensions are reflected in the nature and functioning of the state. That the same makes the Indian state non-autonomous and permeable, unlike Majone's (1994) notion of an autonomous European regulatory state or the South East Asian developmental state.

The thesis also correlates the notion of a permeable Indian state susceptible to societal pressures (Mukherji 2016), with Moore's notion of 'the way the state

acknowledges diverse social fields within society and represents itself ideologically and organizationally in relation to them' as a reason for the emergence of legal pluralism in state law (Moore 2001:107). The ideological or normative aspect in the context of this thesis is associated with the renewed societal electoral expectations of an interventionist role for the state in sectoral activity, as opposed to a minimalist regulatory state proposed by the Bank. In terms of the organisational reorganisation of the state in response to societal pressures, this thesis, and especially Chapter 8 on Andhra Pradesh's experience with sectoral reform, focusses on two institutional solutions integral to the Bank's sectoral reform model. These, as discussed in the context of reform process in Orissa and replicated in Andhra Pradesh, comprise, firstly, disaggregation of the institutional apparatus of the interventionist state, i.e. the State Electricity Board, into separate generation, transmission and distribution utilities and, secondly, the establishment of an autonomous sectoral regulator. However, as will be argued in Chapter 8, the permeable and non-autonomous Indian state had to reorganise itself in response to societal and electoral expectations, mimicking the institutional arrangement of the interventionist state, i.e. the SEB. This thesis argues that self-organisation, and resultant self-regulation by state functionaries associated with the sector, as opposed to institutional organisation through statutory law, aimed at establishing a regulatory state results in pluralism in sectoral state law. Therefore, whereas state law endeavoured to disaggregate the institutional arrangements associated with the interventionist state, self-organisation and resultant self-regulation led to the re-aggregation of the disaggregated SEB. State regulation and the resultant institutional disaggregation, as opposed to self-regulation by

state actors and institutional re-aggregation, are the plural variants of state law. Black notices a similar phenomenon in the context of the changing nature of the state, from what has been that of a traditional hierarchical monolith to one which is torn between the tensions of the 'centrifugal' and 'centripetal' forces requiring it to function in a disaggregated manner, especially through regulatory agencies, whilst simultaneously being able to supervise their functioning (Black 2007:66). The tensions in the Indian context are generated owing to conflicting normative and corresponding institutional organisation of the state, i.e. disaggregated state law institutions versus re-aggregated institutional configuration, reflecting the normativity of the interventionist state.

### **6.3. Relationship between Plural Legal Orders**

Opinions differ as to the nature of the relationship between plural legal orders. Twining opines that, in the early exploration of legal pluralism, legal orders were conceptualised in 'oppositional terms', i.e. 'conflicting or competing' (Twining 2004:14-15).<sup>132</sup> However, he is of the view that the relationship between legal orders (what he terms as 'coexisting') is far more 'diverse'. According to him the relationship may range from 'co-operation, co-optation, competition, subordination, or stable symbiosis; the orders may converge, assimilate, merge, repress, imitate, echo, or avoid each other' (Twining 2004:14-15).

Peter Fitzpatrick explores 'state law and its relation to a plurality of social forms' (Fitzpatrick 1984:117). In his opinion '[s]ocial forms are constituted in

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<sup>132</sup> Sally Engel Merry was of the view that '[r]esearch in the 1980's has increasingly emphasised the dialectic, mutually constitutive relation between state law and other normative orders' (Merry 1988:880).

contradictory relations of support and opposition with a plurality of other social forms. I tentatively suggest that the more social forms stand in relation of integral support, the sharper is the opposition between them: “the more alike, the more dissimilar” (Fitzpatrick 1984:117). In this context Fitzpatrick uses the term ‘social forms’ to include those that are integral for the generation of ‘non-state law’ and therefore connote legal pluralism (Fitzpatrick 1984:117). Merry opines that legally plural scenarios evolve over a period of time ‘through the dialectic between legal systems, each of which both constitutes and reconstitutes the other in some way’ (Merry 1988:889). Therefore, both Fitzpatrick (1984) and Merry (1988) are of the view that reflexivity be it between ‘[s]ocial forms’ or between ‘legal systems’ resulting in mutual reconstitution leads to the emergence of legal pluralism. This thesis endorses the approach of a reflexive reconstitution of different legal orders. It argues that the non-autonomous nature of the Indian state makes both enforcement of law by a state and resistance to state law by societal forces possible.

Tamanaha enumerates six systems of normative ordering. These are the official or positive legal system, the customary normative system, the religious normative system, the economic or capitalist normative systems, the community/cultural normative system and, last but not least, the functional normative systems (Tamanaha 2008:397-399). By a functional normative system, he means a system ‘organised and arranged in connection with the pursuit of a particular function... their particular functional orientation makes them distinctive and shapes their nature’ (Tamanaha 2008:399). He gives examples of sports leagues, schools and universities to illustrate such systems (Tamanaha 2008:399). It will be argued in the course of this thesis that the

procedural solution to determine the role of the Indian state in economic activity put in place by the framers of the Constitution led to the emergence of a functional legal system. The functional legal system, in the Indian context, owes its normative leanings to the interventionist electoral aspirations pertaining to the role of the Indian state in economic activity. The interventionist normative leanings of the functional legal system also emerge from what Bardhan describes as the Indian political culture, which according to him is not congenial for implementing market reforms (Bardhan 1998:136-137).

Tamanaha explores the notion of 'clashes' between normative systems and their causal factors (Tamanaha 2008: 400). He says that the sources of normative ordering lay claim to one or more of the following, i.e. 'they possess binding authority; they are legitimate; they have normative supremacy; and they have (or should have) control over matters within their scope' (Tamanaha 2008: 400). Given their competing 'claims to authority' Tamanaha is of the view that they are bound to clash and this is more likely when the 'underlying norms and processes are inconsistent' (Tamanaha 2008: 400).

#### 6.3.1. Relationship between State Law and Non-State Legal Orders

According to Twining endorsing legal pluralism as a social fact does not necessarily imply that state law is not important or that 'state law is withering away' (Twining 2010: 489). Moore does not undermine the importance of state law, on the contrary Moore explores the ability of state law to influence social processes (Moore 1973:722-723). Moore opines that '[s]ince the law of sovereign states is hierarchical in form, no social field within a modern polity

could be absolutely autonomous from a legal point of view' (Moore 1973:742). Moore, however, also suggests that 'absolute domination' through state law is inconceivable because of the fields of autonomy within the society (Moore 1973:742). Merry appears to be in agreement with Moore in terms of the significance of state law and its influence on the understanding of the phenomenon of legal pluralism. This is evident in her observation that:

'I think it is essential to see state law as fundamentally different in that it exercises the coercive power of the state and monopolizes the symbolic power associated with state authority. But, in many ways, it ideologically shapes other normative orders as well as provides an inescapable framework for their practice.' (Merry 1988:879).

Fitzpatrick states that legal pluralism has been 'ambivalent' in relation to state law, and has either underplayed or overplayed its importance, either by elevating state law to a position of domination over plural legal orders, or by placing it on par with other legal orders in society (Fitzpatrick 1984:116). Fitzpatrick states that there is truth in both of these positions and that,

'[s]tate law does take identity by deriving support from other social forms. Thus, it would appear to be one social form among many, even as a subordinate form. But in the constitution and maintenance of its identity, state law stands in opposition to and in asserted domination over social forms that support it.' (Fitzpatrick 1984:116).

Thus, for Fitzpatrick 'state law is integrally constituted in relation to a plurality of social forms' (Fitzpatrick 1984:115). Fitzpatrick terms the phenomenon 'integral plurality'.

In the course of establishing the emergence of legal pluralism in sectoral state law, this thesis endorses Moore's and Merry's view, i.e. that state law has an undeniable role in influencing other normative orders (Moore 1973; Merry 1988). This also corresponds with Mukherji's (2016) observation that the Indian state, though permeable and surrounded by a strong society, can bring about change, and that it continues to exercise a dominant influence.

Merry critiques the social fact study of processes of pluralism in the late 1980s. She observes that '[a] legal pluralist analysis tends to emphasise changes that occur through interactions between social fields but not those taking place within a social field. It is likely to miss the way a particular social field is gradually reshaped by a variety of ideological and political forces both within and outside it' (Merry 1988: 891). Although this critique may no longer be true, Merry's observation is important given its emphasis on the 'ideological and political forces' both inside and outside the social field in moulding it. It is argued that the scholarship on self-regulation and semi-autonomy, as a source of pluralism, as will be discussed in the context of SASF and self-regulation, examines the internal processes resulting in legal pluralism (Moore 1973; Griffiths 1986; Black 1996). The next section discusses the notion of SASF and its contextual relevance to observing the emergence of legal pluralism in the sectoral state law of Andhra Pradesh.

#### **6.4. The Semi-Autonomous Social Field**

The notion of SASF will be deployed in the forthcoming chapters to establish the emergence of legal pluralism in sectoral state law in the State of Andhra Pradesh. Sally Falk Moore's notion of SASF acknowledges that state legal

interventions have to encounter social forces. Moore argues that it is the rules according to which a society organises itself that dictate compliance with state law (Moore 1973:721-722). In Moore's words '[i]t is well established that between the body politic and the individual, there are interposed various smaller organized social fields to which the individual "belongs"' (Moore 1973:721). Moore calls these 'smaller organised social fields' SASF, and claims that the same provides a methodological tool for 'defining areas for social anthropological study in complex societies' (Moore 1973:722).

Moore deploys the methodology of SASF from the perspective of the 'small field observable to an anthropologist to be chosen and studied in terms of its semi-autonomy' (Moore 1973:720). Moore emphasises the characteristic of semi-autonomy because the way societal processes organise themselves are not completely autonomous from state law and are influenced and amenable to the same (Moore 1973:721-723). At the same time, it is these semi-autonomous processes resulting in SASF 'that make internally generated rules effective are often also the immediate forces that dictate the mode of compliance or noncompliance to state-made legal rules' (Moore 1973:721).

Sally Falk Moore explores the limitations of state interventions in reordering established societal relationships through resistance to the imposition of state law by the Tanzanian state on the Chagga tribe (Moore 1973). Moore explores societal resistance from the perspective of law reflecting an ideological shift of the state towards economic activity, more specifically private property rights (Moore 1973: 731). Moore explores the Chagga tribe's societal resistance to the redefinition of property rights through the Tanzanian government's legislation converting 'freehold land' into 'government leaseholds' (Moore

1973:731). Moore observes that state law professing a particular economic ideology had little or no impact on the relationships between the Chagga (Moore 1973:734).

Observing a similar resistance to legal interventions aimed at replacing the relationships of kinship through legislation, Moore observes that '[r]elationships long established in persisting semi-autonomous social fields are difficult to do away with instantly by legislative measures' (Moore 1973:739). Moore further states that 'the interdependence or independence of elements in the social scene may sometimes be revealed by just such piecemeal legislation' (Moore 1973:743). Marina Kurkchian (2009) makes a similar observation in her study of the functioning of the institutional transplant of media regulators in Russia, established in pursuance of market reforms. She observes that the way an institutional transplant is internalised reflects the true nature of a society and that the process of adapting an external institutional transplant helps understand the true nature of a society's organisation. In her words '[a]s the foreign idea is adopted, it will be adapted. The adaptations and interpretations that lie behind them can provide valuable insights into the society in which the players operate' (Kurkchian 2009:340). The discussion on the emergence of a sectoral SASF in Chapter 8 reveals the dynamics of the internal organisation of the semi-autonomous or non-autonomous Indian state, by observing the process of institutional re-aggregation mimicking the erstwhile SEB, as opposed to the legislative objective of disaggregating it.

Moore asserts that the influence of state law on SASF is 'often exaggerated', whereas the influence of SASF on state law is 'often underestimated' (Moore

1973:745). Moore is of the view that manifestations of the SASF vary. In her words, 'Some semi-autonomous social fields are quite enduring, some exist only briefly. Some are consciously constructed, such as committees, administrative departments, or other groups formed to perform a particular task; while some evolve in the marketplace or the neighbourhood or elsewhere out of a history of transactions' (Moore 1973:745). Therefore, according to Moore, SASF does not have a specific institutional structure and it can be either deliberately brought into existence or can take shape owing to social reorganisation. She advocates a processual methodology for identifying a SASF. Moore states that '[t]he semi-autonomous social field is defined and its boundaries identified not by its organisation (it may be a corporate group, it may not) but by a processual characteristic, the fact that it can generate rules and coerce or induce compliance to them...The inter-dependent articulation of many different social fields constitutes one of the basic characteristics of complex societies' (Moore 1973:722). In other words, a SASF need not be a pre-defined and organised institutional body, like a corporation or an association, but can be identified by its ability to make rules and enforce compliance with the same. Moore emphasises that it is the characteristic of semi-autonomy that defines the social field (Moore 1973:722). The fields of autonomy, i.e. SASF, signify 'modes of self-regulation' which are not only important for processes within the social field but also mediate the relationship of the SASF with the larger society (Moore 1973:743). That semi-autonomy directs its actions vis-à-vis its constituents as opposed to viewing its behaviour as being merely transactional in nature (Moore 1973:722). Through her description of SASF, Moore provides a methodology to identify the semi-

autonomous and self-regulatory social processes. In other words, self-regulation is an essential feature of SASF and facilitates the identification of semi-autonomous processes. This characteristic of the SASF to 'generate rules and coerce or induce compliance with them' has been described as being reflective of 'Shared Norms' within the social field (Sportel 2011). Similarly, Lucy Finchett-Maddock traces the emergence of SASF from the perspective of 'alternative normative fields' (Finchett-Maddock 2010). She characterises the normativity of UK's Social Centre Movement, as will be discussed shortly, as arising from a left-leaning anti-market ideology. Therefore, semi-autonomous organisation is preceded by a normative consensus amongst the participants in a social field.

Merry endorses Moore's notion of the Semi-Autonomous Social Field (Merry 1988:878). In her words

'The advantages of this concept are that the semiautonomous social field is not attached to a single social group, that makes no claims about the nature of the orders themselves or their origin (whether traditional or imposed), and that it draws no definitive conclusions about the nature and direction of influence between the normative orders. The outside legal system penetrates the field but does not dominate it; there is room for resistance and autonomy' (Merry 1988: 878).

Establishment of the SASF's existence is premised on the identification of a processual nature of organisation, as the notion of SASF does not predetermine the nature of the organisation or the normativity associated with it (Merry 1988:878). This makes it an ideal methodology to trace the processes

and the corresponding organisational structure across the social sphere rather than identifying social processes based on a predetermined structural or normative criterion.

It is argued that Moore's notion of SASF enables a nuanced understanding of the way legislative interventions play out in the social space. SASF's emphasis on the characteristic of semi-autonomy and the resultant self-regulatory processes help understand the reasons for compliance or non-compliance with state law. Moore's conceptualisation of the limits of state law correspond with Griffiths observations on the limits of legislative interventions (Griffiths 1986; 2003). Griffiths observes that the presence of SASF disproves the notion of 'normative vacuum' and that it is ideally suited to identify and observe the phenomenon of legal pluralism in a particular society (Griffiths 1986:34, 37). The exploration of the limits of legislative interventions by Moore, owing to societal resistance, corresponds with Twining's critique of 'simplistic assumptions' informing the process of global diffusion of law ignoring social phenomena in the nature of 'resistance' and 'struggle' (Twining 2004:16-17).

### **6.5. Studies Applying the Methodology of SASF**

This section explores the different contexts in which the notion of SASF has been deployed. These studies help bring out the characteristics of SASF which will be relied on to identify the emergence of legal pluralism in sectoral state law in Andhra Pradesh as opposed to viewing the institutional re-aggregation of the disaggregated SEB as merely transactional. These studies establish the following in terms of observing the emergence of legal pluralism associated with SASF, i.e. a. legal pluralism emerges as a result of resistance to the

imposition of law; b. such resistance is informed by an oppositional normativity; c. self-regulation as a form of plural legality emerges from the processes of self-organisation within the SASF; d. that state itself is one amongst the many societal SASF's, a notion that comes closer to the non-autonomous attributes of the Indian state in economic activity; and e. that the SASF and the resultant institutional organisation is horizontal and based on a functional criteria as opposed to a hierarchical institutional organisation. This strengthens the thesis's approach of deploying a regulatory space framework so as to observe the actor dynamics in response to regulatory interventions, introduced, ignoring a particular jurisdiction's regulatory attributes. As discussed, Scott observes that an approach associated with regulatory space differs from the 'New Institutional Economics' approach and does not consider the relationship between the regulators and regulatees to be hierarchical (Scott 2001:351). The present enquiry also observes the emergence of legal pluralism owing to a horizontal institutional reaggregation mimicking the SEB in response to a legislative model disaggregating the SEB and implementing hierarchical regulatory arrangements.

Not all the studies observe the emergence of legal pluralism, but all of them approach the emergence of an SASF from the view point of differing normative perspectives. As discussed earlier, this thesis takes Tamanaha's and Twining's perspective of approaching legal pluralism from the perspective of normative pluralism (Twining 2010: Tamanaha 2008). It is in this context that an analysis of these studies identifying SASF premised on normative criteria becomes significant.

Lucy Finchett-Maddock explores the emergence of '*hidden law*' and SASF, as opposed to state law, in the context of the United Kingdom's 'Social Centre Movement' (Finchett-Maddock 2010). She describes social centres as being 'of a very left-leaning radical political nature, seeking autonomy from the dominance of the market culture through the form of differing plateaus of anti-authoritarianism' (Finchett-Maddock 2010: 37). She describes them as being 'anarchist' in nature based on a 'rejection of the imposition of force upon the action of free and mutually inclined individuals' (Finchett-Maddock 2010:38). She observes that the members of the social centres 'self-organise' and generate their own rules through 'consensus' and enforce compliance with the same (Finchett-Maddock 2010:38, 41). She labels these internally generated rules as '*hidden law*' (Finchett-Maddock 2010:38). She argues that '[*h*]idden law, is an alternative form of semi-autonomous law, one that is horizontal and not vertical in its nature, and offers a glimpse into an ulterior means of social organisation' (Finchett-Maddock 2010: 46). The social centres reflect an alternate normativity (Finchett-Maddock 2010: 50). In this context, she is of the view that '*hidden law*' echoes Moore's notion of SASF as it reflects both 'autonomy' and 'self-regulation' (Finchett-Maddock 2010: 49). She identifies 'consensus' amongst the participants as one of the characteristic features of '*hidden law*' (Finchett-Maddock 2010:49). She further suggests that '*hidden law*' has a different organisational apparatus from that of state law and helps trace resistance to state law (Finchett-Maddock 2010:46-47).

Iris Sportel explores the notion of SASF from the perspective of transnational networks consisting of non-governmental organisations, lawyers and state organisations like consulates sharing similar normative values (Sportel 2011).

Sportel's observations pertain to organisations involved in the Netherlands and Morocco providing legal aid and facilitating the divorces of Dutch Moroccans (Sportel 2011:37-38). She argues that the same led to the emergence of a 'transnational field of legal aid in Dutch-Moroccan divorces' (Sportel 2011:38). In this context, Sportel explores the question of whether inclusion of governmental organisations, such as consulates, is consistent with Moor's observation that SASF emerges 'between the body politic and the individual' (Sportel 2011:42). Sportel, however, argues that the

“body politic” is not a monolithic, single institution; rather, it consists of many institutions and localities, including some outside its own territory, such as embassies and consulates. These different elements of the body politic may very well be part of other semi-autonomous social fields as well, including the transnational field of legal aid. Even though they are state institutions, I consider the embassies and consulates to be an important part of the transnational field of legal aid' (Sportel 2011:42).

Sportel further asserts that she included state embassies and consulates on the premise that SASF is processual in nature and that it can be identified by its ability to 'generate rules and coerce or induce compliance to them' (Sportel 2011:49-50). She identifies two important features of the transnational legal aid network resulting in the formation of the SASF, namely participation in shared activities and having shared norms (Sportel 2011). The shared activities of the organisations in the legal aid network include advising and educating those in the transnational divorce and influencing policy pertaining to transnational divorces (Sportel 2011:43-46). The agreement on the

victimisation of women in a transnational divorce process and the need to protect the rights of women is seen by Sportel to be reflective of a shared normative understanding between the participants in the SASF (Sportel 2011: 47-48).

The characteristics of SASF therefore include resistance to imposition of a normativity and an acknowledgement of the state not being a monolithic entity. The characteristics also includes horizontal, as opposed to a vertical or hierarchical organisation. As discussed, Colin Scott (2001) identifies vertical or hierarchical organisation to be a characteristic of institutions established in pursuance of neoliberal regulatory globalisation. The ability to generate rules internally and enforce compliance, i.e. to self-regulate, is a common feature across the studies.

#### **6.6. The Unique Attributes of the Indian State as the Reason for the Emergence of SASF and Resultant Legal Pluralism within the State**

This section contextualises the discussion of legal pluralism owing to the emergence of a SASF in terms of the Indian state. It observes that the examination of the regulatory attributes of the Indian state establish that it is semi-autonomous and porous and that the same makes SASF an ideal approach to observe the interaction between state law and societal actors. Analysing Moore's notion of SASF, Filip Reyntjens observes that '[w]hile Moore does not say so explicitly, the state is but one of many SASFs, because its normative capacity is also 'affected and invaded' by the normative activity of other SASFs' (Reyntjens 2015:349). Reyntjens further states that 'SASF exist everywhere, and no state is fully autonomous, although of course its normative capacity is challenged more in some countries than in others'

(Reyntjens 2015:351-352). This corresponds with Sportel's observation that the body politic is not a monolithic whole and that it can be part of other SASFs (Sportel 2011:42).

As discussed earlier, this thesis takes the view that the Indian state is not an autonomous monolithic whole. This is because, as discussed in Chapter 3, though occupying a prominent role in the nation's regulatory space the state in India itself is relatively weak when compared to societal processes (Mukherji 2016). This can be compared to Reyntjen's observation of differing degrees of autonomy of different states (Reyntjens 2015:351-352). Rejecting the notion that the Indian state is a developmental state, Mukherji observes that the Indian state 'is so penetrated by social actors' that it does not display the requisite autonomy like a development state (Mukherji 2016:219-220). This is reflected in the entrenched interests of groups associated with state led development in the resources owned and distributed by the state, and includes politicians, bureaucrats, industrialists and the farmers (Bardhan 1998; Kaviraj 2000; Varshney 2013). The procedural solution of the framers tying the role of the state in economic activity with electoral expectations resulting in a functional normative system makes the Indian state porous and responsive to societal pressures. Therefore, it is observed that the Indian state is semi-autonomous by nature. It is argued that this attribute of the Indian state is reflected in implementation of state law. Therefore, state law in India both influences, and is influenced by, societal pressures.

The other characteristic of semi-autonomy is the highly contested nature of the state's role in economic activity. The state is torn between the tensions generated by 'elite politics' and 'mass politics' (Varshney 2007) and the

competing notions of developmental state, welfare state and regulatory state. In addition to these pressures external to the state, the organs of the Indian state, i.e. the executive and legislature on one hand and the judiciary on the other, are competing with one another so as to interpret the constitutional mandate, often resulting in divergent positions. The differing notions of the Indian state between the national state and the States created further tensions within the state. This semi-autonomous porous nature combined with 'the way the state acknowledges diverse social fields within society and represents itself ideologically and organizationally in relation to them' (Moore 2001:107) results in processes of self-organisation and the emergence of self-regulation within the Indian state, resulting in pluralism in state law.

### **6.7. SASF, Self-Regulation and Horizontal Organization**

As discussed earlier, Moore states that SASF is identified by its 'processual characteristic, the fact that it can generate rules and coerce or induce compliance to them' (Moore 1973:722). Finchett-Maddock observes that the semi-autonomous legal processes need not rely on a vertical organisation, and that the organisation of the SASF can be horizontal as well (Finchett-Maddock 2010:46). Julia Black explores the nature of organisation of self-regulating bodies like professional bodies of lawyers, sport associations, trade bodies etc. Julia Black terms these self-regulating processes '[s]elf-regulatory associations', she conceptualises them to be 'horizontal' in organisation linking different sections of society (Black 1996:28). Black's notion of horizontal self-organisation (Black 1996) corresponds with Moore's processual methodology of identifying SASF (Moore 1973) and underlines the need to view these processes beyond the conventional hierarchical or institutional perspective.

This thesis takes a horizontal approach to the identification of the SASF. In other words, given that SASF is premised on identification of a processual nature of organisation, it does not predetermine the nature of the organisation or the normativity associated with it. This makes it an ideal methodology to trace the processes and the corresponding organisational structure across the social sphere, rather than identifying social processes based on a predetermined structural or normative criteria.

The next section discusses the features, advantages and drawbacks of self-regulation primarily from the view point of adopting self-regulation as a strategy by the state to regulate effectively (Baldwin et al 2012; Graham 1994; Ogus 1995). Julia Black's description of self-regulation includes the phenomenon of self-organisation without state intervention, which corresponds with the notion of self-regulation in SASF (Black 1996; Moore 1973; Griffiths 1983, 2003; Finchett-Maddock 2010). Both self-regulation as a state initiated process or self-regulation arising from a self-organising process exhibit similar advantages and drawbacks. It is argued that an understanding of these features will help identify the self-organising processes and resultant self-regulation in the State level electricity sector in Andhra Pradesh in Chapters 7 and 8.

## **6.8. Semi – Autonomy and Self- Regulation**

### **6.8.1. Self- Regulation as a Characteristic of SASF**

This section focuses on the characteristic of self-regulation of the SASF. This characteristic will be relied on to establish the presence of a sectoral SASF in the State of Andhra Pradesh in Chapter 8. As discussed earlier, Moore states

that SASF is identified by its 'processual characteristic, the fact that it can generate rules and coerce or induce compliance to them' (Moore 1973:722). Julia Black explores the nature of organisation of self-regulating bodies, like professional bodies of lawyers, sport associations, trade bodies, etc. Julia Black terms these self-regulating processes '[s]elf-regulatory associations', she conceptualises them as 'horizontal' in organisation, linking different sections of society (Black 1996:28).

Speaking about self-regulation emerging from self-organising processes, Black argues that 'the essence of self-regulation is a process of collective government' (Black 1996:27). That the term 'self' is used to describe 'a *collective*', "[s]elf-regulation" describes the situation of a group of persons or bodies, acting together, performing a regulatory function in respect of themselves and others who accept their authority' (Black 1996:27). She states that '[s]elf-regulation is neither a new phenomenon, nor one which is likely to disappear' (Black 1996:25). She notes that professions, sports, and financial services are usually self-regulated (Black 1996:25). Black further argues that '[s]elf-regulatory bodies can be significant sources of law in particular areas, and networks of self-regulatory systems exist in which different SRAs demand compliance with each other's rules' (Black 1996:25). This observation by Black corresponds with Moore's observation on the presence of self-regulating semi-autonomous social fields whose regulatory rationale normatively differs from state law (Moore 1973; Griffiths 1986, 2003).

Black is of the view that self-regulatory processes are horizontally structured (Black 1996:29). In her words

‘... in acting as horizontal linkages between different systems, SRAs link politics not with individual but with other specialised sectors of society. They participate simultaneously within those different sectors; the legal rules governing their public status and those governing their internal democratic processes thus need to be reformulated in the light of the different claims of these sectors’ (Black 1996:29).

In the context of self-regulation as a state strategy for regulation, Cosmo Graham borrows the definition used by Birkenshaw et al. and defines self-regulation as ‘the delegation of public policy tasks to private actors in an institutionalized form’ (Graham 1994:190). Ayres and Braithwaite speak of self-regulation in the context of exploring regulatory solutions between the opposing choices of strong regulation and deregulation (Ayres and Braithwaite 1992:101). They explore the possibility of adopting strategies in the nature of enforced self-regulation ‘as a form of subcontracting regulatory functions to private actors’ (Ayres and Braithwaite 1992:103). This sub-contracting challenges the notion of division between public law and private law, which according to Graham ‘ignores an important phenomenon characteristic of the modern state, namely the blurring of division between the public and private spheres’ (Graham 1994:189). Black endorses this blurring of distinction between public and private in the context of self-regulation and observes that ‘[s]elf-regulatory associations (SRAs) combine the governmental function of regulation with the institutional and often legal structure and interests of a private body’ (Black 1996:28).

Anthony Ogus argues that it would be wrong to slot all forms of self-regulation into one category. In this context, Ogus discusses the nature of self-regulatory

agencies in terms of their attributes, and states that they differ widely (Ogus 1995:99). This view corresponds with Moore's view of different forms and degrees of semi-autonomy (Moore 1973: 745). He states that '[t]here is no clear dichotomy in this respect between "self-regulation" and "public regulation", but rather a spectrum containing different degrees of legislative constraints, outsider participation in relation to rule formulation or enforcement (or both), and external control and accountability' (Ogus 1995:99-100). Ogus makes crucial linkages in terms of self-regulation and public-regulation, i.e. the ability to intervene in autonomy. In his words, 'at one extreme, rules may be private to a firm, association or organization; at the other, they may have to be approved by a government minister or some independent public authority' (Ogus 1995:100). Ogus further states that even the rules issued by the SRA may have differing degrees of applicability, from being legally binding to being subject to discretionary and voluntary compliance (Ogus 1995:100). As discussed, the concept of SASF accommodates this notion of varying degrees of autonomy associated with self-regulatory processes (Moore 1973:745).

#### 6.8.2. Advantages and Drawbacks of Self-Regulation

The advantages of self-regulation include greater expertise, increased compliance and reduction in costs of information and administration (Baldwin et al 2012; Graham 1994; Ogus 1995). The drawbacks, amongst others, include a lack of democratic accountability, the impact of decisions of actors in self-regulatory arrangements on third parties, inability to rein in errant members and the tendency of actors in self-regulatory processes to cartelise and impose barriers to entry for other actors (Baldwin et al 2012; Graham 1994; Ogus 1995).

Baldwin and others opine that, '[s]elf-regulatory bodies can usually command higher levels of relevant expertise and technical knowledge than is possible with independent regulation' (Baldwin et al 2012:139). Those who support self-regulation also make a case for 'regulatory effectiveness', as they believe that 'self-regulators have a special knowledge of what regulated parties will see as reasonable in terms of regulatory obligations' (Baldwin et al 2012:139). The reasonable standards in turn help promote greater 'voluntary compliance' when compared to 'externally imposed regimes of control' (Baldwin et al 2012:139).

Self-regulators have ease of access to information allowing them to formulate and monitor compliance with regulatory standards (Baldwin et al 2012:140). Their familiarity with the regulated parties allows them to interact informally, and this results in lower information, monitoring and enforcement costs (Baldwin et al 2012:140; Ogus 1995:97-98). Ogus observes that 'administrative costs' in the case of self-regulation are borne by the participants in the activity and 'in the case of independent, public agencies, they are typically borne by taxpayers' (Ogus 1995:98). Graham opines that:

'By reducing reliance on statute, self-regulation offers a speedier, more flexible means of solving problems. By harnessing the expertise of those involved in the industry, government is able to overcome the information problems and standards can potentially be set higher than in a statutory scheme' (Graham 1994:194).

Critics of self-regulation view it as the 'capture of power by groups who are not accountable through normal democratic channels' (Baldwin et al 2012:142) or

established constitutional processes (Ogus 1995:98). The decisions taken by members of a self-regulatory arrangement may ignore the repercussions for non-members (Baldwin et al 2012:145). Graham notes that ‘negotiation and bargaining necessary to establish a self-regulatory scheme may take place without input from third parties’ (Graham 1994:195). The potential to abuse the position becomes even greater if the ‘rules affect third parties’ (Ogus 1995:99). Self-regulatory bodies have a track record of not being able to protect the public interest owing to their inability of ‘enforcing standards against errant members’ (Baldwin et al 2012:142). Self-regulating processes ‘may not cover all firms in an industry’ (Graham 1994:194).<sup>133</sup> Self-regulatory bodies also have the power to determine whom to allow or disallow, this vests in them tremendous power to ‘enable incumbent practitioners to earn supra-competitive profits’ (Ogus 1995:99).<sup>134</sup> Graham notes that ‘self-regulation can lead to restrictive practices which discourage competition and innovation and work to the detriment of the consumer’ (Graham 1994:195). Therefore, self-regulation can also be symptomatic of anti-competitive agreements between a select set of firms within a sector.

### **6.9. ‘Juristic’ and ‘Social Science’ View of Legal Pluralism and Conceptualising the ‘Legal’ in Legal Pluralism**

Griffiths defines legal pluralism in two ways. The first is in terms of a legal system’s relationship with state law; the second dissociates itself from state processes and observes pluralism as ‘an empirical state of affairs in society’

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<sup>133</sup> Graham refers to the self-regulatory processes as ‘Self-Regulatory Arrangements’ (Graham 1994:192).

<sup>134</sup> Ogus uses the term ‘Self-Regulatory Agencies’ to refer to self-regulatory processes (Ogus 1995:97)

(Griffiths 1986:8). He is dismissive of notions of legal pluralism associated with state processes (Griffiths 1986:8). Griffiths gives the example of the state legal system recognising the applicability of other legal systems in the nature of customary law or religious law alongside the state system as pluralism in the 'weak sense' (Griffiths 1986:5-8). For him, legal pluralism is a 'descriptive' phenomenon observable in social processes (Griffiths 1986:38). Sally Engle Merry categorises Griffiths's characterisation of 'weak' versus 'descriptive' as the 'juristic' versus 'social science' view of legal pluralism (Merry 1988:871). This thesis adopts Merry's phraseology of 'juristic' and 'social science' to describe the phenomenon.

Griffiths gives a very expansive definition of the term 'law', i.e. 'law is the self-regulation of a semi-autonomous social field' (Griffiths 1986:38).<sup>135</sup> He further states that "law' is present in every 'semi-autonomous social field', and since every society contains many such fields, legal pluralism is a universal feature of social organisation' and opines that 'all social control is more or less 'legal'" (Griffiths 1986:38-39). Griffiths relies on Moore's notion of Semi-Autonomous Social Field to assert that 'all social control is more or less 'legal'" (Griffiths 1986:39). Moore, however, dismisses assigning the label 'law' to the processes identifiable by deploying her methodology (Moore 2001:106; Tamanaha 2008:394). Moore states that '[f]or reasons of both analysis and policy, distinctions must be made that identify the provenance of rules and controls' (Moore 2001:106).

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<sup>135</sup> Moore's notion of SASF acknowledges that state legal interventions have to encounter social forces. Moore argues that it is the rules according to which a society organises itself that dictate the compliance with state law (Moore 1973:721-722).

Sally Engel Merry objects to such a wide conceptualisation of 'law' and Tamanaha endorses Merry's caution about terming all social ordering as law (Tamanaha 2008:393). In Merry's words, '[i]n writing about legal pluralism, I find that once legal centralism has been vanquished, calling all forms of ordering that are not state law by the term law confounds the analysis' (Merry 1988: 878). This thesis takes the approach that not all modes of social control can be labelled as law. To that extent, though relying on the methodology of SASF this thesis' approach is in agreement with Merry (1988) and Moore (2001), i.e. not all forms of social control can be termed as law.

Twining observes that conceptualising what is 'legal' in legal pluralism has been controversial (Twining 2010:497). Twining is of the view that issues pertaining to 'conceptualising law' for the purpose of legal pluralism are not restricted to an analysis of pluralism (Twining 2010:515). Twining suggests that debates pertaining to pluralism and law pertain to the wider issues of conceptualising law (Twining 2010:515). Twining observes that 'removing questions about conceptualising law from the agenda of theorizing about pluralism, opens the way to considering other issues – including switching the focus of attention to concepts of norms and of pluralism' (Twining 2010:498). It is in this context that Twining endorses Tamanaha's view that 'that legal pluralism is best seen as a species of normative pluralism' (Tamanaha 2008; Twining 2010:497).<sup>136</sup> This thesis endorses Twining's and Tamanaha's view

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<sup>136</sup> Twining makes this observation in the context of examining the notion of 'global legal pluralism' and drawing linkages with a descriptive analysis of pluralism within the confines of a state. This endorsement of Twining's observations, however, pertains to the study of pluralism within the national space. Twining further states that 'We all encounter normative pluralism every day of our lives. We treat it as a social fact and rarely speculate about it. If one treats legal pluralism as a species of normative pluralism, this helps to de-mystify legal pluralism by de-centering the state, providing links to a rich body of literature, and showing

that legal pluralism can be seen as a sub-set of 'normative pluralism'. The normativity discussed in this thesis is the one associated with the role of the state in economic activity and its dominant manifestations, i.e. the interventionist state and the regulatory state.

This thesis also adopts a social science view in identifying societal processes culminating in legal pluralism (Merry 1988:871). This is not to suggest that the state law in India does not accommodate the notion of legal pluralism in the juristic sense. In fact, the definition of 'law' under the Indian Constitution is expansive and states that "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law'.<sup>137</sup> However, it is contended that the SASF can only be identified by its processual nature through the social science approach. The SASF discussed in this thesis is associated with state functionaries in Andhra Pradesh and observes the phenomenon of pluralism in state law itself. Given that it is a phenomenon associated with the state law and state processes, it is argued that it is not possible for state law processes to identify and give recognition to the said alternate organisational structure and legality. It is in this regard that the social science approach helps identify the participants and processes resulting in semi-autonomy and legal pluralism.

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that some of the puzzlements surrounding pluralism can usefully be viewed as much broader issues of general normative and legal theory' (Twining 2010:515).

<sup>137</sup> Article 13 (3) (a) of the Constitution of India.

## **Chapter 7 – Regulatory Attributes of the Role of the State in Sectoral Activity in Andhra Pradesh**

### **7.1. Introduction**

The following discussion on the social, economic, legal and political dynamics in the electricity sector of Andhra Pradesh endeavours to establish that the state in Andhra Pradesh, like the national state, ‘cohabits a rather powerful society around a relatively weak state and a democratic political system’ (Mukherji 2016:233). The chapter demonstrates that the tensions in the Indian state, as discussed in Chapter 3, make the state in Andhra Pradesh’s electricity sector non-autonomous (Mukherji 2016), reflecting characteristics of semi-autonomy. The thesis attributes the emergence of legal pluralism in sectoral state law to this semi-autonomous nature of the State of Andhra Pradesh in the sector, along with the way the state ‘acknowledges diverse social fields within society and represents itself ideologically and organizationally in relation to them’ (Moore 2001:107).

The Bank’s 1993 Policy, as adopted by the national government and implemented through legislative interventions, aimed at establishing a sectoral regulatory state, was implemented with the intention that the market and not politics would determine the allocation of resources. This model was sought to be implemented by Andhra Pradesh to revive the sector which was a drain on the State’s finances owing to redistributionist politics emanating from the notion of an interventionist state. As Tshuma, Chang and Faundez observe, the move to depoliticise economic decision-making itself proved to be political (Chang 1999; Tshuma 1999; Faundez 2010). It is argued that the adoption of an external regulatory model, which did not acknowledge the sectoral

regulatory attributes, generated tensions within the Indian state. The tensions in the context of the State level electricity sector have particular institutional manifestations,<sup>138</sup> namely a ‘centrifugal’ (re-aggregated) and ‘centripetal’ (disaggregated) organisation of the state, corresponding to notions of an interventionist and a regulatory state respectively. As will be demonstrated in Chapter 8, sectoral state law endeavoured to disaggregate the institutional arrangements associated with an interventionist state. However, self-organisation and resultant self-regulation by the semi-autonomous state in response to electoral expectations and bureaucratic and technocratic consensus on sectoral organisation resulted in re-aggregation of the disaggregated SEB. Institutional re-aggregation and self-regulation by state actors in pursuance of normativity of an interventionist state, as opposed to institutional disaggregation engineered by state law, are seen as the plural manifestations of state law in Andhra Pradesh’s electricity sector.

This chapter discusses the co-evolution of the political, legal, economic and social developments in Andhra Pradesh. This is undertaken in the context of the corresponding national developments both in terms of the larger role of the Indian state in economic activity and the electricity sector, as discussed in Chapters 3, 4 and 5 of this thesis. The chapter firstly explores the reason for choosing the State of Andhra Pradesh to observe the impact of legislative interventions aimed at establishing a regulatory state. It establishes that the developments in the State of Andhra Pradesh and the nature of the state in Andhra Pradesh’s electricity sector mirrors the national regulatory attributes.

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<sup>138</sup> This thesis borrows this terminology from Julia Black’s (2007) categorisation of the tensions in the regulatory state.

The chapter then discusses the politicisation of the provision of electricity and the role of farmers' movements in persuading the state to allocate the resource. It discusses the state's response to social movements against rich landlords and upper castes and the women's movement against the sale of country made liquor, or 'arrack', as a vindication of Mukherji's (2016) observation that the Indian state is surrounded by a powerful society.

The chapter thereafter discusses the issue of budgetary deficits owing to increased political competition and the politics of resource disbursement. It examines the home-grown reform model put forward by the sectoral bureaucrats and technocrats. The reform model emphasised a continued interventionist role for the state in economic activity and in coordinating sectoral activity. Andhra Pradesh however sought to implement the Bank's 1993 Policy advocating a regulatory state as opposed to the populist electoral, bureaucratic and technocratic perception of an interventionist role for the state in economic activity. The chapter thereafter discusses the terms of the Bank's assistance and the legislation ushering in the sectoral regulatory state and corresponding institutional arrangements. The move towards establishing a regulatory state resulted in electoral reversals, forcing a course correction involving interventionist political posturing. The thesis argues that this change in political posturing towards an interventionist state, despite the sectoral legislation advocating a regulatory state, led to the semi-autonomous state reorganising itself institutionally and resulted in legal pluralism in sectoral state law. The following discussion therefore provides the necessary background to contextualise the economic, social and political developments after reform, which resulted in the state reorganising itself in the light of the electoral

expectations of an interventionist state and a bureaucratic and technocratic consensus regarding sectoral organisation.

## **7.2. Reasons for Choosing Andhra Pradesh as the Focus Jurisdiction**

Andhra Pradesh was considered a leader in ushering in economic reforms at the State level in India (Srinivasulu 2004:3845; Suri 2004:5493). Unlike other States, Andhra Pradesh did not carry out the programme of economic reforms by stealth, it went public with it and combined it with governance reforms (Kennedy 2004:30, 46, 63). Suri observes that what sets Andhra Pradesh apart from other States is that

‘the ruling party took an open ideological position in favour of a market-oriented economy. Between 1997 and 2004, economic restructuring has virtually become the official ideology of the state government. It has also occupied a central place in political and electoral campaigns...The tension between economic reforms and welfare politics has been extremely intense in AP politics. Since 1991, the state has lived through the language of reforms and also the rhetoric of welfarism, sometimes in opposition and sometimes in combination’ (Suri 2005:135-136).

It is this eagerness of the executive in Andhra Pradesh to change its public posturing from an interventionist state to a regulatory state that makes it an ideal jurisdiction to study the efficacy of legislations ushering in a regulatory state. Andhra Pradesh also becomes important because the electricity sector was the primary target for the proposed reforms. As will be evident, Andhra Pradesh also reflects the wider national phenomenon of redistributionist politics, leading to budgetary deficits and the State trying to make a course

correction through economic reforms at the behest of the Bank aimed at establishing a regulatory state.

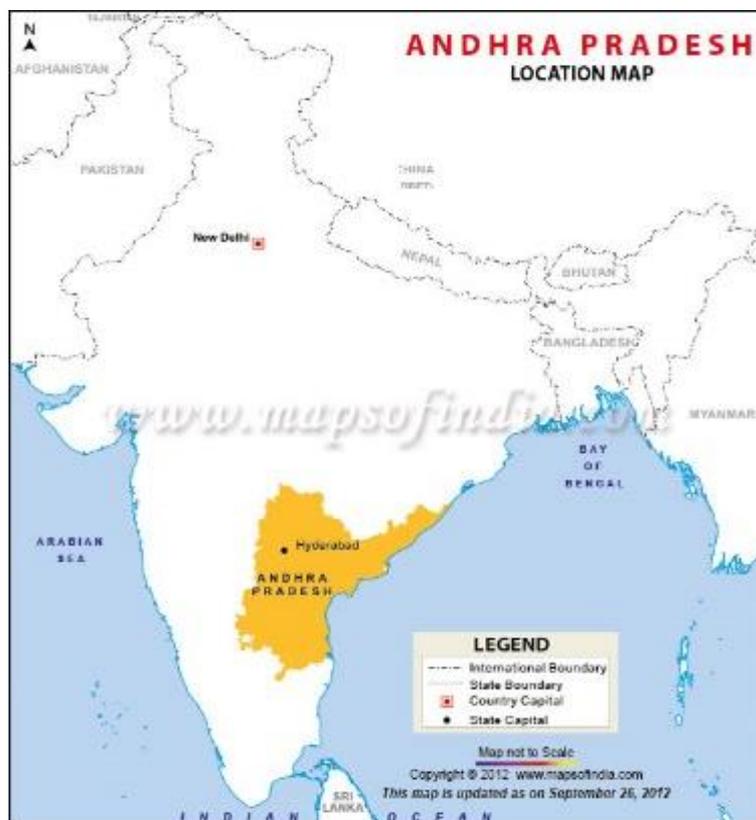
The period from 1998 to 2004, as discussed in Chapter 5, was associated with the Bank directly engaging the States, unlike the earlier practice of lending exclusive to the national government. This period corresponded with the Chief Ministership of Nara Chandrababu Naidu (hereinafter Naidu), the reformist, in Andhra Pradesh. As Kirk puts it 'Andhra Pradesh was the public face of the Bank's focus states strategy, and Naidu was the public face of Andhra Pradesh' (Kirk 2011:63). Between 1998 and 2004, Andhra Pradesh, with 7% of the country's population, received 12% of all assistance earmarked by the Bank to India (Kirk 2011:63). 2001-2003 was the 'high point of engagement' and Andhra Pradesh attracted one third of all external assistance received by India, be it from the Bank, ADB or bilateral sources (Kirk 2011:63). Kirk further observes that 'DFID's grants to AP in 2002 exceeded British aid to any other *country*' (Kirk 2011:63).

Suri describes the politics in Andhra Pradesh as tension between the notions of development and welfare (Suri 2005). That the same lead to the debate regarding the allocation of the State's scarce resources to what was considered 'productive investment' or development, and welfare, or 'using state resources to provide direct or indirect support to the needy in order to ameliorate their hardships. Development is rational economics, while welfare is populist politics' (Suri 2005:133-134). This debate between development and welfare in the political space of Andhra Pradesh corresponds with what Chang observes to be the neoliberal critique of the interventionist state attacking politics (Chang 1999:190).

As will be evident in the following narrative, the national level attempts of the Indian state to change its public posturing and the corresponding State level endeavors to toe the national line, shared a reflexive relationship and influenced one another. The dynamics in Andhra Pradesh are reflective of the tensions and clamour for resources owned and allocated by the state. The following narrative brings to the forefront the actor dynamics associated with economic reform through legislative change. This helps understand the semi-autonomous nature of the state in the electricity sector in Andhra Pradesh and to identify the institutional organisation informed by normative notions of the role of the state economic activity.

### 7.3. Andhra Pradesh – Demography and Socio-Economic Indicators

Fig 3-State of Andhra Pradesh



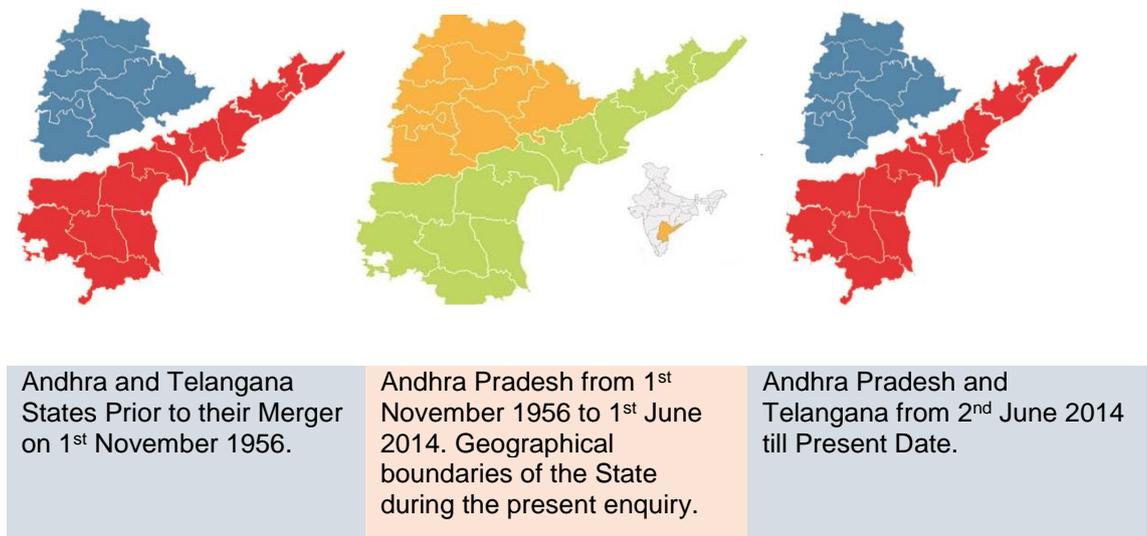
Boundaries of Andhra Pradesh from 1<sup>st</sup> Nov 1956 to 1<sup>st</sup> June 2014.

The State of Andhra Pradesh was formed by combining the 'Telugu' speaking States of Telangana and Andhra Pradesh in 1956. This was in consonance with the then national government's policy of constituting States on a linguistic basis. It remained a united

State of Telugu speaking people till June 2014 when it was bifurcated into its

earlier constituent units of Telangana and Andhra Pradesh. Geographically Andhra Pradesh was the fourth largest State in India (Govt AP 2013:1). As per the 2011 Census, Andhra Pradesh had a population of 84.6 Million making it the fifth most populous state in India, with 7 per cent of the nation’s population (Census 2011). 67.02% of its population is literate (Census 2011). As discussed, the narrative of the events in this thesis and the corresponding analysis of the emergence of a sectoral SASF is restricted to the State formation in 1956 till bifurcation of the State in June 2014.

**Fig 4 – State of Andhra Pradesh Prior to Merger and After Bifurcation**



Andhra Pradesh had a high proportion of rural population. 33.36% of the population live in urban areas whereas 66.64% of the population lived in rural areas (Census 2011). As per 2009-10 estimates of the Planning Commission 22.8% of the rural and 17.7% of the urban population lived below the poverty line (Govt A.P. 2013:221). It has a high agricultural output and is called the ‘Rice Bowl of India’ (Govt AP 2013:1). Incidentally rice is also a crop that is water intensive to cultivate and requires standing water in the fields. The State

is also in the forefront of production of commercial crops like tobacco, cotton, groundnut, etc. (Govt AP 2013:1). For the financial year 2012-13 the contribution of agriculture to the Gross State Domestic Product was 18.7%, the industrial and service sector's shares were 24% and 57.7% respectively (Govt A.P. 2013:12). The State government estimates more than half of the population of the State is dependent on some form of agricultural activity or other to earn its livelihood (Govt A.P. 2013:24). The State government identifies the sector as a means to reduce poverty and also increase food self-sufficiency (Govt A.P. 2013:24). The agricultural sector in Andhra Pradesh therefore plays a very important role both in terms of percentage of population dependent on it and the national goal of attaining food self-sufficiency. The higher prevalence of poverty in the rural areas is also reflective of the precarious finances of the agriculturalists.

#### **7.4. Andhra Pradesh 1956-1983 – Congress Party and Redistributive Politics**

Politically, Andhra Pradesh had been a Congress bastion till 1983, owing its grip on political power to Indira Gandhi's flavour of redistributionary politics. In fact, as discussed in Chapter 3, Congresses' nationwide electoral reversals in 1967, associated with currency devaluation and other reform measures, and the post emergency scenario of 1977, were not reflected in the party's performance in the State (Kale 2015:140; Kohli 2010:389; Shatrugna 1985:138; Mukherji 2014:150). This was owing to Indira Gandhi's personal charisma with the voters in Andhra Pradesh, who referred to her as 'Indiramma' or 'Mother Indira' (Shatrugna 1985:139). Indira Gandhi's power also emerged from the fact that Congress leaders in Andhra Pradesh were

more reliant on her pro-poor schemes and personal popularity than individual ability, this further reduced their ability to create a political base (Kohli 2010:393). Indira Gandhi appointed four Chief Ministers between 1978-1983, who were considered to be political lightweights chosen on the basis of their loyalty, to ensure that they did not threaten her supremacy within the party (Harshe & Srinivas 1999:3103; Kohli 2010:391; Rubinoff 1997:2833). The change in Chief Ministers also witnessed frequent bureaucratic transfers amongst the senior bureaucracy within the State, thereby creating administrative confusion and discord (Kohli 2010:392).

## **7.5. The Electricity Sector in Andhra Pradesh from 1956-1983**

### 7.5.1. The Establishment of the SEB and the Expansion of Capacity and Network

State provision of electricity in Andhra Pradesh was initially undertaken through the State electricity department. The Andhra Pradesh State Electricity Board (hereinafter APSEB) was constituted in April 1959 under the provisions of the 1948 Act (Govt AP 1995:9). After the formation of the APSEB, the assets and functions of the electricity department were transferred to it (Kale 2015:143). APSEB also took over many electricity utilities in the private sector making the sector wholly state owned by December 1961 (Kale 2015:143). APSEB played an important role in enhancing access and availability of the resource. It was able to increase the installed generation capacity from 213MW to 4,729 MW in little over three decades 1960-61 to 1993-94 (Govt AP 1995:9). Between 1960-61 to 1994-95 the number of towns and villages electrified increased from 2,680 to 27,610 and the number of electrified farm pump sets increased from 17,968 to 1.6 million (Govt AP 1995:9).

### 7.5.2. Farmers' Movements and Shift in Allocation from Industry to Agriculture

Though a substantial proportion of the State's planned expenditure was on the sector, the sectoral policy's focus was to attract industrial investors with subsidised tariffs (Kale 2015:144). Kale observes that, in its first two decades of operation, APSEBs allocation to industrial consumers exceeded all other segments (Kale 2015:146-147). Kale summarises the same in the following table (Kale 2015:147).

**Fig 5 – Percentage of Electricity Sales by Category of Consumer in Andhra Pradesh**

<b>Percentage electricity sales in Andhra Pradesh by category of consumer, 1960-1961 to 1975-1976</b>				
	1960-1961	1965-1966	1970-1971	1975-1976
Domestic	10.8	8.1	8.2	9.5
Commercial	7.5	8.2	5.8	4.9
Public lightning	2.3	1.9	1.6	1.1
Industrial – low-tension	8.4	7.8	7.3	8.2
Industrial-high-tension	56.3	56.1	58.7	55.6
Agricultural	9.4	17.4	18.0	20.7
Misc.	5.2	.6	.4	.1
<i>Source: Andhra Pradesh State Electricity Board, Administration Report, 1970-71 and 1975-76.</i>				

Kale notes that, in the initial years of State formation, the tariffs in Andhra Pradesh reflected the actual cost of supply to the rural areas and took a cautious approach to rural electrification (Kale 2015:137). In fact, agricultural tariffs also varied from region to region reflecting the actual cost of supply (Kale 2015:137). Till the mid-1970s, per unit tariff payable by agriculturalists was more than that payable by the industrial consumers (Kale 2015:145). Kale also observes that there was no evidence of one segment being cross subsidised at the expense of the other (Kale 2015:145). This trend in the preferential

allocation of the resource to the industrial sector was reversed with the emergence of farmers' movements in Andhra Pradesh demanding subsidised agricultural inputs.

The farmers' movements in Andhra Pradesh were part of the larger national phenomenon of 'agrarian politicization' (Kale 2015:148). The farmers' movements in India have primarily targeted the Indian state (Pai 2011:391). In Pai's words 'The centrality of the State in a developing country characterized by agricultural backwardness means that farmers' movements are largely a response to change in agricultural policy' (Pai 2011:391). The movements were spearheaded by rich farmers who benefitted from the green revolution (Pai 2011:392). Therefore, the provision of subsidies for agriculture, be it in Andhra Pradesh or the rest of the country, must be contextualised from the perspective of the green revolution which was initiated in the mid-1960s (Birner and Sharma 2011:110). The provision of water, be it through surface irrigation or through electrical pump sets, was an indispensable input of the green revolution (Birner and Sharma 2011:110). Birner and Sharma note that when electricity pumpsets were initially introduced they were metered and farmers paid for the electricity consumed (Birner and Sharma 2011:110). The subsidies to the agricultural sector, which were integral for the success of the green revolution (aiming to achieve self-sufficiency), made a comeback in the 1970s as an electoral strategy to appeal to the farmers (Birner and Sharma 2011:110).

Many farmers associations emerged in Andhra Pradesh in the 1970s (Birner and Sharma 2011:110). These associations were often constituted on the basis of crops raised, like 'the Andhra Pradesh Sugarcane Grower Association

was founded in 1973/74 and the Andhra Pradesh Cotton Growers Association in 1976/78' (Birner and Sharma 2011:110). Kale observes that policies favouring farmers came to be adopted only in the late 1970s and through the 1980s in response to 'farmers' movements' (Kale 2015:144). The electoral issue of free and subsidised electricity must be viewed from this perspective of tensions between different societal groups to influence the state's allocation of the resource.

### **7.6. 1983 – Entry of Telugu Desam Party and Advent of Competitive Politics**

The entry of the Telugu Desam Party (hereinafter TDP) signalled political competition in the State (Kale 2015:142). Behind the founding of TDP was the disenchantment of the 'Khammas' a prosperous caste which had grown industrially, agriculturally and commercially with the Congress party (Kohli 2010:394). The Congress was dominated and run by the 'Reddys' a traditional feudal agrarian caste with pan Andhra Pradesh presence (Kohli 2010:394). The time was therefore ripe for the emergence of Nandamuri Taraka Ramarao (hereinafter NTR), a popular matinee idol with a cult following, belonging to the Khamma caste, who played the roles of Hindu gods and saviour of the poor (Kohli 2010:395-396; Rubinoff 1997:2833).

NTR Blended 'charisma with populism' (Rubinoff 1997:2833). Amongst others, NTR played on the injury to Telugu pride, owing to repeated interference with the democratically elected State governments by the national government, reducing Chief Ministers to puppets (Harshe & Srinivas 1999:3103; Kohli 2010:396). More importantly, as part of his poll campaign, NTR announced a slew of populist policies from subsidized rice, free midday meals for school

children, to reservation for backward castes in educational institutions, attracting the traditional vote banks of the Congress (Kohli 2010:396; Rubinoff 1997:2833; Shatrugna 1985:138). NTR was able to capitalise on the discontent of the farmer's groups which 'demanded state support for higher prices and subsidies for vital agrarian inputs, of which rural electrification and electricity tariffs were a central concern' (Kale 2015:142).

## **7.7. 1983-1989: TDP, Governance and Social Movements**

### 7.7.1. Subsidy Allocation and Governance

After coming to power in 1983, the biggest budgetary subsidy outlay of the TDP government was the Rs.2 a kilogram of rice. The scheme performed well as the public distribution system functioned well and was accessible to the poor, both urban and rural (Pai 1996:145). The scheme's initial qualifying criteria was expanded, allowing for a greater number of poor people to benefit from it (Pai 1996:145). As would be symptomatic of the State's fiscal health for the times to come, the interim budget presented in 1983 had a 'Revenue Account Deficit' for the first time in more than a decade (Baru 1983:492). There was a shift in outlays from water and power sectors to 'Social and Community Services' (Baru 1983:492).

NTR lost power to Congress in the 1989 elections owing to social issues in the nature of the Naxal disturbance (Left Wing Extremism) and upper caste dominance (Pai 1996:145). Increased Left Wing Extremism and upper caste atrocities on the lower castes owe their origins to the inability of the state in Andhra Pradesh to implement legislation aimed at redistributing land and

ensuring better conditions for agricultural tenants (Srinivasulu 2002; Thomas 2014). This is an early indicator of the limitations of legal instrumentalism in redistributing resources and rearranging societal relationships. The next subsections discuss the 'class' struggles in Telangana region and the 'caste' struggles in the Andhra region and their influence on the state in Andhra Pradesh.

#### 7.7.2. Rise of Left Wing Extremism in Telangana

The villages of the northern Telangana were 'dominated' by landlords belonging to the upper castes (Srinivasulu 2002:17). The exploitation of labour involved extracting services without compensation referred to as 'vetti' (Srinivasulu 2002:17-18). The landlords also occupied village commons, acted as money lenders, adjudicated disputes, and imposed and collected fines (Srinivasulu 2002:18). The landlords, in addition to continuing the feudal dominance and exploitation of village life, also had access to the 'developmental resources' of the state (Srinivasulu 2002:18). Srinivasulu attributes the reasons for the emergence of peasant class struggles in the late 1970s to a shift in the State's approach to the movements from that of 'co-optation', which involved implementing land redistribution legislations, and poverty alleviation measures to adopting 'coercive' measures against these underprivileged groups (Srinivasulu 2002:1). Srinivasulu also attributes the 'class mobilisation' in rural areas towards left-wing activism to the struggle for access to higher education for the backward castes and the Scheduled Castes for the very first time in the 1970s (Srinivasulu 2002:19)

The peasant movements were violently repressed by the State police (Srinivasulu 2002:27). Tactics included extrajudicial killings termed 'encounters', this led to the left parties, particularly the Communist Party of India Marxist-Leninist, moving away from 'popular mobilisation' towards an armed struggle (Srinivasulu 2002:27). There was increased violence between the left wing extremists and the police in the 1980s and the 1990s (Thomas 2014). More than 4000 people died as a result of the violence, of which 1,204 died in-between 1990-96, i.e. when the violence was at its peak (Thomas 2014). Incidentally, this was also the time when Naidu was looking to the Bank to reposition the role of the state in economic activity. The left wing extremists held their sway over many districts, especially in the Telangana region, and 'declared a virtual blockade of state-sponsored developmental' activities (Thomas 2014). They had a huge social following, especially amongst the Scheduled Castes, Scheduled Tribes and backward castes, and were able to counter the oppression of the feudal landed castes, to curtail practices like 'vetti' and to redistribute excess lands (Thomas 2014). By establishing people's courts, they were able to make governmental officials answerable (Thomas 2014). They also undertook their own developmental activities, like building roads, providing and repairing irrigation facilities, ensuring the supply of quality agricultural inputs like seeds and fertilizers, protected tribal interests and redistributed surplus land from land lords to the landless (Thomas 2014).

### 7.7.3. Violence against Lower Castes and the Dalit Movement in Andhra Region

The green revolution made little or no difference to the social and economic conditions of the Scheduled Castes in the coastal regions of Andhra Pradesh

(Srinivasulu 2002:33). The incitement of violence against the Scheduled Castes heightened with the TDP in power as the Khamma community now in power was angry with them for not politically supporting them despite being socially dependent on them (Srinivasulu 2002:35). The attacks on Scheduled Castes in the villages of Karanchedu and Neerukonda by Khammas led to the emergence of the Scheduled Caste (Dalit) solidarity (Srinivasulu 2002:35).

The emergence of left wing extremism in Telangana and Scheduled Caste movements in Andhra Pradesh was in many ways a direct consequence of the state not being able to implement legislation aimed at redistribution of land and state policies. Further, the resource intensive green revolution, reinforced the existing iniquitous social and economic relations in the countryside. The ability of the left wing extremists to prevent the State from functioning in their area of influence, alongside being able to coerce or regulate the way state officials discharge their functions, is proof of the fact that the state in Andhra Pradesh does not have absolute dominance over the social sphere. The perpetuation of iniquitous social relations, combined with access to state resources and the power of the upper castes resulted in atrocities against the Scheduled Castes and led to the emergence of Scheduled Caste or Dalit solidarity, forcing the state to react and check the atrocities of the upper castes.

#### 7.7.4. Women's Agitation against Arrack – Political Support for NTR in the 1994 Elections

In the early 1990s, women's agitation against the sale of liquor was gathering momentum in Andhra Pradesh. In 1990-91, Andhra Pradesh had the highest consumption of country made liquor, 'arrack', in the country (Reddy and Patnaik 1993:1062). The women's movement against prohibition emerged

from the increased consumption of 'arrack' (Reddy and Patnaik 1993; Ilaiah 1992). In 1989-90, excise duty on liquor contributed nearly 28% cent of the State's revenues, and revenues from sale of arrack contributed 70-80% of the said revenue (Reddy and Patnaik 1993:1063). Arrack is a poor person's drink, the State however was not inclined to prohibit its consumption or sale given its contribution to the exchequer (Reddy and Patnaik 1993).

Reddy and Patnaik observe that in Andhra Pradesh the sale and consumption of arrack had two aspects, namely a 'social' or 'gender' dimension and a 'political' one. From a gender perspective, men tend to spend most of their daily wages on arrack and thus fail to contribute to the family's income (Reddy and Patnaik 1993:1064). Women have to struggle to make ends meet, provide for their children and also bear the physical abuse from a drunken husband (Reddy and Patnaik 1993:1064). One other social aspect of the consumption of arrack was that it was consumed more by Scheduled Castes, for whom, unlike the Upper Castes, there was no taboo associated with the consumption of alcohol (Reddy and Patnaik 1993:1064). On the political front, it was the larger nexus between the arrack contractors and suppliers, politicians, upper castes, the State bureaucracy and police that allowed the manufacture and sale of Arrack to continue (Reddy and Patnaik 1993; Ilaiah 1992).

The women activists would halt auctions for the allocation of marketing rights, prevent arrack from being sold in the village shops and destroy stocks of arrack (Reddy and Patnaik 1993; Ilaiah 1992). Their tactics also included making men take an oath not to consume arrack in temples and publicly humiliating those who broke the oath and those who sold arrack (Reddy and Patnaik 1993; Ilaiah 1992). The women's collectives resisted attempts by the

State government to disrupt their movement and such was their resilience that arrack had to be sold under police protection and was also sold in police stations (Reddy and Patnaik 1993:1059). Women defended themselves and enforced the restrictions on consumption of arrack by ingeniously using chilli powder, brooms, fire and sticks (Reddy and Patnaik 1993; Ilaiah 1992). These movements reinforce Mukherji's observation that the state in India is surrounded by a powerful society (Mukherji 2016).

NTR, in a move to woo women voters, promised to implement complete prohibition (Suri 2002:36). NTR's support for the agitation against liquor in 1994 garnered him political support, helping him win the election, earning TDP the reputation of being the party of the poor (Harshe & Srinivas 1999:3103). Before discussing TDP's performance after 1994, the next section discusses the performance of the Congress government between 1989-1994 and reasons for its electoral defeat in 1994 elections.

### **7.8. 1989-1994: Congress & Economic Liberalisation**

The Congress Party was in power in Andhra Pradesh and at the national level between 1989 and 1994. P.V.Narasimha Rao, the Indian Prime Minister at the time, was from Andhra Pradesh and was a former Congress Chief Minister of the State (Pai 1996:143). The national Congress government insisted on fiscal discipline from the States after 1991, and this was particularly so in the States ruled by it (Pai 1996:143). This put the Congress ruled State government, which had to counter the electoral populism of TDP, in an unenviable position (Pai 1996:143). In Andhra Pradesh, Congress followed the path of fiscal restraint and rolled back the populist measures to a certain degree (Rubinoff

1997:2833). The rollback included restricting the beneficiary base of the rice subsidy scheme and other subsidies so as to reduce the budgetary deficit (Pai 1996:145; Suri 2005:136).

#### 7.8.1. Issues in the 1994 Assembly Elections and Subsequent Fiscal Deficits

The primary issues in the 1994 Assembly elections were inflationary trends and access to essential commodities, and distributional issues associated with the implementation of Rs.2 a kilogram of rice (Pai 1996:142). In the run-up to the 1994 elections NTR took advantage of the increasing perception within the State that the economic reforms favoured the middle class and the rich at the expense of the poor (Pai 1996:145). NTR argued that, though the food subsidies for the poor were severely curtailed, the subsidies to the rich farmers were continued by the Congress in the State, he further promised subsidised electricity to farmers (Pai 1996:145; Suri 2005:137). Accordingly, TDP's 1994 manifesto aimed at the small farmers in the rural areas, unemployed in the urban areas and resumption of the rice subsidy scheme (Pai 1996:145-146). Congress's manifesto was all praise for the national government for stabilising the economy, increasing employment and developments before the GATT etc. (Pai 1996:146). Pai observes that Congress's manifesto, released by the national party, did not address the requirements of the State level electorate (Pai 1996:146). The manifesto, though advocating good economics and expenditure on projects like roads and dams, failed to understand that these works only catered to the middle class and it was the rice subsidy that directly benefitted the rural and especially the landless poor (primarily agricultural

labourers) (Pai 1996:146). The 1994 election victory of TDP was a turning point in Andhra Pradesh, as it pitched NTR's version of welfare versus the economic reforms undertaken in the name of development by Congress (Suri 2005:134). Pai observes that the 1994 election in Andhra Pradesh was an early indication of the pace and scope of reforms in a democratic set up, and the realisation that the same needed to be rolled out at a measured pace whilst paying due attention to the distributional issues affecting the poor (Pai 1996:147). Pai observes that the Andhra Pradesh experience shows that 'elections in a democracy provide an in-built mechanism against harsh and painful reform pushed through at a fast pace' (Pai 1996:147). The 1994 poll debacle at the State level led to much introspection within the Congress party in terms of its economic policy (Pai 1996:147). Congress had been a beneficiary of its politics of cultivating votes through the use of state resources since 1950s, accordingly the 1995 pre-electoral national budget reflected many pro-poor schemes (Pai 1996:147).

After the 1994 electoral victory of TDP, the question being faced by the State was how to balance the rice subsidy, given the precarious financial condition resulting partly from the taxes foregone as a result of the imposition of prohibition (Sarma 1995:417). It was also opined that the rice subsidy was not properly targeted and that there was a significant number of non-poor who were beneficiaries of the scheme (Sarma 1995:419). As discussed earlier, revenue deficits had become part of the Andhra Pradesh budget since 1983-84 (Sarma 1995:418). Sarma observes that the budgetary figures are an understatement of the expenditure as there was significant extra-budgetary expenditure as well (Sarma 1995:418). The burden of subsidising electricity

supplied by the State's SEB further added to the deficit. The next section explores the politicisation of the provision of electricity and its repercussions on sectoral finances.

### **7.9. Politicisation of Provision of Electricity and Dwindling Finances of APSEB**

The increasing influence of farmers' movements led to diversion of the resource from industrial consumers to agriculturalists (Kale 2015:149). In fact, Kale observes that '[i]ncreasingly throughout the 1970s and 1980s, the supplies of electricity to industrial consumers were curtailed to allow greater allocation to farmers' (Kale 2015:149). In the tussle for control over the scarce resources, the industrial consumer lost to the agricultural and domestic consumer (Kale 2015:149-150). This loss of control over the resource can be attributed to the fact that agricultural and domestic consumers were electorally significant as they outnumbered the industrialists, influencing allocation and pricing to their benefit.

There was a reduction in electricity tariffs in the State after the election of the TDP government in 1983, which, amongst other populist measures announced a flat rate for the agricultural sector in its election manifesto (Birner et al. 2007; Birner et al. 2011). As a consequence, in that very year i.e. 1983 the percentage of agricultural consumption went up by 50 per cent (World Bank 1999a:7). After 1983, the governments also started requiring the SEB to increase the number of agricultural connections by setting up targets (Medepalli 2016). Subsidisation of agricultural electricity also led to an increase in consumption and diverted resources from the industrial sector in

the nature of power cuts and quotas on the sector, to divert power to the agricultural sector (Kale 2015:149).

APSEB was one of the most profitable SEBs in India till 1991. It had avoided the 1970's trend that saw many SEBs incur losses (Shankar 2003:1171). The share of agricultural consumption in total consumption increased from around 19 per cent in 1970-71 to 43 per cent in 1993-94 (Govt AP 1995:16, 23). In 1993-94 the agricultural sector consumed 43 per cent of the power, but only contributed 3 per cent of APSEB's revenues (World Bank 1997a:33). Industry consumed 33 per cent of the power supplied by APSEB, but contributed 70 per cent of the SEB's revenues for the corresponding period (World Bank 1997a:33). Nearly 1.6 million pump sets were electrified by the APSEB and, though the cost of supplying electricity was Rs.1.26 per unit, the agriculturalists were only charged Rs.0.6 per unit, requiring the State to provide nearly Rs.1000 Crores or \$14,741,660.00 in subsidy (Govt AP 1995:51). Therefore, the pricing of agricultural electricity shifted from being more expensive than industrial electricity to being subsidised, and in fact cross-subsidised, by the industrial sector. The Bank notes that 'AP is one of the four Indian states with the highest industrial power rates. It appears that potential for cross-subsidizing agriculture by taxing industry has been largely exhausted' (World Bank 1997a:33). The disproportionate tariff burden could not be sustained by the industrial sector, which switched over to captive generation, reducing APSEB's ability to cross subsidise (Shankar 2003:1173). The State government did subsidise the SEB, but the subsidy to the SEB was in the nature of conversion of debt into equity by the Government, this book

adjustment left the SEB cash strapped, doing little to improve its liquidity (Shankar 2003:1173).

The period between 1990 and 1996 also saw an increase in unmetered sales of electricity, i.e. transmission and distribution losses,<sup>139</sup> and agricultural consumption. This was primarily because the agricultural sector was no longer metered owing to the State announcing a flat rate based on the capacity of the pump set used. There was also an attempt by APSEB management to conceal the inefficiency in the distribution business and the failure to detect and prevent theft. Also, improper billing and corruption adversely affected the financial health of the SEB (ASCI 2008:1). A culture emerged of non-payment by consumers and collusion between the consumers and the SEB employees who continued to supply to defaulting consumers (Shankar 2003:1173). This collusion was rampant in the domestic/residential segment and also, to an extent, in the industrial sector. Those vested with discretion i.e., 'linemen, officers, meter readers, and billing clerks' were the most corrupt (Lal 2005). Together these factors contributed to the under recovery of revenues. In fact, for the period 1994-95 to 1999-2000 only 39-41% of the electricity purchased/generated by the Board was billed (Ramachandra 2003:134-137). These factors severely affected the SEBs financial fortunes, necessitating the State government to explore means to revive the utility.

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<sup>139</sup> This according to Dubash & Rajan (2001) was a 'euphemism for theft'.

## **7.10. NTR & Sectoral Reforms: The Report of the High Level Committee**

### 7.10.1. Sectoral Reform Strategy under NTR

Andhra Pradesh, under NTR, was aware of the national government's push towards sectoral liberalisation and the developments in neighbouring Orissa, which was actively engaging with the Bank. Despite its populist interventionist sectoral posturing, the NTR led TDP government was aware of the precarious nature of the State's finances. It was of the view that further public investment in the sector, especially in generation, may no longer be possible. The State government constituted a High Level Committee (hereinafter the HLC) to examine the State's power sector (Govt A.P. 1995:1). The HLC gave recommendations to address the sectoral issues but its reform strategy was different from that recommended by the Bank.

### 7.10.2. Mandate, Composition and Approach of the HLC

The HLC's mandate required it to examine the organisation of the sector and propose measures to restructure it along with suggesting an appropriate organisation 'to ensure that the tariffs promote optimum use of scarce resources of the State' (Govt AP 1995:2). This was to include examining 'the scope for private sector assuming total responsibility for generation, transmission and distribution of electricity' (Govt AP 1995:2).

The HLC comprised of technocrats and bureaucrats who were familiar with the functioning of the sector.<sup>140</sup> HLC's report was submitted before Andhra

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<sup>140</sup> The Chairman, Hiten Bhaya was a former member of the Planning Commission of India. Mr. Narla Tata Rao was a technocrat and a prominent figure in the nation's electricity sector. He played an important role in setting up the SEB in the State of Madhya Pradesh and was actively associated with the SEB in Andhra Pradesh. T.L.Shankar and E.A.S.Sarma were career bureaucrats belonging to the Indian Administrative Service, with expertise in the energy

Pradesh approached the World Bank for financial assistance. When the HLC was deliberating reforms in Andhra Pradesh, the sectoral restructuring in Orissa was in a nascent stage. Mr. Balram Reddi, the then Chairman of the SEB and the Convener of HLC, notes that they were aware of the 1993 Policy (Kotamreddi 2014a).<sup>141</sup> However, despite being aware of the Bank's model and having consulted the Bank during the preparation of its report, HLC's recommendations differed from the Bank's 1993 Policy. This is evident in the restructuring solution, road map to privatisation, and the functions and composition of the sectoral regulator proposed by the HLC. HLC's recommendations have to be appreciated from the perspective of local knowledge of actors familiar with the sectoral dynamics. It is argued that the HLC's recommendations also reflect the technocratic and bureaucratic consensus regarding the institutional organisation of the sector in Andhra Pradesh. A consensus which would influence the way the State re-aggregated in response to the electoral expectation of an interventionist state after the Bank sponsored reforms disaggregated the SEB.

The HLC's recommendations were in keeping with an interventionist role for the state in economic activity. At the same time the HLC was aware of the State's desire to not make any further investments in the sector, nor stand guarantee to the independent power producers, even if they were supplying to APSEB (Govt AP 1995:42). The report reflects the balance it sought to strike between these competing demands.

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sector. The Chairman of APSEB K. Balarama Reddi, a career technocrat, was both a member and convener of the HLC.

<sup>141</sup> Mr. Balram Reddi also mentioned that the HLC was aware of the sectoral restructuring experience in Latin America as implemented by the World Bank and had access to documents pertaining to the same (Kotamreddi 2014a).

### 7.10.3. Restructuring APSEB and a Coordinatory Role for APSEB

At the time of constitution of the HLC, APSEB had over 70,000 employees and 8 million consumers, the majority of whom resided in rural areas (Govt AP 1995:64). It recommended that the SEB be reorganised on functional lines, i.e. as generation, transmission and distribution entities (Govt AP 1995:65). In terms of organising the distribution segment, the HLC opined that it must be firstly reorganised into smaller wholly state owned companies. It was insistent that the privatisation process must be gradual (Govt AP 1995:129).<sup>142</sup>

The HLC noted that the restructuring must take into consideration the interests of the employees, especially their job security and career growth (Govt AP 1995:65). HLC did not want to change the existing service conditions of the workers. The idea of the HLC was to operate the distribution business along commercial lines, co-opt the employees of the distribution companies by making them part of the management and subsequently make them co-owners by offering them shares in the course of the disinvestment process (Govt of A.P.1995:72,77). The HLC recommended that the State government enter into talks with the employees and their unions so as to explain and convince them about the necessity for reforms and the career opportunities they presented (Govt AP 1995:131). The HLC, in its report, notes that regulatory reform must also provide a conducive environment for the growth of the private sector (Govt AP 1995:65).

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<sup>142</sup> The HLC was of the view that the distribution companies must first be given to private players on the basis of management contracts, then on a lease hire basis for a private player and then subsequently the ownership may be transferred to a private player through equity participation, either partial or total (Govt AP 1995:76-77).

The HLC was not inclined to do away with APSEB as it was of the view that APSEB had certain statutory functions under the Electricity (Supply) Act, 1948. More importantly, it was of the view that '[a]n interface with the government is also necessary' (Govt AP 1995:67). It proposed retention of APSEB as a holding company with no functions at the operational level. This holding company was to oversee the sectoral development at the State level, advise the State government as and when required, oversee the functioning of the subsidiaries and oversee the process of privatisation of the distribution companies (Govt AP 1995:67). Balram Reddi, the Convenor of the HLC, opined that the holding company solution was put forward as the members thought they needed an agency to coordinate the working of the companies, as all their activities were interconnected (Kotamreddi 2014a). The HLC's view on the need for a state owned utility to coordinate sectoral activity appears to endorse what Chang views as inalienable coordinator function of the state in economic activity (Chang 1999:192-197).<sup>143</sup>

#### 7.10.4. Establishment of Regulatory Commission, Composition and Functions

The HLC proposed the establishment of a statutory Regulatory Commission to oversee the sectoral arrangements proposed by it. It was of the view that the Regulatory Commission must be vested with adequate powers to function in an independent and autonomous manner (Govt AP 1995:111). It proposed a Regulatory Commission comprising of four members from the judicial,

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<sup>143</sup> Chang uses the term 'coordination' in the context of the state ensuring 'complementary investments' (Chang 1999). The use of the term 'coordination' in the present context corresponds with the state ensuring that complementary decisions being taken across the sectoral participants to mutual advantage.

technical, financial disciplines and an economist with sound understanding of the sector (Govt AP 1995:112). It further clarified that the Regulatory Commission will be headed by the judicial member, who would be a judge of the highest State level constitutional court, i.e. the High Court (Govt AP 1995:112).<sup>144</sup> It is interesting to note that the HLC, which comprised of bureaucrats and technocrats, did not put undue emphasis on bureaucratic expertise, and that it explicitly wanted a judicial appointee to head the Regulatory Commission.

#### 7.10.5. A Pro-Active and Distributary Role for the Regulatory Commission

The HLC vested in the sectoral Regulatory Commission the power to fix tariffs and redistribute revenues where necessary (Govt of A.P. 1995:108). The HLCs report notes that,

‘In the event that State Government desiring that certain categories of consumers should be supplied power at rates lower than the cost of supply fixed by the Commission, then it will be for the Commission to decide the manner in which the burden should be shared between the Government, the producers and the distributors’ (Govt of A.P.1995:110).

In other words, as opposed to the procedure for subsidy fixation by the State government under the present arrangements, the Regulatory Commission had

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<sup>144</sup> The technical member shall be of the rank of a Chief Engineer of the SEB (Govt of AP 1995:112). That the finance member should have worked as ‘Finance Director’ of a large public sector undertaking or of the rank of Principal Secretary to the State government with experience in financial matters (Govt AP 1995:112,119). In terms of the qualifications of the economist, the HLC favoured a person adept in infrastructural matters and of the rank of a professor in a reputed university or equivalent in qualification (Govt AP 1995:112). It recommended a restricted term for the members (Govt AP 1995:112).

the power to fix the proportion of subsidies for each category as well as the cross subsidy burden to be borne by the sectoral participants. The HLC vested in the Regulatory Commission the mandate to allocate the sectoral resources. It was of the view that much of the subsidy must be cross subsidised. This would involve the industrial consumers paying higher than their cost of supply to compensate for the lower tariff of agricultural consumers, with the rest to be borne by the State government. This ratio was to be decided by the Regulatory Commission. That the Regulatory Commission would also examine the amount of cross subsidy to be borne by the industrial sector (Govt AP 1995:52). The Regulatory Commission therefore was given the role of allocation and distribution of resources and balancing sectoral interests as opposed to a mere tariff fixation function. They reiterate the same when they observe that the State government 'can then make its case before the Regulatory Commission which can then decide objectively how this burden has to be shared by different categories of consumers' (Govt AP 1995:73). HLC was of the view that the subsidies should be restricted to the 'small, marginal and subsistence farmers' and that the regulatory commission would fix the subsidy rates as per the category of the agriculturist, level of consumption and the level of the water table (Govt AP 1995:52). This would also be accompanied by better metering arrangements (Govt AP 1995:52). The Regulatory Commission, in addition to fixing tariffs, was required to formulate standards of performance which would be applicable to the providers and it would be empowered to impose fines for non-adherence to the same (Govt AP 1995:79). Though the State government accepted the

report, it chose to seek the Bank's assistance for sectoral restructuring (Shankar 2003:1174).

### **7.11. Nara Chandrababu Naidu and the State's Engagement with the Bank**

The HLC was constituted by NTR in January 1995 and it submitted its report in April 1995. The period following submission of the report witnessed internal changes in the ruling party's leadership and involved NTR being replaced by Naidu as the Chief Minister in August 1995. Naidu, who was NTR's son-in-law, ousted him to become the State's Chief Minister.

Naidu initially supported NTR's electoral agenda revolving around Telugu pride and welfare politics (Kirk 2011:64). However, after wresting power from NTR, Naidu took the stand that subsidies towards food and power, coupled with the policy of prohibition, were disastrous for the State (Kirk 2011:64). Approaching the Bank was also made possible because of a change in the Bank's lending policy. As discussed in Chapter 5, the Bank's policy based lending to States was endorsed by the national government to fiscally discipline the States, which were reluctant to fall in line with the national government's endeavour to usher in a regulatory state.

The Bank endeavoured to realign the State level sectoral dynamics on the lines of the principles enunciated in its 1993 Policy (World Bank 1993a). As in the case with the national government, the State government was experiencing a fiscal crisis. However, as will be evident in the following narrative, the Bank's intervention would not have been possible without the active support of the State's Chief Minister, who emerged as the most prominent actor in the reform process. Chandrababu Naidu belonged to the

category of what Lal describes as the 'new age Chief Minister', with a reformist outlook (Lal 2005:650). What made the Naidu era, i.e. between 1995-2004, different from NTR's in terms of undertaking reforms was 'a radical departure in the way they were sought to be implemented and publicly articulated' (Suri 2005:139). As Mukherji observes 'Naidu strived to replace populism with good economic governance during his tenure as AP's chief minister between 1995 and 2004' (Mukherji 2014:151). In the context of the financial impact of populist sectoral posturing under NTR, the electricity subsidy bill for the year 1995, i.e. the year Naidu assumed office, was nearly USD 487.1 Million (Mukherji 2014:151). The other actors ushering in the reform process include a national government eager to fiscally discipline the States, bilateral aid agencies and international consultants.

Naidu, who had just assumed the reins of power wanted to emerge from the shadow of his illustrious predecessor by projecting himself as a reformer. Naidu was an economist by qualification and preferred being referred to as the CEO of the State (Asia Society 2001; Kale 2015:138; Mooij 2005:3; Suri 2005:152). Naidu was described as a 'moderniser' and viewed economic reforms as a means to bring about much required change (Harshe & Srinivas 1999:3103). As discussed, TDP owed its pro-poor image to subsidised rice, subsidised power to the farm sector and housing schemes for the poor (Srinivasulu 2004:3846). Naidu reversed these policies in his drive to liberalise the State's economy (Srinivasulu 2004:3846). Naidu increased the price of subsidised rice, as well as electricity, imposed restrictions on recruitment to the State's public services, lifted the prohibition which had depleted the State's revenues (Harshe & Srinivas 1999:3104; Kennedy 2004:46; Vaugier-

Chatterjee 2001:995). After the 1996 parliamentary elections the Government of Andhra Pradesh released a white paper on the State's finances, which advocated fiscal restraint (Suri 2005:139).<sup>145</sup> The Bank's scoping report on the State's finances and economic potential in January 1997, titled 'Andhra Pradesh: Agenda for Economic Reforms' marked the beginning of the reform process (Kirk 2011:66). In the report, the Bank observed that the State's growth had been below its potential and attributed the same to its inability to provide essential infrastructure, such as roads, ports and irrigation, and social services, such as education and health, and that these resources were being allocated to 'subsidy and welfare programs' (World Bank 1997a: i-ii). It noted that the fiscal situation further deteriorated because of the State's decision to provide rice at a subsidy and simultaneously impose prohibition which affected the revenues (World Bank 1997a: ii). It is in this context that the report noted that the power sector is a drain on the State's scarce resources and that the SEBs losses have put strain on public finances (World Bank 1997a:vi).

With reference to the power sector, the report noted that the power shortages were linked to underinvestment in generation capacity and the loss making SEB. It estimated that an annual investment of \$US 2.5 billion was required over the next 6 years to make the State self-sufficient in electricity (World Bank 1997a:vii). It made the case for private sector participation to bridge the investment gap (World Bank 1997a: vii). It also advocated the adoption of its 1993 Policy prescription and a roll back of agricultural subsidies (World Bank

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<sup>145</sup> Naidu was attracted to the Malaysian growth story and sought to emulate the same (Kirk 2011:65). Such was his enthusiasm that when World Bank President Jim Wolfensohn visited India in October 1996, Andhra Pradesh was not on the radar, Naidu however flew to Delhi and made a power point presentation to Wolfensohn and Lim (the country head of the Bank), impressing Wolfensohn and setting the wheels for assistance in motion (Kirk 2011:65-66).

1997a: vii). It is in this context that the Bank made the linkage between fiscal reform in Andhra Pradesh and power sector financing, as discussed in its 1993 Policy (World Bank 1993a:16; World Bank 1997a:vi-vii). The reform was aimed at improving the creditworthiness of the sector and to reduce the losses of the SEB (World Bank 1997a: vii).

The Bank's report became controversial in terms of the secrecy surrounding its preparation, the methodology adopted and the findings. There were concerns that the A.P. Agenda for Economic Reforms, did not appreciate the data properly (Rao 1998:1499-1502). Its methodology for arriving at conclusions with regard to agriculture, industry and the electricity sector in particular were disputed (Rao 1998:1499-1502). It was argued that the report preparation and its acceptance in secrecy showed a marked departure from the existing 'relationship between people and governance' (Rao 1998:1502). This was contrasted with the earlier instances of socially responsive policy-making illustrated by the imposition of prohibition as a result of the mass anti-liquor social movement supported by the TDP to come to power in 1994 (Rao 1998:1502). It is also pertinent to note that both electricity subsidies to the farm sector and prohibition were policies formulated in response to social movements which subsequently translated into electoral preferences, with the TDP co-opting these issues in its electoral manifesto.

In January 1999, the State government released a document titled '*Swarnandhra Pradesh: Vision 2020*' which was prepared in association with McKinsey and Company (Suri 2005:141). The vision document made the government's ideology and intentions very clear '[t]he document gave primacy to market forces and rejected the theory that the state alone can be the driving

force for economic development and eradication of poverty' (Suri 2005:141). Accordingly, there was a roll back of the subsidy on rice, which was viewed as a drain on the exchequer (Suri 2005:141). The State government also lifted its policy of prohibition which had led to reduced revenues (Suri 2005:141).

### **7.12. Bank Sponsored Sectoral Restructuring Process – Sectoral Disaggregation and Centripetal Institutional Framework**

Andhra Pradesh was the third national government sponsored and Bank financed, power sector restructuring project after the States of Orissa and Haryana (World Bank 2004a:17). The sectoral restructuring comprised a crucial component of a larger project, i.e. the Andhra Pradesh Economic Restructuring Project (World Bank 1998). The Andhra Pradesh Economic Restructuring Project, in turn, was the first State level programme in keeping with the Bank's 1998 Country Assistance Strategy, which prioritised State level engagement (World Bank 1997b). The Bank viewed the electricity sector reform project as the single most important 'structural and fiscal reform' in Andhra Pradesh (World Bank 1999a:3).

As discussed, Andhra Pradesh had undertaken an internal exercise through the HLC which proposed sectoral restructuring within the matrix of public ownership. The alternatives proposed by Andhra Pradesh included a package to 'revitalize' the SEB, whilst retaining its structure. But the Bank rejected the suggestion citing its experience with SEB reform at State level in the 1980s. As Ngaire Woods rightly observes 'local knowledge' is neither valued nor is it taken into consideration when the Bank takes decisions (Woods 2006:55). It is argued that this dismissive attitude of the Bank towards local knowledge prevented it from understanding the true sectoral dynamics in Andhra

Pradesh. This thesis argues that it is important to acknowledge and incorporate local dynamics when initiating legal reform. The approach of legal pluralism helps better understand local dynamics (Twining 2010) and alternate normative orders present in the state's regulatory space. The Bank went on to declare that the policy makers in Andhra Pradesh were aware and acknowledged that the sectoral crisis was caused by politicisation of decision making processes of APSEB (World Bank 1999a:7).

The reform process, was seen as a way to shift public spending from the electricity sector to the social sectors of education and health, similar to what the Bank observed in its 1993 Policy (World Bank 2004a:2). The restructuring programme had two developmental goals, namely to bring about a change in public expenditure in the power sector so that the savings could be diverted to other social sectors, and secondly to undertake sector specific restructuring so as to improve investments, supply scenario, etc. The ultimate objective of the sectoral reform was 'for the Government to withdraw from the power sector as an operator and regulator of utilities and to have commercially operated, largely privately owned utilities functioning in a competitive and appropriately regulated power market' (World Bank 1997a:8). Therefore, complete sectoral privatisation and a roll back of the interventionist state was the ultimate objective of the Bank's reform prescription. Unlike the HLC, which advised a cautious approach to the process of sectoral regulation, especially the managers' and employees' ability to internalise the rationale for reform, the Bank had a pre-set rigid time-table detailing the reform process (World Bank 1999a:4). This is reproduced below

Phase I	Establishment of a new legal, regulatory and institutional framework, functional unbundling of the system, corporatization of sector entities, and removal of some of the most critical bottlenecks of the power system (1999-2001)
Phase II	Regulatory Commission and the corporate entities fully functional, privatisation of part of the distribution business, partial restoration of creditworthiness of the sector, and improvements in system efficiency (2001-2003)
Phase III	Completion of privatization of distribution business, consolidation of the functioning and financial performance of the new power utilities (2003-2005)
Phase IV	Achievement of higher customer satisfaction through reduction of power deficit, attainment of higher quality and efficiency in electricity services, and deepening of power sector reforms to increase competition and private participation (2005-2007)

As is evident from the Bank's phraseology, these goal posts are general in nature, which is reflective of the Bank's straightjacketed approach to sectoral reform. This paved the way for the unbundling of the SEB, and the establishment of the Regulatory Commission. The privatisation of at least one distribution business was the prerequisite for the release of the second tranche of the loan (World Bank 1999a:17-18). Unlike the restructuring exercise in Orissa, as discussed in Chapter 5, there was to be no intermediary stage of placing the unbundled entities under a management contract (World Bank

1999a:19). The Bank advocated outright privatisation. This approach was in stark contrast to the internal exercise i.e. the report of the HLC, which favoured a more gradual approach to privatisation of the distribution business (Govt of A.P. 1995).

#### 7.12.1. Pre-Reform Commitments – Policy Ownership

As evidenced in the case of Orissa, Andhra Pradesh had to demonstrate its willingness to undertake the reforms and make them 'irreversible' (World Bank 1997a:11). The government of Andhra Pradesh initiated a series of reforms or what Celine Tan terms as 'prior actions' (Tan 2011:124) to comply with the pre-disbursal requirements and continue compliance to qualify for the next tranche of the loan. The new sectoral policy announced by the State government in 1997 reflected the Bank's 1993 Policy. The reform legislation was modelled on the Orissa Electricity Reform Act, 1995. It was passed by the State legislature before the Project Appraisal Document was submitted to the Bank's Board for approval.<sup>146</sup> The bilateral donors funded the technical assistance for formulating the sectoral policy and reform legislation. The consultancy services were proposed to be supported through grants from organisations such as the Canadian International Development Agency (CIDA), the UK Department for International Development (DFID), the United States Agency for International Development (USAID), etc. (APSEB 1997:23). This appears to be a kind of volte face from the approach of the HLC headed by the technocrats and bureaucrats associated with the APSEB, who were

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<sup>146</sup> The Project Appraisal Document, dated 25<sup>th</sup> January 1999, notes that Andhra Pradesh had fulfilled its pre-reform commitment to enact the Reform Act 1998 and adoption of a new sectoral policy (World Bank 1999a:11).

confident of undertaking the reforms with internal expertise. There was intense resistance to the introduction of the reform legislation from both the opposition in the legislative assembly and the employees of the APSEB. The next section will discuss the actors in the State's regulatory space opposed to the reform process who, amongst others, include the SEB's employees and the left parties.

### **7.13. Resistance to New Sectoral Regulatory Arrangements**

#### **7.13.1. Resistance in Legislature**

The Congress Party, the Communist Party of India (CPI) and the Communist Party of India Marxist CPI (M), organised a sit in in the Andhra Pradesh legislative assembly when the reform legislation was introduced by Naidu (Kale 2015:153). Naidu responded to Congresses' opposition by reading out from the Congress party's recent manifesto for the parliamentary elections where it had promised similar reforms in the sector (Kale 2015:153). The opposition to the reform legislation continued into the next day and those opposing it were suspended from the house (Kale 2015:153; Madduri 2003). There was no deliberation and the legislation was passed in the absence of the opposition (Kale 2015:153; Madduri 2003).

#### **7.13.2. Employee Resistance and the Tripartite Agreement**

Employees of APSEB were aware of Orissa's reform experience and that not everything was smooth sailing in that State after the reforms (Medepalli 2016).<sup>147</sup> They went on strike when the legislation was being tabled in April

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<sup>147</sup> Medepalli Satya Murthy, an active member of the APSEB Engineers Association and the Zonal Secretary of the East Zone at the time, suggested that the Engineers Association was

1998 (Suri 2005:153). Such was the resistance to the passage of the reform legislation, that police intervention was required to control the protesting employees (World Bank 2004a:19). The employee's union construed corporatisation to be equivalent to privatisation (Ramachandra 2014a). It took some time to convince the unions that restructuring does not necessarily imply privatisation (Ramachandra 2014a). This affected the 'employee efficiency' and morale, adding to the SEBs dwindling finances (Shankar 2003:1174). Time was lost making peace with employee unions, and the 'transfer scheme' of the Reform Act 1998 assured the employees the continuation of service conditions and benefits (Upadhyay 2000:1027).

Tripartite agreements were entered between the associations or unions, the State government and APSEB to allay the aspersions of the employees. Medepalli Satya Murthy was a signatory to one such 'Tripartite Agreement', entered between APSEB, APSEB Engineers Association and the Government of Andhra Pradesh to safeguard the interest of the employees (Medepalli 2016).<sup>148</sup> The phraseology of this agreement will be discussed in this subsection and the agreement is referred to as 'Tripartite Agreement' for the purposes of the present discussion. Similar agreements were signed with the workers unions as well (Medepalli 2016). Medepalli Satya Murthy observes that, though certain modifications were made to the agreements subsequently, the pith and substance remained the same (Medepalli 2016). The assurances

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opposed to privatisation and conducted many seminars in and around Hyderabad and throughout the State, discussing the benefits and drawbacks of the reforms (Medepalli 2016). The members of the Engineers Association attended national seminars organised on similar lines. Their opposition to privatisation was associated with fear of loss of employment (Medepalli 2016).

<sup>148</sup> Tripartite Agreement Between the Government of Andhra Pradesh, APSEB and A.P. State Electricity Board Engineers Association (Regd.No. 874 of 1975).

in the Tripartite Agreement included a 'guarantee that there will be no retrenchment' or change in employee status or service conditions in the event of reorganisation of APSEB into one or more corporate entities.<sup>149</sup> It stipulated that the terms and conditions of the employees in the reorganised entities shall be governed by the existing service rules, pertaining to promotions, transfers, leave and allowances, etc.<sup>150</sup> It further asserted that any changes to the existing conditions of service as under the SEB will be made possible only upon mutual negotiations without affecting the existing benefits.<sup>151</sup> This was to include the obligation towards retirement benefits in the nature of pensions, provident fund etc.<sup>152</sup> The successor corporate entities were required to continue these obligations of SEB.<sup>153</sup> The agreement further requires the assurances to be incorporated in the Reform Act and the Rules implementing it.<sup>154</sup>

These agreements became part of the legislative provision of the Reform Act 1998 (Medepalli 2016; Upadhyay 2000:1027).<sup>155</sup> Medepalli observes that this resulted in a more receptive attitude of the employees towards the restructuring (Medepalli 2016). It is argued that the tripartite agreements, continuing the employee service conditions including retirement benefits, such as pensions, played an important role in continuing state ownership and

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<sup>149</sup> Clause 4(a) of the Tripartite Agreement.

<sup>150</sup> Clause 4(b) of the Tripartite Agreement.

<sup>151</sup> Clause 4(b) of the Tripartite Agreement.

<sup>152</sup> Clause 4(h) of the Tripartite Agreement.

<sup>153</sup> Clause 4(h) of the Tripartite Agreement. The agreement also assures that there will be no break in the service of the employees and that they will be given an option to choose which successor entity to join (Clause 4(k) of the Tripartite Agreement). In the event of the newly formed corporate entities not abiding by the agreement, it would be the State government's duty to ensure that the newly formed corporate entities abide by the terms of the agreement (Clause 4(q) of the Tripartite Agreement)

<sup>154</sup> Clause 4(r) of the Tripartite Agreement.

<sup>155</sup> Section 24 (2) Second Proviso of the Andhra Pradesh Electricity Reform Act, 1998.

generating cohesiveness between the resulting entities. It is also argued that the continuation of the governmental service conditions, accompanied by a demonstration of employee resistance to reforms prior to introduction of the reform legislation, raised doubts concerning any further attempts at sectoral privatisation. It is observed that any private player would find the service and pension related costs of a state owned utility prohibitive to operate.

#### **7.14. The Andhra Pradesh Electricity Reform Act, 1998**

The Reform Act 1998 amongst other things, sought to restructure APSEB into independent corporate entities in the areas of generation, transmission and distribution. It endeavoured to redefine the relationship between the State and the electricity utilities through the establishment of a sectoral Regulatory Commission by the name of 'Andhra Pradesh Electricity Regulatory Commission' (hereinafter APERC).<sup>156</sup>

##### 7.14.1. An Autonomous Commission

The APERC was the institutional mechanism used to enforce the statutory provisions, giving effect to the principle of transparent regulation. The Reform Act 1998 reiterates that APERC in the course of its functioning, shall act as an 'independent statutory body corporate' and that the same ought to reflect in its decision making.<sup>157</sup> APERC is vested with the 'exclusive power' to make regulations to discharge its functions.<sup>158</sup> It has the power to issue orders and enforce them through imposition of fines in the event of non-compliance.<sup>159</sup>The

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<sup>156</sup> Section 3 (1) of the Andhra Pradesh Electricity Reform Act, 1998.

<sup>157</sup> Section 11(2) of the Andhra Pradesh Electricity Reform Act, 1998.

<sup>158</sup> Section 9(2) of the Andhra Pradesh Electricity Reform Act, 1998.

<sup>159</sup> Commission's power to Pass Orders and Enforce Decisions. Part IX of the Andhra Pradesh Electricity Reform Act, 1998.

decisions and orders of APERC shall be in writing, and it is required to assign reasons for the same.<sup>160</sup>

APERC is empowered to issue licenses to the players and determine the conditions of licences.<sup>161</sup> APERC can frame regulations prescribing the standards of performance informing consumers of their rights, upon consulting the utilities, consumer representatives and affected parties.<sup>162</sup> It is empowered to fix tariffs, however such tariff fixation shall not show any undue preference to any particular category of consumers.<sup>163</sup> The Reform Act 1998 requires the tariffs to be reasonable and to promote economic efficiency.<sup>164</sup> Interestingly, the Reform Act 1998 requires the APERC to 'endeavour to fix tariff in such a manner that, as far as possible, similarly placed consumers in different areas pay similar tariff'.<sup>165</sup> APERC is required to promote sectoral competitiveness and progressively involve the private sector, whilst ensuring a fair deal to the consumers.<sup>166</sup>

#### 7.14.2. Unbundling of the State Electricity Board

The Reform Act 1998 requires the State government to prepare a transfer scheme to give effect to the unbundling of APSEB.<sup>167</sup> As discussed earlier, unbundling of the SEB was in keeping with the principle of commercialisation and corporatisation. As per the Reform Act 1998 unbundling was to take place

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<sup>160</sup> Section 9(7) of the Andhra Pradesh Electricity Reform Act, 1998.

<sup>161</sup> Section 11(1) (c) of the Andhra Pradesh Electricity Reform Act, 1998. The licensing powers of the Commission is further elaborated in Part VI of the Reform Act titled 'Licensing of Transmission and Supply'.

<sup>162</sup> Sections 33& 34 of the Andhra Pradesh Electricity Reform Act, 1998.

<sup>163</sup> Section 26(7) (a) of the Andhra Pradesh Electricity Reform Act, 1998.

<sup>164</sup> Section 26(7) (b) of the Andhra Pradesh Electricity Reform Act, 1998.

<sup>165</sup> Section 27(8) of the Andhra Pradesh Electricity Reform Act, 1998.

<sup>166</sup> Section 11(1) (f) of the Andhra Pradesh Electricity Reform Act, 1998.

<sup>167</sup> Section 23 of the Andhra Pradesh Electricity Reform Act, 1998.

in three phases. The first phase involved a transfer of property rights and liabilities of the SEB to the State government.<sup>168</sup> The second phase involved the creation of two state owned companies, one dedicated to generation<sup>169</sup> (APGENCO) and the other responsible for transmission and distribution (APTRANSCO).<sup>170</sup> The third phase involved further disaggregation of APTRANSCO into one transmission (hereinafter referred to as APTRANSCO) and four distribution utilities (hereinafter referred to collectively as DISCOMS).<sup>171</sup> All the disaggregated utilities were constituted under the Companies Act, 1956, as wholly owned government companies.

It states that terms of conditions of employees transferred to the successor companies through the transfer schemes shall not be 'less favourable' to those enjoyed by them in the SEB and shall be in line with the tripartite agreement entered between the State government, SEB and the employees.<sup>172</sup> This provision was included in accordance with the tripartite agreement discussed earlier. The Reform Act 1998 permits the State government to advance and guarantee loans and payment of interest thereon of companies wholly or partially owned by the State after reorganisation.<sup>173</sup>

#### 7.14.3. Sectoral Role of State Government and Relationship with APERC

The State government's role is curtailed by law from being that of a sectoral participant actively associated with the day to day decision-making of the

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<sup>168</sup> Section 23(1) of the Andhra Pradesh Electricity Reform Act, 1998.

<sup>169</sup> Section 23(2) of the Andhra Pradesh Electricity Reform Act, 1998.

<sup>170</sup> Section 13 of the Andhra Pradesh Electricity Reform Act, 1998. The section specifies the functions of APTRANSCO.

<sup>171</sup> Section 23(5) of the Andhra Pradesh Electricity Reform Act, 1998.

<sup>172</sup> Section 24 of the Andhra Pradesh Electricity Reform Act, 1998.

<sup>173</sup> Section 27 (3) & (4) of the Andhra Pradesh Electricity Reform Act, 1998.

utility, as observed in the pre-reform sectoral dynamics to sectoral policy making.<sup>174</sup> It further requires all policy directions to be issued in a manner consistent with the statutory objects. The Reform Act 1998 emphasises that the State government shall in no way 'adversely affect or interfere with the functions and powers of APERC, including, but not limited to, determination of the structure of tariffs for supply of electricity to various classes of consumers'.<sup>175</sup> In other words, the statutory arrangements ensure that the State government does not in any way impinge on the autonomous functioning of APERC. Further, the State government is required to consult APERC regarding any rules or legislations proposed in lieu of any policy decision taken by it.<sup>176</sup> The enactment permits the State government to declare subsidies to a particular class or classes of consumers, upon APERC's approval of the same, the State government can compensate the said utility for the same.<sup>177</sup> The APERC is empowered to determine the timeline and the terms and conditions of payment of the subsidy amounts by the government to the utilities.<sup>178</sup> This differs from the HLC's recommendation, which vested the power to determine subsidies and allocate the resource in the Regulatory Commission.

As discussed, the statutory mandate included an unbundling (disaggregation) of APSEB, which at the time of the initiation of reforms, was the most important sectoral 'organisation'. The Bank was of the view that the unbundling of the sectoral organisation and its subsequent privatisation would make the sector

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<sup>174</sup> Section 12 (1) of the Andhra Pradesh Electricity Reform Act, 1998.

<sup>175</sup> Section 12 (1) of the Andhra Pradesh Electricity Reform Act, 1998.

<sup>176</sup> Section 12 (4) of the Andhra Pradesh Electricity Reform Act, 1998.

<sup>177</sup> Section 12 (3) of the Andhra Pradesh Electricity Reform Act, 1998.

<sup>178</sup> Section 12 (3) read with 27 (1) of the Andhra Pradesh Electricity Reform Act, 1998.

more efficient. Hancher and Moran argue that regulatory regimes are influenced by the dynamics of their regulatory space and that dominant sectoral organisations leave their imprint on the nature of regulation (Hancher & Moran 1989).<sup>179</sup> Marina Kurkchian, in her analysis of the adaptation of an institutional transplant in Russia, observes that '[a]s the foreign idea is adopted, it will be adapted. The adaptations and the interpretations that lie behind them can provide valuable insights into the society in which the players operate' (Kurkchian 2009:340). In other words, Kurkchian is of the view that '[t]he process of adaptation creates an opportunity to examine the receiving society's established practices and way of thinking' (Kurkchian 2009:337). The dominant sectoral organisation, i.e. the SEB had a 'coordinatory' function as identified by the HLC contributing to the emergence of what Black refers to as 'centrifugal forces' (Black 2007). Chapter 8 brings to the fore the 'centrifugal' processes, giving effect to an interventionist and coordinatory role for the state in sectoral economic activity, which in turn leads to institutional re-aggregation of the state mimicking the erstwhile SEB and the emergence of legal pluralism in sectoral state law.

#### **7.15. 1999-2004: Re-election of Nara Chandrababu Naidu and Implementation of Reforms**

The Reform Act was passed in 1998 and Naidu came under increasing criticism for his economic policies. Though an advocate of reform, winning the 1999 election was equally crucial for Naidu, as they were the first elections contested by TDP without its founder and crowd puller NTR (Suri 2005:147).

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<sup>179</sup> Though Hancher & Moran's analysis is with regard to 'advanced capitalism', it is opined that this is applicable in the context of Andhra Pradesh.

The ensuing 1999 election to the State legislative assembly was viewed as crucial to gauge the public opinion on reforms and Naidu emerged victorious (Kirk 2011:67). This result however was more in the nature of a false positive for the reforms. In fact, Naidu owed his electoral success to two factors, namely a last minute electoral alliance with the Bharatiya Janata Party (BJP) which led to a transfer of votes in TDP's favour and a return to NTR's welfare model by Naidu in the days preceding the election (Kirk 2011:67; Kale 2015:156). To quote Suri, '[I]ike a political wizard, Chandrababu Naidu pulled out one welfare scheme after another from his hat, averaging one every week' (Suri 2005:147). The opposition was not prepared for this change in approach just before the election and was put on the back foot (Suri 2005:147).

Though Naidu publicly expressed his displeasure towards agricultural subsidies, the tariffs were not increased till after the 1999 elections, i.e. after APERC began functioning (Kale 2015:152). Kale observes that the delay in increasing tariffs and making APERC functional prior to the elections was deliberate (Kale 2015:153). This was because, unlike in neighbouring Orissa, the farmers were a formidable political force in Andhra Pradesh (Kale 2015:153). Kale also observes that Naidu was given relaxation from tariff increase by the Bank and the national government, given that TDP was a major political player in the national coalition which could risk collapsing if Naidu withdrew support (Kale 2015:153). Thus, at a very early stage of reform implementation, the inevitability of engaging politics, as opposed to insulating economic decision making from politics, becomes clear.

### 7.15.1. Consumer Resistance to Electricity Reforms

As discussed, though constituted prior to the elections, APERC began functioning after the elections. Naidu assumed that the 1999 electoral victory was as an endorsement of his reform strategy (Srinivasulu 2004:3849). The power sector reforms led to a hike in power prices and Naidu refused to take any measures to alleviate the hardship (Srinivasulu 2004:3849). Naidu's firm stand on electricity sector reforms after the 1999 elections galvanised the opposition (Srinivasulu 2004:3849).

Public resistance to the tariff setting process was supported by the opposition, which had expressed its displeasure in the legislature at the time of enactment of the reform legislation (Kirk 2011:69). When APERC organised public consultations aimed at tariff revision, it was met with opposition especially from the farmers lobby (Kirk 2011:69). APERC also barred the media from covering the hearing, drawing negative publicity (Kirk 2011:69). The Commission increased power tariffs across all the categories, which included a 54% increase for domestic or household consumers (Kirk 2011:69).

Kale observes that Naidu's electricity sector reform 'stimulated the longest agitation in the state centered on an economic issue' (Kale 2015:139). The increase in power tariffs by APERC led to an upsurge of public opinion against the government and also the Bank (Kale 2015:157). The popular upsurge also led to members of Naidu's own party expressing reservations about the reforms (Kale 2015:157). The Bank's involvement was further politicised when its President, James Wolfensohn, inadvertently remarked that the tariff escalation should have been higher (Kirk 2011:69-70). Kirk observes that the

Congress was now armed with an 'even more effective rhetorical weapon', i.e. that Naidu had surrendered the State's 'economic sovereignty' to the Bank, much on the lines of NTR's rhetoric of protecting 'self-respect' of the Telugus from the interfering national Congress Party (Kirk 2011:69-70). The Congress and the Left parties opposed the sectoral reforms through agitations and public mobilisations (Suri 2005:150). One such demonstration involving nearly 25,000 protestors saw the government taking a hard stance which resulted in the death of two persons and 26 others sustaining injuries in the ensuing police firing (Kirk 2011:69; Srinivasulu 2004:3849).

#### **7.16. 2004 Elections – Losing the Plebiscite on Reforms**

Naidu neglected the agricultural sector and rural economy leading to a sectoral crisis, as reflected in the weavers and farmers' suicides (Srinivasulu 2009:8). The Congress based its poll campaign around the neglect of the agricultural and handloom sector (Srinivasulu 2004:3849). The neglect of the agricultural sector was apparent in the State government not being able to control activities of companies supplying low quality seeds, pesticides and chemicals and reluctance of the state to intervene in the prices of agricultural inputs especially electricity (Srinivasulu 2004:3849). This resulted in many farmers committing suicide (Srinivasulu 2004:3849).

The leader of the Congress Party, Y.S.Rajashekhar Reddy (hereinafter YSR) undertook a 1,500 km campaign by foot in May 2003 and this struck a chord with the underprivileged and the masses (Suri 2004:5494; Suri 2005:163). The campaign by foot helped the Congress connect with farmers, handloom weavers and constituencies affected by the reforms projecting the government as being pro-rich and prioritising information technology and biotechnology,

whilst neglecting issues affecting livelihoods (Srinivasulu 2004:3850). YSR called Naidu an agent of the Bank. He rebuked the claims of development stating that Naidu's concept of development resulted in farmer's suicides owing to neglect of agrarian problems (Suri 2004:5494; Suri 2005:163). As discussed, the majority of the population in Andhra Pradesh is dependent on agriculture for its livelihood.

The 2004 elections to the State's Assembly were in many ways plebiscitary in nature in terms of people's mandate on the economic reforms initiated by Naidu and Naidu in turn projecting it as a referendum for his governance (Srinivasulu 2004:3845, 3847; Suri 2004:5497). The united opposition in the elections portrayed the contest as a test of approval of Naidu's economic policies (Suri 2004:5493). Interestingly, in 1994 the TDP advocated welfare whereas the Congress sought to play the reform card, in 2004 it was the Congress vouching for welfare and the TDP for reforms (Suri 2004:5493). Suri traces the reason for politicisation of the reform issue in Andhra Pradesh as opposed to the other States undergoing reforms like Tamil Nadu, Karnataka, Orissa etc to Naidu's endeavour to emerge from the shadow of his illustrious predecessor who advocated welfare politics (Suri 2005:151).

The sectoral reforms came to occupy a central role in the electoral discourse. The Congress headed by YSR campaigned with the electoral promise of free power to the farm sector and promised not to increase tariffs for at least three years (Kale 2015:158; Kirk 2011:72). This was criticised by Naidu as irresponsible and he claimed that 'free power' meant 'no power' and that the transmission lines could only be used to dry clothes thereafter (Srinivasulu 2004:3851; Kirk 2011:72). Mukherji observes that Naidu supported a policy of

'subsidized uninterrupted power' rather than free power demanded by the Congress (Mukherji 2014:153). Naidu also argued that the provision of free electricity would not be agreeable to the Bank, given the loan conditionalities (Suri 2004:5495). Congress was quick to brand Naidu as 'anti-farmer and pro-World Bank' (Suri 2004:5495). The opposition's narrative of the reform process can be summed up with the claim that 'the state's economic reform was externally imposed and anti-poor', Naidu in his defence pleaded with the electorate for more time for the reforms to take effect (Kirk 2011:72). This eroded the pro-poor image of TDP making it lose its support base amongst the farmers. In the ensuing discourse about the repercussions of the reform, the Bank became the face of the reforms (Srinivasulu 2004:3851).

The Congress's turn to populism to wrest power also invoked the historical memories of Indira Gandhi's pro-poor approach of the 1970s by promising to bring back 'Indramma Rajyam' or the rule of Indira Gandhi (Srinivasulu 2004:3852). In addition to free electricity to the agricultural sector, Congress also promised subsidised agricultural loans, new irrigation projects and the resumption of recruitment in the State civil services (Suri 2004:5495). TDP fared badly in both the State legislative assembly and national parliamentary elections in 2004 (Suri 2005:163). Out of the 294 Assembly constituencies, TDP won only 47 seats in the 2004 elections, as opposed to 180 seats in the 1999 polls (Mukherji 2014:163). The Congress, on the other hand, won 185 seats out of the 294 seats in 2004 and formed the government with a comfortable majority. TDP's 2004 electoral defeat can be attributed to an excessive focus on urban issues whilst neglecting the agricultural and rural sectors (Suri *et al* 2009:112). A post poll survey indicated that the TDP had

lost its vote share amongst almost all sections of society, and especially 'women, farmers and the poor' (Suri 2005:165).

### **7.17. 2004-2014: Congress and Return to Indira's Rule**

The Congress government introduced a slew of pro-poor and pro-farmer measures between 2004 and 2009. YSR, in his first act as Chief Minister, signed the government order implementing free power to the farm sector in full public view immediately after taking the oath of office (EPW 2009b:5; Kale 2015:158; Kirk 2011:72). The Congress government also built houses for the poor under a scheme named after Indira Gandhi 'Indiramma' (Mother Indira) keeping up its promise to bring back her rule (EPW 2009b:5). The Congress government reintroduced the subsidised rice scheme, announced pensions for widows and the aged, and took up major infrastructural initiatives (EPW 2009b:5).<sup>180</sup> The Congress government also announced a host of welfare policies, which included loan waivers for agriculture, subsidised agricultural inputs, irrigation projects, and health benefits, including treatment in private hospitals, fee waiver in educational institutions (Srinivasulu 2009:8; EPW 2009a).

Srinivasulu argues that this was possible because of increased state revenues owing to economic growth (Srinivasulu 2009:8). The tax revenue, as percentage of the State's GDP, increased from 5.2% in 1995-96 to 10.1% in 2007-2008, and this further enhanced the ability of the State to provide the

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<sup>180</sup> The massive infrastructural projects funded by the State, i.e. irrigation projects, housing schemes and roads, also helped the Congress Chief Minister cultivate loyalists, to whom the contracts for the execution of these projects were entrusted (EPW 2009b:5).

pro-poor measures (Srinivasulu 2009:8). As discussed in Chapter 3, Jean Dreze and Amartya Sen draw a similar conclusion regarding the increase in the tax revenues presenting the state with an opportunity 'to make good use of public revenue for enhancing living conditions through public services and support' in the context of the national government (Dreze & Sen 2014:270). TDP could not recover ground lost in 2004 in the 2009 elections (Suri *et al* 2009:110). The Congress, however, did not announce any new welfare measures, but reiterated its commitment to continuing the benefits being provided by the State (Suri *et al* 2009:111). The Congress came back to power in the 2009 and was in power till 2014, i.e. till the State was reorganised into the two separate States of Andhra Pradesh and Telangana.

#### **7.18. Provision of Free Power and Resource Exploitation**

The decision to provide free electricity both by NTR led TDP in the 1980s and 1990s and YSR in 2004 resulted in increased consumption. Mukherji observes that NTR's policy of billing farmer's as per the capacity of their pump sets, i.e. as per the horse power, rather than the actual energy consumed resulted in there being no incentive to conserve electricity (Mukherji 2014:159). Free provision of the resource of electricity also led to over exploitation of another resource, namely ground water (Kumar et al 2011). The indiscriminate exploitation of the groundwater resources led to a lowering of the water table and a corresponding increase in pump set capacity to draw water from greater depths, and therefore higher electricity consumption (Medepalli 2016).

Studies in Andhra Pradesh indicate that rich farmers benefitted disproportionately over poor farmers from the provision of free electricity

(Mukherji 2014:166). This reinforces the argument that the rich farmers as part of the 'dominant coalition' (Bardhan 1998) shape the discourse of the mass politics surrounding provision of agricultural electricity, given their influence over the countryside. Peddireddi Chengal Reddy, former Secretary General and presently Advisor to the Consortium of Indian Farmers Associations and a prominent farmer leader in Andhra Pradesh, was of the view that populist politics have done more harm than good for the farmers (Peddireddi 2014). Peddireddi opined that farmers were caught in the wave of political populism and that issues of efficient utilization of scarce resources, like water and electricity and planning cropping patterns, appeared to have been ignored in the popular political discourse (Peddireddi 2014).

Mukherji, based on interaction with farmer's representatives in Andhra Pradesh, observes that the quality of power supplied deteriorated with the announcement of free power. The supply issues include a higher incidence of voltage fluctuations, which damaged the pump sets, and an underinvestment in rural transformers, which have affected the distribution system (Mukherji 2014:166-167). According to Mukherji farmer's representatives were not very happy with the duration of supply of free power as the DISCOMS were only providing 4 hours of supply, as opposed to the promised 7 hours per day (Mukherji 2014:167). He observes that the same was owing to the fiscal constraints of providing agricultural electricity on the distribution companies (Mukherji 2014:167). Another aspect of free electricity is that it is supplied late into the night, causing great inconvenience to farmers (Mukherji 2014:167). Provision of power in the night has also increased the risk of electrocution and associated deaths (Mukherji 2014:167). One of the reasons for provision of

free electricity late at night is a reduction in consumption from paying consumers in the city, with the result that the generation capacity can be utilised to supply the countryside. This in turn throws up issues of allocation of the resource between the urban and rural populace.

### **7.19. Conclusions**

The role of the state in sectoral economic activity in Andhra Pradesh reflects the national attributes. The narrative of the chapter traces this through the interventionist phase and the regulatory state phase. What comes out clearly is that the State of Andhra Pradesh's ability to implement economic policies is subject to social co-optation and approval. This becomes very clear considering its inability to enforce land reform legislation aimed at land redistribution, given the resistance from the upper castes immediately after independence. Politics associated with resource distribution and the tensions between the constituents of the 'dominant coalition' (Bardhan 1998) led to a decline in the sectoral fortunes. This forced the populist Chief Minister, i.e. NTR, to rethink sectoral strategy. The downturn in sectoral fortunes also corresponded with societal agitations based on economic issues. Both the emergence of left wing extremism, which made parts of the State out of bounds for the State government, and the movements of the landless peasants and Dalits against the upper caste rich landlords have their origins in the economic injustice ingrained in the rural property relations reinforced by caste. The green revolution, which shifted the State's attention from land redistribution to agricultural productivity, further reinforced these iniquitous caste and consequent economic relations. The agitation of the Dalit and backward caste women against the arrack lobby was also an agitation against

state support for the politician and upper caste nexus. TDP's turn to populism in the nature of food subsidies, government employment, prohibition etc. aimed to appease the economic hardships of the populace, which had not had access to state resources for millennia. The relationship between social power and political power in Andhra Pradesh becomes evident in the upper caste violence against lower castes who were socially dependent on the former but voted against them. The ability of the rich farmers, who are also upper castes, to sway votes of the marginal and small farmers brings to light the relationship between social power and political power and resource allocation by the state. The impact of free power on ground water levels, making them unsustainable, is another unintended consequence of the State's populist public posturing. These developments reinforce the ability of social forces to influence state behaviour in Andhra Pradesh. It also brings to fore the fact that the state in Andhra Pradesh, like the national state, is constantly trying to mediate and negotiate these tensions.

The legislation aimed at insulating the State's economic decision making from politics and a roll back of the state from economic activity was sought to be implemented by the Bank in this socio-political milieu. Though occupying a prominent position, the state in Andhra Pradesh is relatively weak in comparison with societal processes. The state in Andhra Pradesh, like the national state, is permeable and susceptible to societal pressures. As discussed, Reyntjens observes that differing states have differing degrees of autonomy (Reyntjens 2015:351-352) and, according to Sportel, the "body politic" is not a monolithic, single institution' (Sportel 2011:42). The same makes the state in Andhra Pradesh one amongst the many social fields within

the regulatory space, with a relatively greater, if not absolute, power to influence change. It will be argued that this semi-autonomous nature of the state in Andhra Pradesh, combined with what Moore observes to be 'the way the state acknowledges diverse social fields within society and represents itself ideologically and organizationally in relation to them' (Moore 2001:107) results in processes of self-organisation and the emergence of self-regulation within the Indian state. These processes of self-organisation and self-regulation are informed by a normativity which is opposed to the normativity of the regulatory state, in pursuance of which the statutory institutional organisation was put in place. As will be demonstrated, these self-regulatory processes, informed by a particular normativity and organising themselves in a non-hierarchical alternate institutional framework, result in pluralism in sectoral state law in Andhra Pradesh.

TDPs electoral defeat in the 1994 and 2004 elections also brings to light the societal resistance to the notion of a regulatory state. The interventionist public posturing of the Congress after 2004, as opposed to the posturing adopted by it after the 1991 reforms, demonstrates that the state had to reposition itself as regards its role in economic activity and political articulation of the same. While the state in Andhra Pradesh was able to reposition itself in the spheres of politics and economics, it is argued that state law remained unchanged because the national enactment, i.e. the Electricity Act, 2003 endorsed the principles and institutional mechanism of the 1993 policy of the Bank. This position was incompatible with the State's interventionist posturing after 2004 in the spheres of politics and economics, which had repositioned themselves given the resistance to the normativity of the regulatory state. This

incompatibility of the state's legal posturing with its repositioning in the spheres of politics and economics resulted in the emergence of alternate regulatory legality.

The next chapter traces the emergence of this alternate regulatory legality, resulting in pluralism in state law in the State level electricity sector in Andhra Pradesh. This is established by tracing the emergence of a sectoral SASF owing to the way the state in Andhra Pradesh 'acknowledges diverse social fields within society and represents itself ideologically and organizationally in relation to them' (Moore 2001:107). The attributes of the susceptibility of the Indian state to tensions, external and internal; the relative weakness of the Indian state vis-à-vis societal forces; the entrenched interests of the 'dominant coalition', comprising bureaucrats, industrialists and rich farmers who vie for the state's resources, and the porous and semi-autonomous nature of the state (Bardhan 1998; Mukherji 2016 ; Sportel 2011; Reyntjens 2015 ) facilitate this internal institutional reorganisation of the state in Andhra Pradesh, contrary to the institutional organisation envisaged under the sectoral legislation. This in turn results in the emergence of legal pluralism in sectoral state law in the State of Andhra Pradesh.

## **Chapter 8 – Sectoral Semi-Autonomous Social Field and Legal Pluralism in State Law in Andhra Pradesh**

The sectoral legislation, i.e. the Reform Act, 1998, was a conscious attempt by the State of Andhra Pradesh to usher in a regulatory state. This was sought to be achieved through institutional disaggregation of the SEB into separate generation, transmission and distribution companies in pursuance of the principle of corporatisation and commercialisation, and by establishing an independent sector regulator in pursuance of the principle of transparent regulation. However, the electoral/citizen expectations from the state continued to be that of a disburser of resources. The evident public opposition to the regulatory reforms culminated in electoral reversals for the Congress and the TDP in 1994 and 2004 respectively. This in turn sent a clear political signal requiring the state to reposition itself as a disburser of resources.

While such repositioning could be achieved with relative ease in the sphere of politics, given the posturing of the Congress in the course of the 2004 elections, this was more challenging in the field of law. This was because regulatory change was brought about legislatively through the Reform Act 1998, with the intention of making it irreversible. Subsequently, the institutional changes in the nature of unbundling of the monolithic SEB and the establishment of an independent regulator were scaled up to the national level through the Electricity Act 2003. Given that the national legislation takes precedence over that of the State's, a corresponding change of posturing in the legislated state law was no longer possible. As observed in the previous chapter, the state in Andhra Pradesh is permeable and prone to societal pressures, which makes it semi-autonomous and one amongst the many

social fields in the State's regulatory space. The same allows it to acknowledge the 'diverse social fields within society and represents itself ideologically and organizationally in relation to them' (Moore 2001:107). The institutional arrangements associated with the regulatory state involved segregation between ownership and regulatory functions, and the disaggregation of the SEB into generation, transmission and distribution utilities. The thesis argues that the semi-autonomous nature of the State in the electricity sector in Andhra Pradesh allows it to re-aggregate institutionally and to self-regulate its activities in response to the normativity of an interventionist state associated with electoral expectations. This chapter argues that the same gives rise to legal pluralism in the sectoral state law in Andhra Pradesh.

In fact, as will be demonstrated in the course of the chapter, the 'centrifugal' forces (Black 2007) which re-aggregate the disaggregated state utilities mimic the institutional structure of the disaggregated SEB. Marina Kurkchyan (2009) observes that the way an institutional transplant is internalised reflects the true nature of a society. The re-aggregation of the disaggregated utilities, mimicking the institutional structure of the SEB, is reflective of the larger bureaucratic and technocratic consensus regarding the sectoral organisation, and the same is facilitated by the electoral expectations of an interventionist state.

As will be discussed, the alternative institutional arrangements that aim to reposition the state in the sphere of law corresponding with the change in its economic and political posturing become more pronounced after Naidu's electoral debacle of 2004. The plural forms of state law, for the purposes of the present discussion, have been categorised as what Anthony Ogus terms

'public regulation', or statutory state law in the present context, and 'self-regulation' (Ogus 1995:99-100). The following discussion regarding the emergence of a sectoral SASF also endorses Merry's notion of the permeable nature of SASF owing to semi-autonomy, allowing it to both give effect to the normativity of the state law and resist it when it is opposed to the same (Merry 1988:878). This is evidenced by the phenomenon of the same actors or personnel participating in the organisation and operation of differing institutional arrangements, giving effect to both public regulation and self-regulation. The conscious construction of the alternate institutional arrangements, with their enduring nature and their organisation informed by a particular normativity and sustained through self-regulation, facilitate their categorisation as a form of non-statutory state law.

### **8.1. SASF and Self-Regulation as an Attribute of SASF**

As discussed in Chapter 6, the notion of SASF has been deployed to observe resistance to imposition of law in a variety of contexts. In the context of the present enquiry, SASF has been deployed to identify processes having a shared conception of normativity (Finchett-Maddock 2010; Sportel 2011). Moore deploys the methodology of SASF from the perspective of the 'small field observable to an anthropologist to be chosen and studied in terms of its semi-autonomy' (Moore 1973:720). The observable field of analysis establishing the presence of a SASF in the electricity sector of Andhra Pradesh involves the disaggregated constituent units of the State Electricity Board, i.e. APSEB, which continue to be owned and managed by the State, the Regulatory Commission, i.e. APERC, and governmental officials associated with the electricity sector.

The chapter endorses Moore's view that a SASF is 'processual' by nature (Moore 1973:722). Julia Black terms the self-regulating processes as 'Self-regulatory associations' or SRAs, she conceptualises them to be 'horizontal' in organisation, linking different sections of a society (Black 1996:28). It is argued that Black's notion of horizontal self-organisation (Black 1996) corresponds with Moore's processual methodology of identifying SASF (Moore 1973) and underlines the need to view these processes beyond the conventional hierarchical or institutional perspective. Accordingly, this chapter takes a horizontal approach to the identification of the SASF. As will be evident, SASF operationalised by the bureaucratic arrangements cuts across the hierarchies and organisational statuses, i.e. the state, Regulatory Commission and the State owned utilities.

#### 8.1.1. Structural and Behavioural Elements of Sectoral Self-Organising Processes in Andhra Pradesh

The emergence of sectoral SASF is established by studying both the structural and behavioural aspects of self-organisation. The structural, i.e. the emergence of alternative institutional mechanisms through bureaucratic self-organisation, is explored through the functioning of two institutional arrangements incorporated into the Reform Act, 1998 aimed at disaggregating the State. The first involves the arrangements disaggregating the SEB into independent corporations undertaking functions of generation, transmission and distribution in accordance with the principle of commercialisation and corporatisation. The second involves the establishment of an independent sectoral regulator in pursuance of the principle of transparent regulation, distancing ownership from regulation. The chapter argues that the alternative

institutional arrangements emerge as a result of 'centrifugal' forces (Black 2007) aimed at operationalising the functions of 'coordination' and 'conflict management' (Chang 1999) of the state. The structure of the SASF is traced through bureaucratic appointments to the Commission and inter-institutional transfers, i.e. from State owned utilities to the Commission and vice-versa.

The behavioural aspect is established through an examination of the cases appealed against the orders of the Commission to the appellate forums, namely the State High Court and the Appellate Tribunal for Electricity. The cases reveal behaviour symptomatic of self-regulation between the personnel of the State government, unbundled utilities, and the Commission. Behavioural aspects are also established through interviews with utility functionaries and sectoral actors. Since self-regulation is symptomatic of SASF, this behaviour in turn strengthens the argument of an alternative institutional framework giving effect to SASF.

## **8.2. Structural Aspects of the Sectoral SASF**

It is argued that the SASF resisting the legislative attempt to unbundle the SEB is 'consciously constructed' (Moore 1973) through administrative mechanisms and carefully coordinated intra-governmental transfers. It is constituted with the objective of ensuring continued state coordination of sectoral activity. This sectoral SASF cuts across the institutional framework established by the Reform Act, 1998.

Another feature of the SASF, in the context of the present analysis, is its ability to both maintain its autonomy and resist whilst simultaneously participating in the sectoral activity (Moore 1973). In the context of this thesis, this translates

into functionaries of the Regulatory Commission and the State owned utilities discharging their functions assigned by state law and corresponding institutional arrangements whilst selectively resisting the normativity associated with state law when inimical with electoral expectations from the state and bureaucratic and technocratic consensus regarding sectoral organisation. This SASF is operationalised by the very functionaries occupying institutional positions created by the sectoral legislation, i.e. the Reform Act, 1998. As discussed by Moore, SASF is a permeable framework which both operationalises and resists the legislative intent of state law. The expectations of an interventionist state are also in keeping with the interests of 'professional class' in the 'dominant coalition' which included the technocrats in the public sector utilities and the bureaucrats. However, as Bardhan observes, the 'professional class' is self-serving and derives its power through its role as the dispenser of state's largess (Bardhan 1998). This is translated in the bureaucratic and technocratic consensus regarding sectoral organisation in the recommendations of the HLC and the institutional framework of the sectoral SASF. Bureaucratic and technocratic organisation plays an important role in the emergence of alternate institutional organisation in the nature of re-aggregation of the erstwhile SEB. The SASF is operationalised by coordination between the unbundled State owned utilities and appointments made from the unbundled utilities and the State bureaucracy to the Commission. The emergence of alternate institutional organisation is explored from the perspective of frustrating the principle of commercialisation and corporatisation and the principle of transparent regulation, premised on which the SEB was disaggregated and the regulator was established.

### **8.3. Principle of Commercialisation and Corporatisation – Disaggregation of the SEB**

The objective of the unbundling process was to create independent corporatised entities capable of administering their affairs and taking commercial decisions independent of the State government. The ultimate objective of the reform measures was complete divestiture of the state from sectoral activity (World Bank 1997a:8). It is argued that, though unbundled into legally separate corporate entities, the expectations of the 'dominant coalition' (Bardhan 1998), especially the rich farmers, bureaucrats and technocrats, mediated by the politicians resulted in the unbundled utilities coordinating their activities through bureaucratic networks, mimicking the SEB. It is further argued that these networks operationalise the sectoral SASF, which resists the imposition of the statutory normativity of public law, whilst being integral to the institutional processes giving effect to the statutory normativity.

### **8.4. Political Ramifications of Distribution Companies Functioning on Commercial Basis**

As discussed, the first phase of disaggregation of the SEB involved constituting two utilities, one undertaking generation (APGENCO) and the other undertaking the transmission and distribution functions (APTRANSCO). The final phase of the disaggregation, i.e. unbundling of APTRANSCO into one transmission and four regional distribution companies, or DISCOMS, was due to take place on 9th June 2005. This occurred after Naidu's 2004 electoral debacle and after the new Congress government came to power. As discussed earlier, Congress had come to power in 2004 on the plank of providing free electricity to farmers and other welfare oriented measures. The principle of

corporatisation and commercialisation requires the utilities to be run on a commercial basis, this means that each distribution company had to individually procure power, maintain books of account and approach the Commission for a separate tariff. The disaggregation of the distribution business into four regional utilities resulted in each company having a different consumer composition and correspondingly different revenue and expenditure (Medepalli 2016; Paruchuri 2016). For example, certain regions have high agricultural consumption and certain others have greater industrial demand, making the utility serving the latter region profitable and the former perpetually loss making. The Eastern region in Andhra Pradesh is primarily canal irrigated, as the area constitutes a river basin, whereas the South-Western region of the State, i.e. Rayalseema, and the Northern region, comprising Telangana, are irrigated primarily through pump sets, hence their having a greater demand for agricultural electricity, which is not profitable to supply (Medepalli 2016; Paruchuri 2016).

The subsidy element in the tariff formula has two components. The first being a direct subsidy through budgetary allocation from the State government and the second being a cross-subsidy from a higher tariff than the cost of supply imposed on the industrial consumers. This necessarily means that different regions serviced by different utilities will have different pricing for similarly placed consumers (as per their category, i.e. domestic, commercial etc.), as each utility will have a different mix of consumers to calculate the cross subsidy and the quantum of State subsidy (Medepalli 2016; Paruchuri 2016). Since the distribution business was state owned and managed, differential tariffs for similarly based consumers would be perceived as discriminatory by the

electorate. Medepalli observed that the government wanted to avoid this situation, in his words 'you have to buy peace in the State, you cannot have heartburn amongst the people in different regions' (Medepalli 2016). So as to get over this statutory institutional arrangement resulting in differential tariffs for similarly placed consumers and the resultant political ramifications, the Congress government constituted the Andhra Pradesh Power Coordination Committee (hereinafter APPCC). The APPCC came into existence on 7<sup>th</sup> June 2005, i.e. a couple of days before the statutorily mandated disaggregation into a transmission and four regional distribution companies was to take effect.<sup>181</sup>

### **8.5. The APPCC – Coordinating the Statutorily Disaggregated Utilities**

Those associated with the sector observe that the APPCC has been created for administrative convenience and to maintain uniformity of power supply and tariffs (Paruchuri 2016; Sayana 2016). APPCC ensures uniformity of tariffs through the single buyer model, in which APPCC procures on behalf of the DISCOMS (Paruchuri 2016). This is because, if the DISCOMS were to purchase power separately, one may purchase at a higher rate and the other at a lower rate (Paruchuri 2016). APPCC also ensures maintaining uniformity of power supply by determining how much electricity is allocated to each distribution company (Paruchuri 2016). Therefore, in effect the state becomes the allocator of resources, i.e. electricity. This becomes clear in a government order effective from the date the DISCOMS were separated from

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<sup>181</sup> G.O.Ms.No.58, Energy (Power. III) Department, dated 07.06.2005 brought about the separation between the transmission business on one side, and distribution and trading on the other, transferring the latter to four state owned distribution companies, and was to take effect from 09.06.2005. G.O.Ms.No.59, Energy (Power. III) Department, dated 07.06.2005 established APPCC i.e. the coordinating mechanism comprising the heads of transmission and distribution utilities.

APTRANSCO, which allocates the power generated by APGENCO to the DISCOMS.<sup>182</sup> The next subsection discusses the institutional arrangements and the governmental justification for its establishment. It becomes obvious that the APPCC puts in place an institutional arrangement that generates ‘centrifugal’ forces. The structure and operation of APPCC is also reflective of the technocratic and bureaucratic consensus arguing for a coordinatory role for the state in sectoral activity, as reflected in the recommendations of the HLC.

#### 8.5.1. APPCC, Composition and Functions – Coordination between the Transmission and Distribution Companies.

The APPCC was constituted by the government of Andhra Pradesh in pursuance of its executive powers. The government order constituting it states that it has been established ‘for the purpose of smooth transition to this new arrangement, the Government considers it necessary to put in place an institutional arrangement for effective co-ordination as well as building capacity of DISCOMS to handle new functions’.<sup>183</sup> The official stand on the APPCC continues to be that it is a transitional arrangement to provide necessary hand holding for the DISCOMS.<sup>184</sup> Though a transitional arrangement, there is no sunset clause in the governmental order constituting

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<sup>182</sup> G.O.Ms.No.53, Energy (Power. III) Department, dated 28.04.2008. This G.O. was made operative with retrospective effect from 09.06.2005, i.e. the date of unbundling of APTRANSCO into one transmission and four distribution companies.

<sup>183</sup> Item 1 of G.O.Ms.No.59, Energy (Power. III) Department, dated 07.06.2005.

<sup>184</sup> The composition and functions of APPCC came under judicial scrutiny in a case challenging the Commission’s decision to allow the APPCC to file petitions on behalf of the DISCOMS. In this case the appellate forum held that the APPCC is a transitional mechanism and that it was not empowered under the provisions of the Electricity Act, 2003 to file the petition on behalf of the DISCOMS. See, *India Cements Ltd. and Another V. Chairman, APSERC, Hyderabad and Others* MANU/AP/0722/2011.

it. The political necessity of maintaining uniform tariffs appears to be the reason to continue with the APPCC.

The APPCC is headed and convened by the Chairman and Managing Director of the state transmission company, i.e. APTRANSCO.<sup>185</sup> Its members include the Director (Finance & Commercial) of APTRANSCO, the Director (Coordination) of APTRANSCO, and the Chairman and Managing Directors of all DISCOMS.<sup>186</sup> Incidentally, all the Chairmen and Managing Directors of the DISCOMS and APTRANSCO belong to the Indian Administrative Service (IAS). As discussed, IAS is also the only service that interacts directly with the political establishment (Vithal 1997:214). The bureaucrats 'define career success by the importance of the posts that they are assigned to' (Iyer and Mani 2008:9). Though the politicians are constitutionally prohibited from altering the service conditions of the bureaucrats, they can influence the service postings of the IAS (Iyer and Mani 2008). The politicians in turn use this power to assign postings to control the officers of the IAS (Iyer and Mani 2008). It is argued that this interrelationship between the IAS and the politicians ensures appropriate sectoral coordination. It is further argued that the officers of the IAS play an important role in recreating the processes of SEB, defeating the statutory objectives of corporatisation and commercialisation. APPCC allows the State government to retain its influence over the utilities of the disaggregated SEB undertaking the functions of generation, transmission and distribution.

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<sup>185</sup> Item 2(3) of G.O.Ms.No.59, Energy (Power. III) Department, dated 07.06.2005.

<sup>186</sup> Item 2(4) of G.O.Ms.No.59, Energy (Power. III) Department, dated 07.06.2005.

The government order vests in APPCC the power to direct APTRANSCO and the DISCOMS, to 'provide necessary information, requisite support and depute its staff for efficient discharge of its functions'.<sup>187</sup> The APPCC is vested with the mandate to examine issues pertaining to bulk supply and independent power producers, and to advise the distribution companies where appropriate.<sup>188</sup> APPCC continues to function as per the mandate of the government order (Paruchuri 2017). When questioned about the legality of the institutional arrangements of APPCC, Paruchuri observed that it may 'not be in consonance with law, but there is no prohibition also' (Paruchuri 2016). He notes that the Electricity Act 2003, prohibits the transmission company to trade in electricity and requires the distribution company to undertake the said activity (Paruchuri 2017). However, because the DISCOMS are unable to undertake the said activity, the APPCC was established (Paruchuri 2017). He says that the present arrangement does not violate any statute as APTRANSCO does not purchase power and its account is independent of that of the DISCOMS. All the transactions regarding trading are carried out by the DISCOMS only (Paruchuri 2017). Paruchuri describes the institutional arrangements endeavoured by the APPCC as follows, 'without violation of any company law, and without any positive violation of provisions of electricity law an adhoc arrangement is maintained for tariff, uniformity of service quality and quantity and administrative convenience' (Paruchuri 2016).

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<sup>187</sup> Annexure A of G.O.Ms.No.59, Energy (Power.III) Department, dated 07.06.2005.

<sup>188</sup> Annexure A of G.O.Ms.No.59, Energy (Power.III) Department, dated 07.06.2005.

### 8.5.2. Role of APPCC in the Tariff Setting Process

As discussed, given the variation in the demand and composition of categories of consumers, even a single buyer policy will not be able to ensure uniform tariffs across regional DISCOMS. In order to arrive at the said uniform tariff, there is a need to have a uniform procurement price. In order to arrive at a uniform procurement price, the entirety of consumption across companies is taken into consideration. Uniformity of the cost of service is arrived at by calculating the total cost of service for the entire State after considering individual profits and losses and deciding as to how to distribute it amongst different categories of consumers, i.e. agriculture, industry, domestic, commercial, etc. (Paruchuri 2016). The entirety of consumption is taken and the accounts of the distribution companies are worked backwards accordingly (Paruchuri 2016; Medepalli 2016). These book adjustments are reflected in the balance sheets and tariff petitions of the individual companies, so as to comply with the statutory provisions of both the Companies Act 1956, the Reform Act 1998 and the Electricity Act 2003. In other words, even the tariff petitions and the annual records submitted to the Commission are worked backwards, keeping in mind the electoral compulsions of ensuring uniform tariffs, the proportion of subsidies and cross-subsidies and a coordinated approach to the allocation and distribution of the resource. This prior coordinatory exercise ensures that uniform tariffs can be fixed across categories. For example, domestic consumers across the State pay the same tariff irrespective of the distribution company's consumer composition. Since the Commission relies on the records of the distribution companies and the account statements submitted by them, the prior coordinatory exercise

projecting a uniform cost to serve enables the fixation of uniform tariffs for consumers belonging to a particular category irrespective of the distribution company serving them.

## **8.6. Other Aspects Hindering Implementation of Principle of Corporatisation and Commercialisation**

### 8.6.1. Continued Need of Political Approval of Utility's Commercial Decisions

Ramachandra observes that the institutional changes that implement the Reform Act, 1998 have been formal and not substantive, and that there is little difference in terms of sectoral organisation after the unbundling (Ramachandra 2014a). She is of the opinion that if the DISCOMS are independent corporate entities, then they should take independent decision regarding power procurement, either through short term buying or bilateral arrangements for the summer months, when the demand is high. However, in the case of Andhra Pradesh, the DISCOMS go to the Chief Minister for approval of power purchase expenses, whereas, ideally, such a decision should have been arrived at after consulting the Commission (Ramachandra 2014a).

The failure to implement the principle of commercialisation and corporatisation is evident in the continued interference of the State government in the internal decision making processes of the utilities. The subsidy being integral to the tariff proposals placed before the Commission appears to be a primary reason for continued state interference in the utility management. A senior manager in one of the distribution utilities, on the condition of anonymity, disclosed that the utilities prepare the Annual Revenue Requirement document, or the tariff

petition, to be filed with the Commission by 30<sup>th</sup> November every year. However, they have to wait till February for tariff and budgetary approval from the government, in other words, the utility's Annual Revenue Requirement submission is interlinked with the government's budgetary processes (Interviewee C 2016).

#### 8.6.2. Rules of Corporate Governance Ignored

Rules of corporate governance are not followed in the managerial practices of the entities comprising the unbundled SEB (Ramachandra 2014a). State owned utilities do not even have independent directors on the company's Board as required by law (Ramachandra 2014a). Ramachandra observed that, at the time of unbundling, there was a perception that if the SEB is corporatised then things would change, but what changed was only the nomenclature of the companies and it was business as usual (Ramachandra 2014a). Similarly, there was only a change in the designation of the employees after unbundling, and that there were hardly any lateral entries for professionalising the top management (Ramachandra 2014a). Ramachandra observes that there is no buy in or ownership of the reform process by the management (Ramachandra 2014a). The training programmes associated with reform were run on grants and, once the money ran out, the programme came to an end (Ramachandra 2014a). There is no ownership of what is to be done (Ramachandra 2014a).

### 8.6.3. Role of External Consultants in Erosion of Internal Decision-Making Capacity

Sayana observes that the State government undertook training funded through USAID, ADB and World Bank to help the employees understand the new processes and the functioning of an independent utility (Sayana 2016). However, the initial training and orientation vanished after some time and the consultants gradually took over (Sayana 2016). Given that the regulations were new and there was little internal understanding of aspects of the new regulatory norms the utilities began relying on consultants (Interviewee C 2016).

Whereas in the early days of reform, the consultants would come and seek inputs from the personnel at the operational level, this was discontinued after some years (Sayana 2016). In Sayana's opinion, the consultants must first discuss their proposals with the Chief Engineers and Superintending Engineers and only then submit their report to the Board of Directors (Sayana 2016). Over a period, consultants began to present their proposals directly to the DISCOM's Board of Directors, without consulting the functionaries who are supposed to implement the recommendations at the operations level (Sayana 2016). Sayana further observed that at the time of transition, the involvement of officers in the decision-making processes of the consultants was compulsory and that, at present, it is only voluntary (Sayana 2016). He opined that authoritative questioning of the consultants is missing (Sayana 2016). He also suggested that the consultants are supposed to discuss and facilitate an internalisation of the processes but that is not happening at present (Sayana 2016). Finally, he noted that the internal expertise was watered down owing to

the consultant's interference (Interviewee C 2016; Sayana 2016). Another interviewee endorsed Sayana's observation, he was of the view that the regulatory capacity has been captured by a few consultants like KPMG, PWC and E&Y (Interviewee C 2016). The reforms have not succeeded at the utility level, as the expertise associated with implementing the new arrangements has not percolated to all the levels in the utility (Sayana 2016). It is argued that this resulted in weakening of the internal organisational structures and administrative processes put in place in pursuance of the Reform Act, 1998, facilitating the emergence of the SASF.

### **8.7. Principle of Transparent Regulation - Erosion of Autonomy of Independent Regulatory Commission**

As discussed, the 1993 Policy wanted to end the 'dual role' of the state as owner and regulator (World Bank 1993a:14). The 1993 Policy further stated that an independent sectoral regulator was required 'to redefine the respective roles of government, utility, and consumers' (World Bank 1993a:14). In other words, the sectoral regulator was the institution with the mandate to enforce the statutory sectoral arrangements. Statutory institutional autonomy from sectoral actor dynamics allowed it to enforce compliance with them.

A perusal of the staffing patterns of the Commission establishes that the personnel appointed to the first three layers of the organisational hierarchy and in charge of the decision-making processes were associated with the larger State bureaucracy and the State owned utilities. The organisational hierarchy is also reflective of the organisation of the bureaucracies of the State departments and the public sector undertakings, i.e. the officers belonging to the All India Services heading the departments staffed by officers of the State

bureaucracy or the State owned utilities. Analysis of the historical data on staffing patterns and appointments made to the Commission from July 22<sup>nd</sup> 1999 till 10<sup>th</sup> October 2014, establishes that particular services have laid claim to the different functional specialisations of the Commission. This erodes the arm's length nature of the Commission, negating the legislative intent.

There is an escalation in the intensity with which certain positions in the Commission were incorporated into the organisational processes of the State owned utilities after the 2004 elections. This establishes the reorganisation of the semi-autonomous state in response to the electoral expectations and pre-existing bureaucratic and technocratic consensus. This occurs through bureaucratic appointments from the State owned utilities and the appointment of retired personnel from the State administration. In fact, as will be evident in the following narrative, most appointments to officer level positions after 2004 have been on deputation, and certain positions filled by regular appointees in the initial phases appear to be increasingly filled by personnel deputed from the State owned utilities and those from State services.

#### 8.7.1. Method of Securing Information on Staffing Patterns

Applications for information were filed under the Right to Information Act, 2005 requesting information pertaining to the qualifications and prior appointments and experience of the Chairman, Members and Officers of the Commission.<sup>189</sup>

The information pertaining to the Support Staff<sup>190</sup> (non-officer cadre) was not

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<sup>189</sup> The applications dated 27<sup>th</sup> July 2015 were made to The State Public Information Officer at the Andhra Pradesh Electricity Regulatory Commission. The information was furnished on 5<sup>th</sup> August 2015. The application pertaining to the Chairman and Members is annexed as Annexure-I and the application for the Officer cadre personnel is annexed as Annexure-II.

<sup>190</sup> Personnel officiating as Support Staff provide administrative assistance to the officers of the Commission and these posts include those of secretaries, accountants, computer

sought as the present enquiry pertains to the key personnel associated with the decision-making processes within the Commission. The information was sought for the time period 22nd July 1999 till 10th October 2014.<sup>191</sup> 10th October 2014 was the last day of Commission constituted prior to the reorganisation of the State of Andhra Pradesh into States of Telangana and Andhra Pradesh, which continued to function after the notified date of bifurcation, i.e. 2nd June 2014.<sup>192</sup>

The first application sought information pertaining to the qualifications and career information of the Members and Chairmen of the Commission prior to their appointment as per the records of the Commission.<sup>193</sup> This information was requested so as to explore the relationship between the composition of the Chairman and Members of the Commission and the larger bureaucracy, especially the All India Services, i.e. the national government cadre which is hierarchically superior to the State government cadre and heads the departments staffed by the State government cadre. Information was also sought as to the period during which the posts were vacant, so as to ascertain the reason for them being vacant.

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operators, clerks, drivers, security staff etc. These positions have also been categorised as Class C and Class D positions in the 2013 Supplementary Regulations (Regulation 4(i) (b) of the 2013 Supplementary Regulations).

<sup>191</sup> It was assumed that 22<sup>nd</sup> July 1999 was the date of notification of operations of the Commission. The Commission however provided data from 3<sup>rd</sup> April 1999 to 10<sup>th</sup> October 2014.

<sup>192</sup> The administrative and institutional arrangements prior to bifurcation continued given the transitional arrangements post reorganisation of the State of Andhra Pradesh into Andhra Pradesh and Telangana.

<sup>193</sup> The composition of the Commission is mentioned in the Andhra Pradesh Electricity Reform Act, 1998. Part II of the Andhra Pradesh Electricity Reform Act, 1998 provides for the constitution of the Andhra Pradesh Electricity Regulatory Commission. Section 3 Clause 2 prescribes that there shall be Two Members and One Chairman. The Andhra Pradesh Electricity Regulatory Commission (Appointment of Chairman and Members) Rules 1999 provides for the selection procedure of the Chairman and Members of the Commission.

The second application requested the Commission for information regarding all officers recruited, appointed, promoted and officiating in the Commission from July 22<sup>nd</sup> 1999 till 10<sup>th</sup> October 2014. It also requested information pertaining to the position and organisation of the official prior to and after officiating in the designated post in the Commission. This was sought to establish the movement of the functionaries between the Commission and the disaggregated utilities which comprised the APSEB. In terms of organisational hierarchy, the Commission comprises of the Chairman and Members, Officers and Support Staff.<sup>194</sup>

### **8.8. Staffing Patterns of the Chairman and Members of the Commission**

The Reform Act 1998, envisages three Members to the Commission of whom one is designated as the Chairman. The Reform Act 1998, requires one of the Members to be a 'graduate Electrical Engineer with adequate experience in generation or transmission or distribution of electricity'.<sup>195</sup> It requires the other two members to have a graduate qualification with a specialisation in disciplines like law, economics, commerce, finance, accountancy or administration.<sup>196</sup> It further stipulates that no person below the age of 55 can be appointed as a member of the Commission. Incidentally a graduate degree is the minimum qualification to be eligible to give the qualifying examination

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<sup>194</sup> These regulations have been revised twice. The first amendment took place in 2006 and Supplemental Regulations to the 1999 Regulations were brought into effect in 2013. The 2013 Supplementary Regulations were formulated under the power vested in Sections 181 read with Section 91(2) & (3) of the 2003 Act with prior approval of the State government. The 2013 Supplementary Regulations further categorised officers in to three categories, however the broad categorisation of 'Chairman and Members', 'Officers' and 'Support Staff' shall be adopted to refer to the respective categories.

<sup>195</sup> Section 5 (1) (i) of the Andhra Pradesh Electricity Reforms Act, 1998.

<sup>196</sup> Section 5 (1) (ii) of the Andhra Pradesh Electricity Reforms Act, 1998.

for the All India Services, and 55 years comes close to the age of superannuation in public bureaucracies in India, which varies from 58 to 60 years.<sup>197</sup> One of the Members is appointed as Chairman.<sup>198</sup> The Selection Committee to select the Members is headed by a retired Chief Justice of any State High Court, or a retired Supreme Court judge who officiates as the Chairman. Other members of the Selection Committee comprise the Chief Secretary of the State of Andhra Pradesh and the Chairman of the Central Electricity Authority.<sup>199</sup> The Reform Act 1998, designates the Secretary of the State's Energy Department as the ex-officio Convenor of the Selection Committee.<sup>200</sup>

#### 8.8.1. Chairman of the Commission

The Chairman to the Commission has always been a retired officer from the Indian Administrative Service. A service which enjoys a position of primacy over all other all India services. The change in political establishment in 2004 also coincided with the retirement of the first Chairman who, though an officer of the Indian Administrative Service, belonged to the national cadre and had retired as the Union Home Secretary. All subsequent appointments after 2004 have been those of the Chief Secretaries belonging to the State cadre.<sup>201</sup> Incidentally, the Chief Secretary is also the ex-officio member of the Selection Committee selecting the Members. This throws up the possibility of the Chief

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<sup>197</sup> This is the approximate age of superannuation in State owned utilities and that of the all India services and State departments.

<sup>198</sup> Section 3(2) of the Andhra Pradesh Electricity Reforms Act, 1998.

<sup>199</sup> Section 4(1) of the Andhra Pradesh Electricity Reforms Act, 1998.

<sup>200</sup> Section 4(2) of the Andhra Pradesh Electricity Reforms Act, 1998.

<sup>201</sup> The Chairmen appointed during this tenure were K.Swaminatham (retired Chief Secretary, from 05.08.2004 to 27.01.2008), A.Raghotham Rao (retired Chief Secretary, from 16.07.2008 to 24.04.2013) and V.Bhaskar (retired Special Chief Secretary from 19.09.2013 to 10.10.2014).

Secretary being a judge in his or her own cause. Some interviewees observed that this allegation was averted through a technicality, i.e. the Chief Secretary, though a member of the Selection Committee, recuses himself or herself from the decision making process for that particular post of Member (Ramachandra 2014a). However, it is obvious that the Chief Secretary, as the top bureaucrat of the State, exercises influence over the decision. This conclusion is further strengthened by the fact that the ex-officio Convenor of the Selection Committee, i.e. the Secretary of the Energy Department of the State government, is also subordinate to the Chief Secretary in the State's bureaucracy.

The preference for bureaucratic appointments of officers belonging to the Indian Administrative Service, especially the Chief Secretary to the post of the Chairman, appears to be to secure political control over the processes of the Commission. The Chief Secretary is the top bureaucrat in the State, who reports to the Chief Minister and has the power to transfer other bureaucrats between postings (Iyer and Mani 2008:7). In this context, it is observed that the higher status, i.e. that of the Chief Justice of the State and High Court Judge, vested on the Chairman and Members appears to be the bureaucratic motivation of politically well-connected bureaucrats to gravitate towards these positions after retirement. The subsequent national enactments which are applicable to the State, i.e. the Regulatory Commissions Act, 1998<sup>202</sup> and the Electricity Act, 2003<sup>203</sup> empower the State governments to appoint retired judges of the State High Court as Chairman of the Commission. The

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<sup>202</sup> Section 17(7) of the Electricity Regulatory Commissions Act, 1998.

<sup>203</sup> Section 84(2) of the Electricity Act, 2003.

preference for bureaucratic appointments is strengthened by the counterfactual that is non-appointment of a person with judicial background as a Chairman of the Commission in the period under reference. Commenting on the bureaucratic appointments to the position of Chairman to the Commission, Ramachandra observes that in the tussle between the Indian Administrative Service and the judiciary, the judiciary has lost out (Ramachandra 2014a).

### 8.8.2. Members of the Commission

As discussed, the Commission comprises three Members, of whom one is designated as the Chairman. Amongst the other two, the Reform Act, 1998, requires one Member to be a graduate engineer and the other to come from a range of listed qualifications, i.e. law, economics, commerce, finance etc. However, as depicted in the organogram hosted on the Commission's website, it appears that the Members have been given the broad designations of Member Technical and Member Finance.<sup>204</sup> Though the requirement of a Member Technical appears in the Reform Act, 1998, (only qualifications and not the nomenclature), there is no corresponding requirement for Member Finance, either in the Reform Act 1998 or the accompanying Rules. This selection preference appears to have excluded a whole range of disciplines mentioned in the enactment, which includes law, economics, commerce etc. from the consideration of the Selection Committee.

Four persons have been appointed as Member Technical in the period of reference. All persons appointed to the post of 'Member Technical' are retired electrical engineers from the State owned electricity utilities. This could be

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<sup>204</sup> This categorisation was confirmed in course of interaction with the officers of the Commission.

partly because of the statutory requirement that no person below the age of 55 can be appointed as a member of the Commission.<sup>205</sup> In effect all the Members Technical have been associated with APTRANSCO and this public utility has effectively captured the post of Member Technical.<sup>206</sup>

The appointee's prior experience appears to have been the reason for the nomenclature 'Member Finance', given that there are no corresponding references to the said designation in the Reform Act, 1998, or the accompanying Rules as discussed above. As with the position of Member Technical, there have been four appointees since the Commission's inception. To the exclusion of the last appointee, all his predecessors were from the all India services associated with Revenue and Accounts and Audit Service.<sup>207</sup>

The last appointee is from a state owned distribution utility and this sends a clear signal of the post being incorporated into the utility's bureaucracy.<sup>208</sup>

Interestingly, the Electricity (Supply) Act 1948, when stipulating the composition of the SEB's Board, specifies that there can be no more than seven and no less than three members.<sup>209</sup> Additionally, it specifies three

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<sup>205</sup> Section 5 (1) (ii) Second Proviso of the Andhra Pradesh Electricity Reforms Act, 1998.

<sup>206</sup> The first Member Technical, i.e. A.V. Subba Rao, held the post of Member Projects with the Andhra Pradesh State Electricity Board before his superannuation. A.V. Subba Rao was a Member of the Commission between 22.07.1999 to 02.04.2002. The second and third appointees to the post were retired Chief Engineers of APTRANSCO or the unbundled transmission entity which in the first phase of unbundling also comprised the distribution business. They were K.Sree Rama Murthy from 05.06.2002 to 03.06.2006 and R. Radhakishan from 16.06.2006 to 15.06.2011. The last appointee for the period under reference, i.e. R. Ashoka Chari, was a Chief Engineer in the Andhra Pradesh Power Coordination Committee from 03.05.2012 to 10.10.2014.

<sup>207</sup> The first and third appointees were retired officers from the Indian Revenue Service. These were D. Lakshminarayana retired as Chief Commissioner of Income Tax from 22.07.1999 to 28.04.2003 and C.R. Sekhar Reddy retired as Commissioner of Income Tax from 14.08.2008 to 13.08.2013. The second appointee was a retired officer from another all India service, i.e. the Indian Accounts and Audit Service, i.e. Surender Pal, was former Principal Accountant General of Andhra Pradesh from 31.10.2003 to 16.06.2008.

<sup>208</sup> The last appointee was a former Director at the State owned distribution entity, i.e. the Andhra Pradesh Central Power Distribution Company Limited, i.e. P.Rajagopal Reddy, from 06.11.2013 to 10.10.2014.

<sup>209</sup> Section 5 of The Electricity (Supply) Act, 1948.

particular specialisations to be represented by three different members at all times, namely commercial matters and administration, electrical engineering and experience of accounting and financial matters in a public utility undertaking, preferably an electricity supply undertaking. The three parameters of administration, engineering and finance, determined to be the minimum disciplines to be represented in the composition of the SEB's Board under the 1948 Act, appear to have become the mandatory qualifications to the exclusion of all other statutorily prescribed disciplines in the 1998 Act. This is reflected in the preference for appointing personnel from the Indian Administrative Service, electrical engineers from the State owned utilities and bureaucrats with financial expertise.

## **8.9. Staffing Patterns of the Officers of the Commission**

### **8.9.1. Officers - Procedure and Qualifications for Selection**

The selection committee for the purposes of Officers (Class A) comprises the Chairman and the Members of the Commission.<sup>210</sup> The recruitment and service conditions of the officer cadre in the Commission are governed by the Principal Regulations 1999,<sup>211</sup> the 2006 Amendment to the 1999 Regulations,<sup>212</sup> and the Supplementary Regulations 2013.<sup>213</sup> The regulations

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<sup>210</sup> If necessary, as per the 2013 Supplementary Regulations, the selection committee can co-opt an expert as a member of the Selection Committee (1999 Regulations, Regulation 8(a)). The qualifications for appointment of Officers to the Commission is stipulated in Appendix-I of the 1999 Principal Regulations and the Supplementary Regulations 2013 reiterate the criteria of the 1999 Principal Regulations (2013 Supplementary Regulations, Regulation 7).

<sup>211</sup> Andhra Pradesh Electricity Regulatory Commission (Method of Recruitment and Conditions of Service of Officers and Staff) Regulations, 1999.

<sup>212</sup> The Andhra Pradesh Electricity Regulatory Commission (Method of Recruitment and Conditions of Service of Officers and Staff) (First Amendment) Regulation, 2006.

<sup>213</sup> Supplementary Regulation to Principal Regulation (No.3 of 1999) of Andhra Pradesh Electricity Regulatory Commission (Method of Recruitment and Conditions of Service of Officers and Staff) Regulation, 2013. The Principal Regulation 1999, the 2006 Amendment and the Supplementary Regulations 2013, were formulated by the Commission after consulting

apply to the Officers and Support Staff.<sup>214</sup> The present examination, is restricted to the Officer cadre as it is associated with the decision making processes.<sup>215</sup> The positions are listed in Annexure - IV.

The qualifications for the positions are categorised into minimum and desirable. Both the officers and support staff may be appointed on a regular, contract service or on a deputation basis from the Government Departments or the organisations of the Central and State Governments.<sup>216</sup> The stipulation of the posts and categories of officers and staff does not necessarily imply that the Commission has to fill all the posts of either the Officers or the Support Staff.<sup>217</sup> As is evident in the tables depicting the cadre strength of the Officers (both 1999 Principal Regulation and 2013 Supplemental Regulations), Class A personnel/officers are further categorised into Category- 1, Category -2, and Category- 3. Category 1 officers head the various functional administrative divisions within the Commission. Category – 1 includes the positions of Commission Secretary, Director Engineering, Director Law, Director Tariff and Director Administration.<sup>218</sup> Category – 2 comprises of Joint Director level cadre

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the State government in pursuance of the Commission's power to make regulations under the Andhra Pradesh Electricity Reform Act, 1998 (1998 Act).

<sup>214</sup> 1999 Regulations, Regulation 2 and 2013 Supplementary Regulations, Regulation 2. The rules applicable to the State and Subordinate services in Andhra Pradesh are applicable to the Officers of the Commission 1999 Principal Regulations state otherwise (2013 Supplementary Regulations, Regulation 2(2)). Even the 1999 Regulations state that A.P. Civil Services (Classification, Control and Appeal) Rules 1991 and A.P. Civil Services Conduct Rules of 1964 as applicable to the employees of the State Government are applicable to the employees of the Commission (1999 Regulations, Regulations 27-29). In addition to the same, in the event of there being no specific service regulation covering a particular area then the regulations governing the employees of the State government become applicable to the employees of the Commission (1999 Regulations, Regulation 29).

<sup>215</sup> These comprise the positions categorised as 'Officers' in the 1999 Regulations and 'Class A' in the 2013 Supplementary Regulations.

<sup>216</sup> 1999 Regulations, Regulation 4 (ii); 2013 Supplemental Regulations, Regulation 6.

<sup>217</sup> 1999 Regulations, Regulation 5.

<sup>218</sup> 1999 Regulation, Regulation 4 (i) (a); 2013 Supplemental Regulations, Regulation 3.

and Category – 3 comprises of Deputy Director level cadre. The next sub-section discusses appointments to Category -1 positions.

#### 8.9.2. Category -1 Positions, Commission Secretary and Director Level Appointments

The regulations state that the appointments can be made on a regular<sup>219</sup> or direct recruitment basis,<sup>220</sup> in addition to deputation and contractual appointments. All Category 1 positions have been filled either by deputies or contractual appointees belonging to the larger civil service. The only exception to this is the position of Director (Administration), a post which involves managing the internal administration of the Commission and officiated by a regular appointee. It is observed that the criteria for appointment facilitated governmental appointments. However, the shift in political posturing from a regulatory state to an interventionist state in Andhra Pradesh in 2004 ensured that only deputed officers who will revert to the parent utility and not retired personnel are appointed. This is the most significant shift in the staffing patterns that has occurred after 2004. The position of Director Law is filled through contractual appointment of retired District Judges, and all other appointments to the positions of Secretary to the Commission, Director Engineering and Director Tariff have been on a deputation basis from the State owned utilities. The position of Director (Tariff), which till recently was filled by a regular appointee, was filled by a depute from the State owned utility after the earlier incumbent appointed before 2004 left office.<sup>221</sup> This shows a clear

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<sup>219</sup> 1999 Regulations, Regulation 4 (ii).

<sup>220</sup> 2013 Supplemental Regulations, Regulation 6.

<sup>221</sup> The appointment was on contract basis. L.Manohar Reddy from APCPDCL 21.11.2011 to 10.10.2014.

link between Category-1 officers and the personnel in the larger State bureaucracy and State owned utilities. A more detailed description of the staffing patterns in the Director level positions is given in Annexure-III.

### 8.9.3. Joint Director and Deputy Director Positions

Joint Director and Deputy Director positions comprise the third and fourth (final) tiers of the officer level appointees in the Commission. The position of Joint Director has remained vacant since establishment of the Commission for extended periods of time across all functional departments to the exclusion of the position of Joint Director Information and Technology. It appears that this tier was completely redundant to the functioning of the Commission until recently, when the positions of Joint Director were filled on promotion by those officiating as Deputy Directors. Interestingly no new appointments were made to the positions of Deputy Directors, who were promoted to Joint Director rank.

The designation of Deputy Director in the Commission comprises of a mix of regular, contractual appointments and appointees through deputation. The positions of Deputy Director Consumer Assistance,<sup>222</sup> Deputy Director

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<sup>222</sup> All appointments made to the position Deputy Director Consumer Assistance are on deputation from the State owned electricity utilities. T. Ranga Rao on deputation from A.P.TRANSCO (13.05.1999 to 16.05.2002); P. Mohan Reddy on deputation from A.P.GENCO (12.07.2002 to 05.12.2003); V.N.V. Ramana Rao on deputation from A.P.TRANSCO (6.12.2003 to 31.03.2005); P. Karunakar Babu on deputation from A.P.CPDCL (24.06.2005 to 23.06.2007); K. Vijaya Kumar on deputation from A.P.TRANSCO ( 12.11.2007 to 21.11.2012 and again 20.01.2014 to 10.10.2014). The post remained vacant in the intervening period of K. Vijay Kumar's reassignment to the post through deputation. The only exception being an appointee on delegation from the Central Public Sector Utility, Power Finance Corporation for a month. S. Srinivasa Rao on deputation from Power Finance Corporation from 17.05.2002 to 14.06.2002.

Transmission<sup>223</sup> and Deputy Director Tariff/Accounts & Financial Analysis<sup>224</sup> have been filled through deputation. An examination of the job description of these positions filled through deputation reveals that the positions are integral to the functioning of the state owned enterprises and are associated with appraisal of their functioning and protecting consumer interest. The Deputy Director Consumer Assistance is required to follow up the utility's performance pertaining to consumer grievance redressal. The Deputy Director Consumer Assistance is also required to assist the Commission to secure compliance with consumer protection related standards of performance by the utilities.<sup>225</sup> Similarly, the Deputy Director Transmission is required to process applications for issuance of transmission and bulk supply licences, monitor the functioning of the licensees and submit reports pertaining to their compliance to the Commission. The Deputy Director Transmission is also required to ensure that the generation utilities adhere to the regulations formulated by the Commission.

This would necessarily imply that the first three layers of the organisational hierarchy of the Commission is associated with the larger public bureaucracy and the State owned electricity utilities whom the Commission is required to

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<sup>223</sup> The position of Deputy Director Transmission has been filled by candidates on deputation from the State owned electricity utilities. P. Ashok Kumar on deputation from Haryana Vidyut Prasar Nigam Ltd from 15.12.1999 to 15.12.2004; S.B.V. Rajesh on deputation from A.P.TRANSCO from 29.08.2005 to 12.06.2008; A.V.L.K.Jagannadha Sarma on deputation from APEPDCL from 02.02.2009 to 10.10.2014.

<sup>224</sup> The initial appointment for post of Deputy\_Director Tariff/Accounts & Financial Analysis was a regular appointment followed by a series of appointments by deputation from public sector electricity undertakings both Central and State. M.N. Ravi Shankar, a regular appointee from 29.10.1999 to 28.05.2003; M.G. Gunasekaran on deputation from NPCIL from 01.08.2003 to 31.03.2008; K. Hari Prasad on deputation from A.P.TRANSCO from 31.10.2008 to 10.10.2014.

<sup>225</sup> These functions correspond with Sections 33 to 35 of the Andhra Pradesh Electricity Reform Act, 1998.

regulate. It is argued that this trend in appointments has eroded the organisational independence and autonomy of the Commission.

### **8.10 Sectoral SASF and Resultant Legal Pluralism**

As discussed, this chapter intends to identify the sectoral SASF by observing the structural and behavioural aspects associated with it. The emergence of legal pluralism in sectoral state law is identified through the behavioural aspect of self-regulation arising from the self-organising processes of the SASF. It is argued that the self-regulating processes are not transactional in nature, but are operationalised structurally through the re-aggregation of the disaggregated SEB. This structural reorganisation can be traced through Moore's observation that an SASF is processual in nature (Moore 1973). The organisation of the SASF is horizontal, as opposed to the vertical or hierarchical institutional organisation proposed by the Bank. The identification of a horizontal institutional organisation also compliments Colin Scott's observation that a regulatory space approach helps transcend the hierarchical institutionalist focus of the 'New Institutional Economics' (Scott 2001).

The Regulatory Commission which is established to oversee the functioning of the sectoral arrangements ushering in a regulatory state is increasingly integrated into the State's bureaucracy and technocracy. This occurs through the appointment of retired civil servants/retired employees of the state owned power utilities, officers on deputation from the state owned power utilities and retired officers or officers on deputation from the extended State bureaucracy to the positions of members and officers of the Regulatory Commission. This integration of the Commission's personnel into the larger State bureaucracy and technocracy erodes the hierarchical and supervisory position of the

Commission, making its relationship with the sectoral players more linear or horizontal.

One other example of horizontal coordination and institutional dynamics is the APPCC. As discussed, the APPCC comprises the Managing Directors of the DISCOMS and APTRANSCO. Commenting on the administrative and managerial practices of the unbundled state utilities, one interviewee stated that 'only heads have increased but body is the same' (Interviewee C 2016). By 'heads' the interviewee was referring to the Managing Directors of the newly constituted state utilities, who belong to the Indian Administrative Service and give effect to the arrangements of APPCC. It is argued that the constitution and functioning of the APPCC and the coordination between the DISCOMS and APTRANSCO and DISCOMS and APGENCO is indicative of a re-aggregation of the disaggregated SEB by the State in response to the electoral expectations of an interventionist state and the bureaucratic-technocratic consensus regarding the sectoral organisation. Dr. Usha Ramachandra endorses the view that the unbundled state companies inter-relate in a manner which mimic the operation of the SEB (Ramachandra 2014a). These illustrations of horizontal institutional organisation help sustain the normativity of the interventionist state. The horizontal institutional organisation, however, also undermines the hierarchical statutory institutional architecture of the regulatory state, as demonstrated in the absorption of the Commission into the State's bureaucracy and technocracy. Excessive interference by the State government in the operational and managerial affairs and reliance on external consultants eroded the corporate identity of the utilities constituted from the unbundled SEB. It is argued that this weakening

of the institutional processes associated with state law make the institutional processes constituted through the sectoral SASF stronger.

Therefore, the constitution of APPCC, continuing interference by the State government and the weakening of institutional processes associated with the principles of commercialisation and corporatisation in the disaggregated constituents of the SEB, and the Regulatory Commission becoming an extension of the State's bureaucracy and sectoral technocracy, facilitated the emergence of the sectoral SASF. This horizontal organisation itself arises as a result of resistance to imposition of the normativity of the regulatory state through state law. The recurrent nature of the processes in the nature of staffing patterns in the Commission, the decisions of the Commission reflective of self-regulation and the continuation of APPCC, which was initially supposed to be a transitional mechanism, are evidence of enduring arrangements reflective of the larger political, technocratic and bureaucratic consensus mirroring the normativity of an interventionist state. This alternative institutional organisation backed by the normative consensus gives the self-regulatory arrangements the flavour of alternate regulatory legality and results in legal pluralism in sectoral state law in Andhra Pradesh.

#### **8.11. Behavioural Characteristics of the Sectoral SASF**

Though brought into existence by external pressures, it is argued that the internal self-regulatory dynamics of the SASF go unchecked under the present regulatory arrangements in the legislated state law. As discussed, the institutional organisation of the SASF reflects the pre-reform bureaucratic and technocratic consensus regarding sectoral institutional organisation. These

dynamics are in the nature of drawbacks associated with self-regulation. The drawbacks of self-regulation amongst others include a lack of democratic accountability, the impact of decisions of actors in self-regulatory arrangements on third parties, an inability to rein in errant members and the tendency of actors in self-regulatory processes to cartelise and impose barriers to entry for other actors (Baldwin et al 2012; Graham 1994; Ogus 1995). As discussed earlier, self-regulation is a symptom of SASF. These drawbacks of self-regulation in the sectoral SASF become evident upon a perusal of cases instituted against the orders of the Regulatory Commission. This also establishes the presence of pluralism in sectoral state law, with processes of public regulation and self-regulation existing side by side and operationalised by the same functionaries.

An examination of the decisions of the statutorily designated appellate bodies brings to light instances of non-compliance with the statutory mandate by the Commission. As will be evident, the instances of non-compliance with the statutory mandate are reflective of drawbacks associated with self-regulatory processes. As discussed, self-regulation is a symptom of self-organising SASF which is associated with the emergence of legal pluralism. The following discussion on behavioural aspects of the self-regulating SASF strengthens the observation pertaining to the structural aspects discussed earlier in this chapter and vice-versa.

#### 8.11.1. Methodology Adopted for Case Law Analysis

The analysis of appeals from the orders of the Commission is based on the premise that appellate bodies are required to uphold the statutory provisions

i.e. statutory normativity in the process of reviewing the orders of the Commission. The Electricity Act 2003 saved the Reform Act 1998,<sup>226</sup> as a consequence, the Commission constituted under it continued to function under the preview of both the enactments. The Reform Act 1998, designated the Andhra Pradesh High Court (hereinafter APHC), i.e. the highest court of appeal at the State level, as the forum for appeal from the Commission's orders.<sup>227</sup> The Electricity Act 2003, established a statutory Appellate Tribunal (hereinafter the AT) to hear appeals from the orders of the Commission.<sup>228</sup> The cases for discussion have been sourced from the reputed Indian online case database 'Manupatra'. The process of identification of sectoral issues pertaining to self-regulation is based on an examination of all appellate cases challenging the decision of the Commission as hosted on the database till 28<sup>th</sup> February 2015. The preliminary search came up with 48 cases before the AT and 40 cases before the APHC.<sup>229</sup> All 88 cases have been reviewed, however from these 54 cases having a direct bearing on the principles of commercialisation and corporatisation and that of independent regulation form the basis of the present analysis.

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<sup>226</sup> Section 185 (2) (a) of the Electricity Act, 2003.

<sup>227</sup> Section 39 of the Andhra Pradesh A.P. Electricity Reform Act, 1998.

<sup>228</sup> Part XI of the Electricity Act, 2003 titled 'Appellate Tribunal for Electricity'. Section 111 of the Electricity Act, 2003, provides for the appeal to the Appellate Tribunal. Despite the constitution of the AT, the APHC exercised its constitutionally vested territorial jurisdiction and entertained cases questioning the orders of the Commission when it deemed necessary to interfere. The APHC also entertained Writ Petitions against the orders of the Commission while it was the designated appellate forum. See. *RCI Power Limited V. Union of India (UOI) and Ors.* 2003(3) ALD 762. The APHC entertained pleas of parties approaching it as the forum of first instance instead of the Commission against the iniquitous and discriminatory behaviour of the distribution companies, reflective of their fears of a biased decision by the Commission. See *Venkatarama Fibres Pvt. Ltd. V. State of Andhra Pradesh and Ors.* 2009(1) ALD 5; *Andhra Pradesh State Road Transport Corporation V. Central Power Distribution Company of Andhra Pradesh Ltd.* 2008(5) ALD 787 and *National Energy Trading and Service Limited and Others V. Central Power Distribution Company of A.P. Ltd. and Others.* 2013(4) ALD 585.

<sup>229</sup> The same is a fairly representative sample, if one were to exclude unreported cases and cases not hosted on the database.

As discussed in Chapter 6, decisions taken by members of a self-regulatory arrangement may ignore the repercussions on non-members who are not part of the decision making process (Baldwin et al 2012:145; Ogus 1995:99). In the context of this thesis, it is argued that actors other than the State officials and employees of State owned utilities are often not consulted in the course of decision making affecting their interests. Self-regulatory bodies have the power to determine whom to allow or disallow, this vests in them tremendous power to 'enable incumbent practitioners to earn supra-competitive profits' (Ogus 1995:99).<sup>230</sup> Cosmo Graham notes that 'self-regulation can lead to restrictive practices which discourage competition and innovation and work to the detriment of the consumer' (Graham 1994:195). The following cases are reflective of the anti-competitive effects of self-regulation in the sectoral SASF. Cases are also symptomatic of the Commission not being able to protect the public interest owing to its inability in 'enforcing standards against errant members' (Baldwin et al 2012:142).

#### 8.11.2. Impact of Self-Regulatory Arrangements on Non-Members of the SASF

As discussed earlier, members of a self-regulatory arrangement ignore the repercussions of their actions on non-members or third parties (Baldwin et al 2012:145; Ogus 1995:99). In fact, instances of the Regulatory Commission deciding by only consulting the State utilities constituted nearly 15% or 8 out of 54 appellate actions analysed in here. It is argued that the operation of the SASF and the co-option of the functionaries of the Commission in this SASF

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<sup>230</sup> Ogus uses the term 'Self-Regulatory Agencies' to refer to self-regulatory processes (Ogus 1995:97).

has resulted in the Commission adjudicating sectoral conflicts in a manner detrimental to the interest of the consumers and private generators. The Commission is an instrumentality of the state and the Reform Act 1998, and Electricity Act 2003, declare its proceedings to be judicial in nature.<sup>231</sup> This requires the Commission to adhere to the principles of natural justice by giving due notice and consulting the affected parties before passing orders or notifying regulations. The appellate forums have observed that the Commission only consulted the State owned utilities and kept the private generators and the consumers in the dark before deciding on issues.<sup>232</sup>

One of the very first cases to be appealed involved the Commission convening a meeting of private generators on the pretext of reviewing the progress of their projects.<sup>233</sup> In course of the meeting, the Commission conveyed its intent to prohibit direct sale of electricity to third parties. It ordered the private generators to enter into wheeling arrangements<sup>234</sup> with the state transmission company i.e. APTRANSCO to supply power to third parties. The order observed that the Commission had previously consulted the Chairman and Managing Director of APTRANSCO and Principal Secretary, Energy Department of the State. On appeal the APHC was of the view that the

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<sup>231</sup> Section 52 of the A.P. Electricity Reform Act, 1998 and Section 95 of the Electricity Act, 2003.

<sup>232</sup> *Rithwik Energy Systems Limited represented by its Director V. Transmission Corporation of Andhra Pradesh Ltd. and Ors.* 2008 ELR (APTEL) 237; *GMR Industries Ltd. V. Andhra Pradesh Electricity Regulatory Commission.* MANU/ET/0005/2007; *Vemagiri Power Generation Limited V. Transmission Corporation of A.P. Ltd. and Ors.* MANU/ET/0150/2007; *Sardar Power Pvt. Ltd. V. Andhra Pradesh Electricity Regulatory Commission and Ors.* MANU/ET/0054/2013; *M/s. IL&FS Wind Farms Limited V. Andhra Pradesh Electricity Regulatory Commission and Ors.* MANU/ET/0095/2013; *Ind-Barath Energies Ltd., Hyd. V. State of Andhra Pradesh and Ors.* 2000(3) ALD 546; *Vishnu Cements Limited V. Central Power Distribution Company of Andhra Pradesh Limited and Anr.* 2003(4) ALD 405 and *India Cements Ltd. and Anr. V. Chairman, APSERC, Hyderabad and Ors.* 2011(6) ALD 35.

<sup>233</sup> *Ind-Barath Energies Ltd., Hyd. V. State of Andhra Pradesh and Ors.* 2000(3) ALD 546.

<sup>234</sup> Wheeling refers to transmission of electricity through the transmission lines.

Commission, by denying the generators a fair hearing, had violated the principles of natural justice.<sup>235</sup> Other instances involving violation of principles of natural justice requiring the intervention of the appellate forums include the Commission amending the power purchase agreements after consulting the state transmission company, i.e. APTRANSCO, without the knowledge of the private generators who were parties to it.<sup>236</sup> In yet another case, the Commission reduced the price of the energy supplied by the private generating company to the state owned distribution companies, without the generator's knowledge.<sup>237</sup>

There are also instances of the Commission not considering the interests of the consumers, the cases pertaining to Fuel Surcharge Adjustment are a good example of the same. Though the tariffs are fixed on an annual basis, there is an inbuilt flexibility in the tariff formula for the generation companies to pass on to the consumer costs in the nature of increase in fuel prices, changes in taxation and other variable costs in the next quarter and this is termed Fuel Surcharge Adjustment (Paruchuri 2017). So as to retrieve the same, the DISCOMS are required to approach the Commission with a petition to bill the consumers the differential in the next quarter and pass it on to APGENCO (Paruchuri 2017). Fuel Surcharge Adjustment in fact comprises a part of the power purchase cost (Kotamreddi 2014). The Commission in one case allowed a petition condoning the delay of the state owned distribution

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<sup>235</sup> *Ind-Barath Energies Ltd., Hyd. V. State of Andhra Pradesh and Ors.* 2000(3) ALD 546.

<sup>236</sup> *Rithwik Energy Systems Limited represented by its Director V. Transmission Corporation of Andhra Pradesh Ltd. and Ors.* 2008 ELR (APTEL) 237; *GMR Industries Ltd. V. Andhra Pradesh Electricity Regulatory Commission.* MANU/ET/0005/2007 and *Vemagiri Power Generation Limited V. Transmission Corporation of A.P. Ltd. and Ors.* MANU/ET/0150/2007.

<sup>237</sup> *Sardar Power Pvt. Ltd. V. Andhra Pradesh Electricity Regulatory Commission and Ors.* MANU/ET/0054/2013 and *M/s. IL&FS Wind Farms Limited V. Andhra Pradesh Electricity Regulatory Commission and Ors.* MANU/ET/0095/2013.

companies filing a petition for Fuel Surcharge Adjustment without consulting the consumers.<sup>238</sup> APHC set aside the order of the Commission and directed the state owned distribution companies to file applications for FSA afresh for the determination of the Commission.

### 8.11.3. Self-Regulation and Anti-Competitive Practices

Promotion of sectoral competition has been seen as one of the objectives of the 2003 Act and the Reform Act 1998.<sup>239</sup> The Reform Act 1998 states that it is one of the functions of the Commission to promote competitiveness and the participation of the private sector.<sup>240</sup> The 2003 Act, empowers the Commission to issue directions to generation, transmission and distribution companies if they abuse their dominant position or enter into a combination or agreement that has an adverse effect on competition.<sup>241</sup> The Commission can also regulate the distribution and transmission companies so as to promote sectoral competition.<sup>242</sup> The 2003 Act requires the Commission to be guided by factors that 'encourage competition, efficiency, economical use of resources, good performance and optimum investments' when specifying the terms and

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<sup>238</sup> *India Cements Ltd. and Anr. V. Chairman, APSCRC, Hyderabad and Ors.* 2011(6) ALD 35. Other appeals agitating non-consultation with consumers include *Vishnu Cements Limited V. Central Power Distribution Company of Andhra Pradesh Limited and Anr.* 2003(4) ALD 405; *Sriramagiri Spinning Mills Limited V. The State of Andhra Pradesh, Department of Energy and Ors.* 2013(3) ALD 298 and *Dhanalakshmi Cotton & Rice Mills Pvt. Ltd. V. Southern Power Distribution Company of A.P. Ltd.* MANU/AP/1543/2014. Other instances of the Commission's non-consultative approach include its notice for proceedings not specifying the nature of issues to be deliberated before the Commission as evidenced in the case of *Nava Bharat Ferro Alloys Ltd. V. A.P. Electricity Regulatory Commission* MANU/ET/0004/2006. In one particular instance, the relief sought and the order passed had no correlation. See *R.V.K. Energy Pvt. Ltd., Hyderabad V. A.P.S.E.B., Hyderabad and Anr.* 2002(3) ALD 196. In one another case, non-publication of new regulations in the official gazette prior to them being implemented led to them being set aside. See *M/s. Dhanalakshmi Iron Industries Limited and Ors. V. A.P. Electricity Regulatory Commission and Ors.* MANU/AP/3650/2013.

<sup>239</sup> Finds mention in the Preambular provisions of the Andhra Pradesh Electricity Reform Act, 1998 and the Electricity Act, 2003.

<sup>240</sup> Section 11 (1) (f) of the Andhra Pradesh Electricity Reform Act, 1998.

<sup>241</sup> Section 60 of the Electricity Act, 2003 titled 'Market Domination'.

<sup>242</sup> Section 23 of the Electricity Act, 2003 titled 'Directions to Licensees'.

conditions for the determination of tariff.<sup>243</sup> However, after its establishment, the Commission has taken decisions and passed orders that had the effect of restraining private generators from supplying directly to consumers and blocked open access.

Issues pertaining to competition arise in 14 out of the 54 cases considered for analysis. These cases constitute 26% of the cases analysed.<sup>244</sup> Of these, the actions directly related to or indirectly arising out of the Commission's decision to prohibit third party sales<sup>245</sup> and discouraging open access<sup>246</sup> constitute the majority. The appellate forums have not examined the issues under consideration from a competition law perspective, nor do their decisions

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<sup>243</sup> Section 61 of the Electricity Act, 2003 titled 'Tariff regulations'.

<sup>244</sup> These include *Small Hydro Power Developers Association and Ors. V. Andhra Pradesh Electricity Regulatory Commission and Ors.* MANU/ET/0094/2006; *Transmission Corporation of A.P. and Anr. V. Andhra Pradesh State Electricity Regulatory Commission and Anr.* MANU/ET/0048/2006; *RVK Energy Pvt. Ltd. V. Central Power Distribution Co. of Andhra Pradesh Ltd. and Ors.* MANU/ET/0140/2007; *Jocil Limited V. Southern Power Distribution Company of Andhra Pradesh Limited and Anr.* MANU/ET/0055/2008; *Velagapudi Power Generation Limited V. Southern Power Distribution Co. of A.P.* MANU/ET/0022/2010; *Sitapuram Power Limited and Zuari Cement Limited V. Transmission Corporation of Andhra Pradesh Ltd.* MANU/ET/0080/2010; *M/s SLS Power Limited V. Andhra Pradesh Electricity Regulatory Commission and Ors.* MANU/ET/0018/2012; *M/s. S.N.J. Sugars and Products Limited V. Transmission Corporation of Andhra Pradesh Limited.* MANU/ET/0024/2013; *SLT Power & Infrastructure Projects Pvt. Limited V. Andhra Pradesh Electricity Regulatory Commission.* MANU/ET/0133/2014; *Gayatri Sugars Ltd. V. APNPDCL.* MANU/ET/0201/2014; *Ind-Barath Energies Ltd., Hyd. V. State of Andhra Pradesh and Ors.* 2000(3) ALD 546; *LVS Power Ltd. V. Transmission Corporation of A.P., Limited, Hyderabad and Ors.* 2002(4) ALD 784; *R.V.K. Energy Pvt. Ltd., Hyderabad V. A.P.S.E.B., Hyderabad and Anr.* 2002(3) ALD 196 and *M/s Balaji Energy Private Limited V. Southern Power Distribution Company Ltd. of A.P and Others.* 2013(5) ALT 212.

<sup>245</sup> *Small Hydro Power Developers Association and Ors. V. Andhra Pradesh Electricity Regulatory Commission and Ors.* MANU/ET/0094/2006; *Transmission Corporation of A.P. and Anr. V. Andhra Pradesh State Electricity Regulatory Commission and Anr.* MANU/ET/0048/2006; *Jocil Limited V. Southern Power Distribution Company of Andhra Pradesh Limited and Anr.* MANU/ET/0055/2008; *M/s. S.N.J. Sugars and Products Limited V. Transmission Corporation of Andhra Pradesh Limited.* MANU/ET/0024/2013; *SLT Power & Infrastructure Projects Pvt. Limited V. Andhra Pradesh Electricity Regulatory Commission.* MANU/ET/0133/2014; *Gayatri Sugars Ltd. V. APNPDCL.* MANU/ET/0201/2014; *Ind-Barath Energies Ltd., Hyd. V. State of Andhra Pradesh and Ors.* 2000(3) ALD 546; *LVS Power Ltd. V. Transmission Corporation of A.P., Limited, Hyderabad and Ors.* 2002(4) ALD784 and *M/s Balaji Energy Private Limited V. Southern Power Distribution Company Ltd. of A.P and Others.* 2013(5) ALT 212.

<sup>246</sup> *RVK Energy Pvt. Ltd. V. Central Power Distribution Co. of Andhra Pradesh Ltd. and Ors.* MANU/ET/0140/2007 and *Sitapuram Power Limited and Zuari Cement Limited V. Transmission Corporation of Andhra Pradesh Ltd.* MANU/ET/0080/2010 .

address issues pertaining to competitiveness resulting in a final definitive answer. That said, all the cases discussed here reflect the implications of the Commission's decisions for sectoral competition.

The 2003 Act defines 'open access' as 'non-discriminatory provision for the use of transmission lines or distribution system or associated facilities' by any generator, transmitter, distributor or consumer as per regulations framed by the appropriate Commission.<sup>247</sup> In other words, the Commission is required to promote an environment congenial to sectoral competition. Third party sales in the context of the case law discussed is the freedom of the generator to sell power using the existing transmission network directly to the consumer, without the need to enter into a power purchase agreement with the state owned distribution company. Prohibition of third party sales, as is evident, amounts to a violation of the principle of open access.

The first case involves a private generator who had established a power plant in pursuance of the governmental policy prior to the Reform Act 1998. The policy permitted private generators to either supply directly to prospective consumers or utilise the then APSEB's transmission infrastructure.<sup>248</sup> The commissioning of the project was delayed and the Reform Act, 1998, constituting the Commission came into operation. As the commercial launch was nearing, the generator approached the Commission seeking an exemption from obtaining an electricity supply license. However, keeping the said application in abeyance, the Commission passed an order stating that it

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<sup>247</sup> Section 2 (47) of the Electricity Act, 2003.

<sup>248</sup> *LVS Power Ltd. V. Transmission Corporation of A.P., Limited, Hyderabad and Ors.* 2002(4) ALD 784.

would not permit third party sales.<sup>249</sup> At this point it will be pertinent to note that, though the Reform Act, 1998 required the Commission to promote competition, there was no provision requiring it to promote open access.<sup>250</sup> This necessarily implied that the generator could not sell power to any other person apart from the sole distribution licensee namely APTRANSCO when it was still undertaking distribution business, prior to its further unbundling into a transmission and four distribution companies. Accordingly, the generator terminated its agreements with the prospective industrial consumers and approached APTRANSCO. After initial negotiations APTRANSCO informed the Commission that it was not in a position to purchase power from the generator as it had surplus power. As a consequence, the generator approached the Commission requesting it to pass orders directing APTRANSCO to purchase power. The Commission passed an order stating that it could not force APTRANSCO to purchase power from the generator. The generator appealed to APHC against the order. Relying on the doctrine of promissory estoppel, APHC noted that APTRANSCO was a party to the proceedings prohibiting third party sales and had subsequently entered into negotiations with the generator. It accordingly held that the behaviour of APTRANSCO was arbitrary defeating the spirit of the Reform Act 1998, which endeavoured to promote private investment in the sector. It observed that Section 11 (1)(f) of the Reform Act 1998, requires the Commission to promote competitiveness and progressively involve the participation of the private

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<sup>249</sup> It would be pertinent to note that, though the Reform Act, 1998 requires the Commission to encourage competition, there was no explicit provision in that enactment requiring it to promote third party sales.

<sup>250</sup> Some interviewees noted that that the explicit provision pertaining to open access in the Electricity Act, 2003 was included given the Commission's stand in Andhra Pradesh.

sector so as to ensure a fair deal for the consumers. APHC further observed that the Commission's suo-moto order prohibiting the third party sales was passed as a response to a representation made by staff and engineers associations of APSEB.<sup>251</sup> APHC observed that it was surprising that the engineers of APTRANSCO were aggrieved by third party sales by private power producers and found it all the more surprising for the Commission to have acted on the same. APHC further noted that no material was placed before the Commission by APTRANSCO to substantiate its contention of surplus availability of power and that the Commission did not understand the functions vested in it under the Reform Act 1998. It directed the Commission to consider the matter afresh and directed APTRANSCO to enter into a power purchase agreement with the generators.<sup>252</sup>

In one other case arising out of similar facts, the private generator challenged the Commission's order prohibiting third party sales directly before the APHC, instead of entering into negotiations with APTRANSCO as discussed in the previous instance.<sup>253</sup> It was argued that the Commission had exceeded its jurisdiction, i.e. whereas the generator's applications were made seeking an exemption from obtaining a licence, the Commission directed the generator to directly sell electricity to APTRANSCO. APHC observed that such a move by the Commission only aimed to make APTRANSCO financially healthier at the cost of private generating companies. In keeping with the observations in the

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<sup>251</sup> *LVS Power Ltd. V. Transmission Corporation of A.P., Limited, Hyderabad and Ors.* 2002(4) ALD 784, Para 50.

<sup>252</sup> *LVS Power Ltd. V. Transmission Corporation of A.P., Limited, Hyderabad and Ors.* 2002(4) ALD 784, Para 66.

<sup>253</sup> *APHC 4 (I) R.V.K. Energy Pvt. Ltd., Hyderabad V. A.P.S.E.B., Hyderabad and Anr.* 2002(3) ALD 196.

previous case, the APHC opined that the Commission had favoured APTRANSCO.<sup>254</sup>

In yet another case, the AT was of the view that the methodology adopted by the Commission for calculating cross subsidy surcharge, made the power generated expensive, and was stifling open access.<sup>255</sup> The AT observed that open access should not be burdened with high surcharges. AT was of the view that the legislative provisions have to be implemented in a manner facilitative to promoting open access and enhancing competition.<sup>256</sup>

#### 8.11.4. Anti-Competitive Practices Emanating from Coordination between TRANSCO and DISCOMS

It is observed that institutional coordination involving the sectoral transmission and distribution entities, which are wholly state owned has stifled the growth of the private generation segment. The anti-competitive practices become evident in the transmission and distribution companies' endeavour to obstruct open access (Sayana 2016, 2017). According to Sayana this is because DISCOMS know that if they give open access they will incur losses (Sayana 2016). Usually the industrial and commercial consumers seek open access, losing them would mean losing consumers who pay higher tariffs so as to cross subsidise the agricultural and domestic consumers.

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<sup>254</sup> In one other matter, the AT was of the view that the Commission could not force private generators to sell electricity to the state utilities in contravention of the State government's policy prior to the establishment of the Commission. See *Small Hydro Power Developers Association and Ors. V. Andhra Pradesh Electricity Regulatory Commission and Ors.* MANU/ET/0094/2006.

<sup>255</sup> *RVK Energy Pvt. Ltd. V. Central Power Distribution Co. of Andhra Pradesh Ltd. and Ors.* MANU/ET/0140/2007 .

<sup>256</sup> *RVK Energy Pvt. Ltd. V. Central Power Distribution Co. of Andhra Pradesh Ltd. and Ors.* MANU/ET/0140/2007, Para 26.

In order to apply for open access, the private generators have to seek the consent of the State Load Dispatch Centre (hereinafter SLDC).<sup>257</sup> The SLDC regulates the amount of electricity supplied into the transmission system by the generators so as to ensure grid stability and integrity. One way of looking at the SLDC's functioning is that it protects the transmission network from fluctuations in the nature of surges or low voltage. The SLDC can regulate the quantum of power in the grid and all generation licensees are required to comply with the directions of the SLDC. The Electricity Act, 2003 requires the SLDC to be operated by a government company, authority, or corporation established under a State enactment. However, pending the notification of such an arrangement, the SLDC is to be operated by the State's transmission company. Shiva Rao observed that APTRANSCO operated the SLDC in Andhra Pradesh and a separate State entity was not created for the period under reference (Paruchuri 2017). Suryaprakasa Rao observes that, so as to apply for open access, the private generators have to take the consent of SLDC, as it regulates the quantum of power supplied in the grid. It is here, he says that there is a nexus between the APTRANSCO and DISCOMS. He observed that APTRANSCO which operates the SLDC and the DISCOMS 'gang up' and refuse the permission to supply (Sayana 2016). This is made possible as APTRANSCO continues to be the operator of the SLDC.

#### 8.11.5. Coordination between DISCOMS and APGENCO

The coordination between DISCOMS and APGENCO can be established through deliberate underpayment of APGENCO and absence of litigation

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<sup>257</sup> The provisions pertaining to SLDC are discussed under the heading 'Intra-State Transmission' in Sections 30-33 of the Electricity Act, 2003.

between the DISCOMS and APGENCO, despite their billing decisions affecting APGENCO's finances. As per one informant, the DISCOMS do not pay for the full amount of power procured from APGENCO (Interviewee B 2015). The DISCOMS first pay the private generators and then proceed to pay APGENCO. In one instance involving underpayment of moneys due to APGENCO, the Energy Secretary to the State was advised by the legal counsel of APGENCO to petition the Commission for the provisional release of payments from DISCOMS (Interviewee B 2015). However, the Energy Secretary was reluctant to take any action against the underpaying DISCOMS (Interviewee B 2015).

Further, it is open knowledge that the officials of DISCOMS and APGENCO communicate informally for disbursement of moneys due from the DISCOMS (Interviewee B 2015). The disbursements from the DISCOMS are never demanded in full, but rather are demanded to cover immediate costs (Interviewee B 2015). This is reflected in APGENCO's officials telephoning the DISCOMS requesting moneys to be dispatched towards procurement of coal or payment of salaries (Interviewee B 2015). Then again, the money is not as per actual requirement, but a bargain for immediate revenue requirements, for example if the generation company requires 100 crores (\$1550429.00) then they ask for 120 crores (\$1860514.80) and DISCOMS release 100 crores (\$1550429.00) (Interviewee B 2015). In reality, the DISCOMS may be owing APGENCO much more. The difference of receivables from the DISCOMS to APGENCO went over Rs.1200 Crores between 2006 and 2009 (Interviewee B 2015). The legal counsel for APGENCO advised it to approach the Commission, but APGENCO was not inclined to do so (Interviewee B 2015).

Finally, the State government brokered a deal between the DISCOMS and APGENCO and the moneys owed were brought down to 800 crores (\$12403432.00) from 1200 crores (\$18605148.00) (Interviewee B 2015). The 400 crores (\$6201716.00) that were written-off would subsequently be a burden on the public exchequer (Interviewee B 2015).

#### 8.11.6. Billing Decisions of DISCOMS and their Financial Impact on APGENCO

APGENCO is also financially affected by the billing decisions of the DISCOMS owing to the political posturing by the State government. A clear indicator of this is the non-imposition of the Fuel Surcharge Adjustment prior to the elections to the State Assembly in 2009. The Fuel Surcharge Adjustment, as discussed earlier, comprises a part of the tariff which is not fixed by the Commission so as to allow the generators flexibility to pass on escalation in fuel prices and other variable costs to the distributors, this results in an increase in consumer tariff. In 2009, YSR the Chief Minister who had come to power on the plank of free agricultural electricity directed the DISCOMS to not pass on the Fuel Surcharge Adjustment costs to the consumers in lieu of impending elections (Kotamreddi 2014). The Chief Minister directed that the moneys shall be recovered from the State government (Kotamreddi 2014). After the elections, the status quo continued, the Chief Minister, though elected for a second term, passed away in a helicopter crash, and no decision was taken as to how to pass on the Fuel Surcharge Adjustment to the consumer (Kotamreddi 2014). In addition to this, even the Chairman of the Commission did not decide on the pending Fuel Surcharge Adjustment petitions of the DISCOMS (Kotamreddi 2014). History repeated itself in 2014, when the Fuel

Surcharge Adjustment was not determined by the Commission, as it was the election year and the same would affect the government's electoral prospects (Madduri 2014). The absence of any action on part of APGENCO to claim the additional costs for generation from the DISCOMS is indicative of an underlying agreement and the belief that it will be compensated from the State's exchequer eventually.

#### 8.11.7. Absence of Litigation between the DISCOMS and APGENCO

As discussed, there are several instances of litigation between the DISCOMS and private sector generators, these include decisions identifying anticompetitive practices owing to collusion between DISCOMS and APTRANSCO hindering open access. In a review comprising all cases arising on appeal from the orders of the Commission (88) before the appellate bodies over a period of 17 years, i.e. from the time of constitution of the Commission, i.e. from July 1999 till February 28<sup>th</sup> 2015, there is not a single reported case between APGENCO and DISCOMS. Instances involving non-compensation of APGENCO by the DISCOMS for the energy supplied and the subsequent payment of the amounts due by the State government mirror the coordination between APGENCO and the DISCOMS and also the continued macro sectoral coordination by the State government.

#### 8.11.8. Other Decisions of the Commission Adversely Affecting the Interests of Private Generators

15 appellate actions, i.e. 28% of the cases analysed, involve decisions of the Commission adversely affecting private generating companies utilising

renewables sources for generation. These include hydro power, wind power, biomass and bagasse.<sup>258</sup> In addition to perceiving the Commission's behaviour as being discouraging of generation through renewable sources, these can also be viewed as being discouraging of private generation, as all the matters pertain to private generators. A closer examination brings to light the fact that such behaviour contrary to the statutory and constitutional mandate arises owing to the Commission favouring and coordinating its actions with the State owned utilities. Appellate forums also noticed delays in tariff fixation and tariff revision by the Commission causing undue hardships to the generators.<sup>259</sup> Certain decisions set aside by the appellate forums also point to an absence of judicial discipline on part of the Commission.<sup>260</sup>

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<sup>258</sup>*Ind-Barath Energies Ltd., Hyd. V. State of Andhra Pradesh and Ors.* 2000(3) ALD 546; *Small Hydro Power Developers Association and Ors. V. Andhra Pradesh Electricity Regulatory Commission and Ors.* MANU/ET/0094/2006; *Small Hydro Power Developers' Association and Ors. V. Transmission Corporation of A.P. Ltd. & Ors.* MANU/ET/0033/2008; *Rithwik Energy Systems Limited represented by its Director V. Transmission Corporation of Andhra Pradesh Ltd. and Ors.* 2008 ELR (APTEL) 237; *Transmission Corporation of A.P. and Anr. V. Andhra Pradesh State Electricity Regulatory Commission and Anr.* MANU/ET/0048/2006; *Transmission Corporation of Andhra Pradesh Ltd. V. A.P. State Electricity Regulatory Commission and Anr.* MANU/ET/0007/2007; *Guttaseema Wind Energy Company Pvt. Ltd., rep. by its Managing Director Mr. Anil Chalamalasetty V. Andhra Pradesh Electricity Regulatory Commission and Ors.* MANU/ET/0061/2011; *M/s SLS Power Limited V. Andhra Pradesh Electricity Regulatory Commission and Ors.* MANU/ET/0018/2012; *M/s. SLS Power Limited Ors. V. Andhra Pradesh Electricity Regulatory Commission.* MANU/ET/0191/2012; *M/s. S.N.J. Sugars and Products Limited V. Transmission Corporation of Andhra Pradesh Limited.* MANU/ET/0024/2013; *Sardar Power Pvt. Ltd. V. Andhra Pradesh Electricity Regulatory Commission and Ors.* MANU/ET/0054/2013; *M/s. IL&FS Wind Farms Limited V. Andhra Pradesh Electricity Regulatory Commission and Ors.* MANU/ET/0095/2013; *Biomass Energy Developers Association V. Andhra Pradesh Electricity Regulatory Commission.* MANU/ET/0130/2014; *SLT Power & Infrastructure Projects Pvt. Limited V. Andhra Pradesh Electricity Regulatory Commission.* MANU/ET/0133/2014 and *Gayatri Sugars Ltd. V. APNPDCL.* MANU/ET/0201/2014. One other action before the appellate forum involving a generator relying on renewable sources has not been included as the issue does not attract special mention to the generator's source of power. See *Hyderabad Chemicals Limited V. Andhra Pradesh Electricity Regulatory Commission.* MANU/ET/0031/2008.

<sup>259</sup> *M/s Balaji Energy Private Limited V. Southern Power Distribution Company Ltd. of A.P and Others.* 2013(5) ALT 212; *M/s SLS Power Limited V. Andhra Pradesh Electricity Regulatory Commission and Ors.* MANU/ET/0018/2012 and *M/s. SLS Power Limited Ors. V. Andhra Pradesh Electricity Regulatory Commission.* MANU/ET/0191/2012.

<sup>260</sup> The cases also bring to fore instances where the Commission was found wanting in its adjudicatory role as a quasi-judicial body. There were instances when the Commission did not answer the question posed by the AT, when it remanded a case for reconsideration. See *M/s. S.N.J. Sugars and Products Limited V. Transmission Corporation of Andhra Pradesh Limited.*

### 8.11.9. Court's Specific Observations Regarding the Coordination between the Commission and State Utilities

Given the parameters of judicial restraint, courts usually refrain from commenting on issues that are extraneous to the legality of the matter before them. However, in the course of its adjudication, APHC did observe that there was coordination between the activities of the Commission and the State owned utilities. The specific observations, discussed herein, were made in the context of appeals arising from the order or conduct of the Commission. In one case arising from the order of the Commission prohibiting third party sales by the private generators, the APHC observed as follows

'By the impugned order, it appears to us that while lifting the A.P.TRANSCO from the debt traps, the Regulatory Commission has thrown the private companies into debt traps'.<sup>261</sup>

In a matter concerning an exorbitant increase in wheeling charges payable by the generators to APTRANSCO from 2% promised by State government to promote private investment to 56.8% after the Reform Act 1998 came into

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MANU/ET/0024/2013 and M/s. *Konaseema Gas Power Limited V. Andhra Pradesh Electricity Regulatory Commission and Ors.* MANU/ET/0044/2013. In other cases, it did the inconceivable, i.e. it decided the matter on merits while observing that the cause of action was barred by limitation. See *Lanco Kondapalli Power Limited V. Andhra Pradesh Electricity Regulatory Commission.* MANU/ET/0004/2015 . The Commission also passed orders beyond the scope of the relief claimed. See *R.V.K. Energy Pvt. Ltd., Hyderabad V. A.P.S.E.B., Hyderabad and Anr.* 2002(3) ALD 196. The first Commission under the 1998 Act levied grid supply charges and wheeling charges only to be struck down, as the Commission did not have the statutory power to impose them. The cases of *Vishnu Cements Limited V. Central Power Distribution Company of Andhra Pradesh Limited and Anr.* 2003(4) ALD 405 and *RCI Power Limited V. Union of India (UOI) and Ors.* 2003(3) ALD 762 discuss the issues pertaining to grid supply charges and wheeling charges respectively.

<sup>261</sup> *R.V.K. Energy Pvt. Ltd., Hyderabad V. A.P.S.E.B., Hyderabad and Anr.* 2002(3) ALD 196, Para 15.

effect, the APHC observed that there was active collusion between the Commission and APTRANSCO.<sup>262</sup> In its words,

'A reading of the impugned order shows how the Commission went out of the way to pull out the licensee from the debt trap. From various orders passed by the Commission, we have a feeling that the Commission is acting more as an agent of the licensee and trying to save the sinking ship under its own weight at the cost of private Generating Companies'.<sup>263</sup>

In one another case questioning the fixation of Fuel Surcharge Allowance without consulting the consumers, APHC set aside the order of the Commission and the judge opined as follows<sup>264</sup>

'Before parting with this judgment, I am compelled to observe that the functioning of the Commission as revealed in the present proceedings is unsatisfactory and not in consonance with the objective for which the Commission was created. The record of proceedings shows the failure of the Commission to discharge its functions. The proceedings indeed show a state of affairs and leave much to be desired'.<sup>265</sup>

In one case, the Commission condoned the delay of the state owned distribution utilities in filing their quarterly applications for Fuel Surcharge Adjustment despite the regulations explicitly barring it.<sup>266</sup> APHC observed

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<sup>262</sup> *RCI Power Limited V. Union of India (UOI) and Ors.* 2003(3) ALD 762.

<sup>263</sup> *RCI Power Limited V. Union of India (UOI) and Ors.* 2003(3) ALD 762, Para 176.

<sup>264</sup> *India Cements Ltd. and Anr. V. Chairman, APSERC, Hyderabad and Ors.* 2011(6) ALD 35.

<sup>265</sup> *India Cements Ltd. and Anr. V. Chairman, APSERC, Hyderabad and Ors.* 2011(6) ALD 35. , Para 134.

<sup>266</sup> APHC 15 (III) *M/s. Jairaj Ispat Limited, Rep. and Ors. V. A.P. Electricity Regulatory Commission and Ors.* MANU/AP/1398/2012.

that the Commission had to act in an impartial manner and should not have favoured the distribution companies at the cost of sacrificing consumer interest.<sup>267</sup>

### **8.12. Intermittent Moments of Autonomy and the Emergence of the Commission as a Deliberative Space**

As discussed, the notion of SASF discussed here endorses Merry's idea of permeable nature of SASF owing to semi-autonomy, allowing it to both give effect to normativity of state law and resist it when it is opposed to the same (Merry 1988:878). Dubash in his analysis of the functioning of the regulator in Andhra Pradesh observes that the regulator, in pursuance of the statutory mandate, has formulated regulations so as to facilitate public hearings, established a consumer advisory committee allowing the interests of various consumers to be represented and a website that provides information regarding its functioning (Dubash 2013:109). He observes that the consumer groups in Andhra Pradesh 'have somewhat disrupted and injected themselves into the triangular negotiation between APERC, the government, and the utility. The main avenue for doing so is forcing release of information, and forcing public, documented, responses to raised objections, thereby limiting the extent to which adjustments in key parameters can be made behind the scenes' (Dubash 2013:110). It appears that the procedural aspects of the regulatory mechanism in the nature of public hearings and the need to respond to objections during the tariff fixation process have indeed made minor inroads

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<sup>267</sup> APHC 15 (III) *M/s. Jairaj Ispat Limited, Rep. and Ors. V. A.P. Electricity Regulatory Commission and Ors.* MANU/AP/1398/2012, Para 43. It should also be noted that the period of non-filing of FSA also corresponds with the year preceding the elections. The FSA's were filed after the elections. This case also reveals the revenues lost owing to this political coordination.

into what was a very insular arrangement under the APSEB. Interactions with civil society interveners before the Commission in course of the field work strengthens this observation of Dubash.

Sreekumar Nhalur from Prayas Energy Group, a prominent civil society organisation working in the area of electricity regulation, was of the view that the Commission is far more approachable and its functioning is far more transparent than the previous SEB related arrangements (Nhalur 2014). Peddireddi, a prominent farmer leader, is of the view that the Commission provides an alternate forum for greater deliberation on issues of quality of service which could not be debated in the arena of popular politics (Peddireddi 2014). Madduri Thimma Reddy, from the People's Monitoring Group on Electricity Regulation, a prominent civil society intervener before the Commission, was of the view that the present regulatory framework was far more effective than the past framework, but the way it is implemented is problematic (Madduri 2014). The need to implement the regulations in pursuance of the statutory mandate appears to have given a foothold for the civil society interveners to hold the actors under the statutory regulatory arrangements accountable.

However, it is still a long way before a culture of deliberative decision making is established. Civil society interveners observe that in the initial years of establishment the Commission used to organize regular public consultations on a variety of topics, that public hearings at present were restricted to deciding the tariff petitions (Nhalur 2014). Even though the number of submissions before Commission during the tariff determination proceedings are relatively high, they comprise of multiple similar submissions (Madduri

2014). Submissions made by a few interveners are copied by others. That this is primarily owing to absence of adequate capacity in the civil society and consumer groups to participate in an extremely technocratic process (Madduri 2014).

### **8.13. Conclusion**

The aforementioned discussion on the creation of the sectoral SASF and the resultant processes of self-regulation points to the conclusion that it is not popular expectations and mass politics that are the cause of the failure of the sectoral arrangements proposed by the Bank. The Bank's model did not take into account the relative weakness of state law vis-à-vis the societal process in India and the ability of societal processes to mould the state's institutional organisation and consequently its behaviour. The Bank failed to understand that legal regulation of economic activity in sectors associated with mass politics must necessarily address the processes associated with the way the state reorganises itself in response to the political processes, rather than isolate state regulation from politics. This approach becomes essential given the semi-autonomous nature of the Indian state. The Bank's model on the other hand was premised on the autonomous nature of the state and ability of law to further strengthen its autonomy.

As discussed, the self-regulatory processes owe their origin to the conscious constitution of a sectoral SASF by the State government acknowledging the electoral expectations of an interventionist state, which was opposed to the statutory normativity (public law) reflective of regulatory state. The normativity of the regulatory state and interventionist state also result in the state

organising itself in a disaggregated and re-aggregated manner. The dynamics within the SASF, i.e. processes of self-regulation, lead to the emergence of legal pluralism in sectoral state law. The two variants of state law are the statutory or public law and processes of self-regulation. It is pertinent to note that the processes of self-regulation emerge as a consequence of the constitution of the sectoral SASF by the state. The processes of self-regulation as discussed, have an adverse effect on the State's finances, decisions pertaining to the allocation of the resource, i.e. electricity, private sector participation and consumer interests. This necessarily implies that the focus of sectoral regulatory arrangements must be on regulation of self-regulatory processes.

## **Chapter 9 – Conclusion**

### **9.1. Summing Up**

The national state in India embraced the regulatory state model in 1991, which was to be implemented in the State level electricity sector through legislation based on the Bank's 1993 Policy (World Bank 1993a). The rationale for the turn to the regulatory state was that previous sectoral decision making was too politicised and resulted in inefficient provision of electricity and draining of the public exchequer. The Bank's conditionality at a time of crisis, i.e. the early 1990's, further facilitated this transition. Law was seen by the Bank and other multilateral financial institutions as a means to roll back the state in keeping with the Washington Consensus (Tshuma 1999:76). Though legal reform necessarily implied a foray into political issues, the Bank justified it by stating that legal reform was necessitated by and aimed at 'institutional transformation' as part of its governance agenda (Faundez 2010:181-183). The legislation implementing the 1993 Policy, especially the principles of commercialisation, corporatisation and transparent regulation aimed to institutionally disaggregate the State by unbundling the SEB and establishing a sectoral regulator. In what came to be known as the Orissa model, the principles of the 1993 Policy were translated into domestic legislative provisions by international consultants with little regard for understanding the unique attributes of the role of the state (national and State) in economic activity in India.

The State of Andhra Pradesh, though aware of the global and national state's tilt towards a regulatory state and reform process in Orissa, undertook an

internal sectoral evaluation exercise through the HLC, comprising bureaucrats and technocrats. HLC's recommendations emphasised the necessity for sectoral coordination within public ownership and a more gradual approach to reforms. It advocated a cautious approach to realigning the existing sectoral dynamics and privatisation. Its recommendations included the establishment of a sectoral regulator headed by a judicial member reflecting the larger constitutional scheme of checks and balances. It vested in the regulator, the power to determine access to sectoral resources, be it the quantum of subsidy or cross-subsidy across the different categories of consumers. This included acknowledging the political significance of sectoral subsidies, need for institutional coordination across electricity generation, transmission and distribution, and giving due regard to the concerns of the employees, technocrats and bureaucrats associated with the SEB and the sector. The recommendations and observations of the HLC appear to reflect an understanding of the attributes of the role of the Indian state (national and State) in economic activity and the State in the electricity sector.

The unique attributes of the Indian state (national and State) include the influence of changing global notions of the role of the state in economic activity and the relative weakness of state vis-à-vis social forces described by Bardhan as the 'dominant coalition' (Bardhan 1998). However, this weakness is only relative as the state retains the ability to influence social change. Another key feature is the non-autonomous (Bardhan 1998; Mukherji 2016) or semi-autonomous attribute of the Indian state, resulting from external and internal tensions. The external tensions include the changing global dominant consensus on the role of the state in economic activity. The reasons for the

internal tensions include the Constituent Assembly's procedural solution, which rejected juridification in favour of linking the scope and extent of the role of the state in economic activity with electoral expectations. This led to the emergence of a functional normative system (Tamanaha 2008) focussed on the redistribution function of the state, with periodic elections reinforcing the interventionist expectations from the state. The same also led to the emergence of politics of resource allocation in India and the emergence of the 'dominant coalition' (Bardhan 1998). The non-juridification of the role of the state in economic activity also led to inter-institutional tensions between the judiciary, on one hand, and the executive and legislature on the other. The national state's act of embracing the regulatory state ideology after 1991 generated further inter-institutional tensions and tensions between the national state and the States.

Despite having undertaken an internal exercise evaluating institutional and corresponding legislative options for sectoral reform, the State of Andhra Pradesh's reformist Chief Minister approached the Bank in anticipation of financial assistance. Andhra Pradesh adopted the Orissa Model incorporating the 1993 Policy. This translated into unbundling the monolithic APSEB into commercially independent generation, transmission and distribution utilities and establishing an autonomous sectoral regulator in pursuance of the Reform Act 1998. In Andhra Pradesh, the process of depoliticisation through legal instrumentalism was inimical to the interests of the 'dominant coalition', especially the rich farmers, career bureaucrats and technocrats associated with the sector, and electoral expectations of an interventionist and redistributionist state in the sector. TDP's 2004 electoral defeat brought to light

the inherently political nature of legal reform aimed at depoliticising sectoral regulation. This in turn sent a clear political signal requiring the state to reposition itself as a disburser of resources. While such repositioning could be achieved with relative ease in the sphere of politics, given the posturing of the Congress during the 2004 elections, this was more challenging in the field of law.

The experience of establishing a regulatory state in Andhra Pradesh's electricity sector corresponds with Dubash and Morgan's observation that political influences on the regulatory decision-making processes impede the implementation of rules associated with a regulatory state (Dubash and Morgan 2013). Haines observes a similar phenomenon, in what she describes as the 'less than intended' consequences of regulatory globalisation owing to the influence of the unique attributes of a jurisdictional space (Haines 2003). In the context of legal interventions accompanying economic globalisation, Tshuma opines that such interventions have 'unintended consequences', which includes the emergence of legal pluralism (Tshuma 1999).

Thus the 1998 Act, incorporating the 1993 Policy of the Bank intended to institutionally reorganise and regulate the State of Andhra Pradesh, but resulted in 'less than intended' consequences and legal pluralism in sectoral state law. The reasons for the emergence of legal pluralism include the semi-autonomous attribute of the Indian state (national and State) and it being prone to the influence of a strong society. The discussion regarding the SASF brought to the fore the fact that the state is not a monolithic whole, but is one amongst the many SASFs in society, and that different states exhibit different levels of autonomy (Reyntjens 2015; Sportel 2011). Mukherji's observation

that the Indian state 'is so penetrated by social actors' that it does not display the requisite autonomy of a development state (Mukherji 2016:219-220) supports the argument of a semi-autonomous Indian state. The thesis demonstrates that it is these same forces that allowed the state to organise itself 'ideologically' (normatively) and 'organizationally' (institutionally) in response to the influence of 'ideological and political forces' (Merry 1988:891; Moore 2001:107). The result is a reassertion of the normativity of the interventionist state through an institutional re-aggregation of the legislatively disaggregated regulatory state. This was made possible through bureaucratic self-organisation resulting in self-regulation leading to the emergence of plural forms of sectoral State law.

The operation of the alternate sectoral state law is demonstrated through the structural and behavioural aspects of self-organisation and resultant self-regulation. Regarding the structural aspect, the thesis demonstrates that the sectoral SASF is 'consciously constructed' (Moore 1973) through administrative orders and intra-governmental transfers. The consciously constructed self-organising processes aimed at resisting the normativity of the regulatory state are operationalised by the very actors vested with the statutory duty to operationalise a sectoral regulatory state. The APPCC, brought into existence through an executive order of the government of Andhra Pradesh, is one example of such a structural arrangement aimed at reaggregating the disaggregated utility. It comprises bureaucrats and technocrats of the disaggregated utilities, and has been constituted with the objective of maintaining uniform consumer tariffs to avert electoral discontent. Similarly, a study of the staffing patterns and appointments to the Commission made over

15 years, from 1999 to 2014, revealed that particular services have laid claim to the different functional specialisations of the Commission. Over time, the first three layers of the Commission's hierarchy came to be staffed by the larger public bureaucracy and sectoral technocracy, eroding the institutional autonomy of the Commission.

The behavioural aspects of the alternate legality, i.e. self-regulatory arrangements, in the electricity sector of Andhra Pradesh are characterised by the drawbacks of self-regulation. The drawbacks amongst others include the absence of democratic accountability, the possible negative impact of decisions of actors in self-regulatory arrangements on third parties and an inability to rein in errant members and the tendency of actors in self-regulatory processes to cartelise and impose barriers to entry for other actors (Baldwin et al 2012; Graham 1994; Ogus 1995). These issues have been established through a review of decisions of appellate bodies in 54 cases with a direct bearing on the principles of commercialisation, corporatisation and independent regulation; principles that the Reform Act 1998 endeavoured to institutionalise through legal reform. Thus, there is self-regulation by the sectoral actors associated with disaggregated utilities comprising the erstwhile SEB and the larger State bureaucracy and consequent legal pluralism in sectoral state law. This institutional re-aggregation by the actors responsible for implementing the statutory normativity of the Reform Act 1998 makes the statute less than effective (Haines 2003; Tshuma 1999). The institutional re-aggregation mimics the coordinating framework recommended by the HLC, which was aware of the true sectoral dynamics and the sectoral attributes of the State of Andhra Pradesh.

From a methodological perspective, the analytical construct of 'regulatory space' (Hancher and Moran 1989) helped understanding the unique attributes of the state's role in economic activity and the associated actor dynamics beyond the narrow statutory and institutional confines. The methodology of 'principles, actors and mechanisms' (Braithwaite and Drahos 2000) complements the spatial approach to regulation, especially in the present context of observing global dissemination of regulatory norms. Moore's notion of SASF explains the institutional re-organisation of the non-autonomous Indian state (at the sectoral level) to give effect to the normativity of the interventionist state (Moore 1973). A combination of these three methodologies helps establish the emergence of legal pluralism in sectoral state law in India.

## **9.2. Ability of the Indian State to Accommodate Competing and Conflicting Normativities**

At the root of the emergence of legal pluralism in sectoral state law are the normative notions associated with the role of the Indian state (national and State) in economic activity and the ability of the Indian state to accommodate the competing notions. The Constituent Assembly's endeavour to resist the path of juridification of the role of the state in economic activity allows both national state and State to accommodate the opposing normativities. The question asked is how are the national state and State able to accommodate these competing notions of their role in economic activity? What is the basis of the uneasy coexistence which takes place without fracture of the state apparatus, chaos and administrative disarray? It is observed that the capacity of the Indian state (national and State) to accommodate and institutionally

reorganise itself in relation to the competing normativities arises out of constitutional pluralism, owing to the deliberate endeavour of the Constitution's drafters to prevent juridification of the role of the state in economic activity. This notion of constitutional pluralism was further nurtured through the intra-institutional tensions between the legislature and the executive on one hand and the judiciary on the other in relation to the interpretation of the constitutional provisions on the role of the national state and State in economic activity.

It is argued that the non-acknowledgement of the alternate institutional arrangements by state law (national and State) resulted in the law's inability to rein in the sectoral dynamics it was designed to address, namely politicisation and the entrenched interests of the dominant coalition. This creates an uneasy relationship between the two normativities, unlike the earlier consensus on a mixed economy where areas of operation of the state and private activity were segregated through a consensus between the state and the private actors. True, the Indian state (national and State) can accommodate conflicting normativities and their institutional manifestations; however, it is argued that the limited power to regulate the sectoral dynamics are expended in accommodating and maintaining this uneasy coexistence, rather than focusing on the sectoral issues pertaining to allocation of resources and quality of supply. This is one of the reasons for the sectoral finances not improving and the sector continuing to be a drain on the national state and State's finances, and the resource continues to be controlled and appropriated by the constituents of the dominant coalition. Given this scenario, the challenge for the Indian state (national and State) is to establish how best to leverage its

relatively strong regulatory capacity vis-à-vis the dominant coalition in order to achieve the constitutional mandate of ensuring that ‘the ownership and control of the material resources of the community are so distributed as best to subserve the common good’.<sup>268</sup>

### **9.3. Need for Regulatory Interventions in India to Move Beyond Institutionalising a Particular Normativity**

Dubash and Morgan (2013) acknowledge that ‘rule based’ institutional solutions may not be the best way forward for developing country jurisdictions where politics inevitably impedes the functioning of rules aimed at establishing a regulatory state. They are, however, of the view that the same does not render the rules irrelevant. Dubash and Morgan lean on the literature of the development state and advocate embedding the regulatory state through the notion of ‘embedded autonomy’. Amongst other ideas, they advocate deliberative politics as a means to embed the regulatory state. In the context of the implementation of the Reform Act 1998 in Andhra Pradesh, procedural aspects in the nature of public hearings and corresponding deliberations before the Commission appear to have been able to check some of the self-regulatory processes by making the Commission accountable. Civil society actors, consumer activists and farmers’ leaders have endorsed this observation (Nhalur 2014; Madduri 2014; Peddireddi 2014). That said, it is argued that the deliberative space within the present regulatory arrangements is not a neutral space and is an embodiment of the normativity associated with the regulatory state. As described by Karen Yeung (2010), the term regulatory state is used to connote a roll-back of the state from the policy of

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<sup>268</sup> Article 39(b) of the Constitution of India.

interventionism associated with the welfare state and the developmental state. It is argued that the same will limit the scope of deliberations before the Commission and corresponding regulatory interventions to those advocating a minimalist state. This is opposed to the popular expectations of an interventionist state, which uses its role in economic activity to reduce inequalities by promoting equitable access to electricity.

In the Indian context, it is argued that it is neither possible nor desirable to institutionalise or embed a particular normativity, be it interventionist or regulatory. It is not possible to embed the rationality of the regulatory state as the state in India is semi-autonomous and porous, whereas autonomy is the prerequisite for embedding or institutionalising. It is not desirable because the statutory regulatory arrangements and the deliberative space within the regulator are not merely there to check errant political resource allocation but represent a particular normativity, i.e. the normativity of a regulatory state which is opposed to the political normativity of an interventionist state.

The historical examination of the role of the Indian state (national and State) in economic activity in the foregoing chapters has made the Indian state's inability to institutionalise a particular normativity abundantly clear. In the late 1960's and early 1970's, Indira Gandhi's push towards nationalisation and state intervention, and corresponding constitutional amendments in pursuance of her version of socialist state interventionism, targeted private capitalists and businesses whilst catering to the interests of the rich farmers and bureaucrats. This resulted in the politics of resource mobilisation, leading to a fiscal crisis and the eventual tilt to a regulatory state. In Andhra Pradesh's electricity sector, this attempt at institutionalising an interventionist state resulted in the

industrialists being burdened with excessive cross subsidies, making electricity from the State-owned utilities expensive. This made the industrialists invest in captive generation, resulting in greater losses for APSEB. These events in the early 1990's provided the narrow constituency of industrialists, national politicians, technocrats and bureaucrats with the opportunity to usher in a regulatory state, which attempted to restrain the role of the state in economic activity through institutional restructuring. However, both attempts of the Indian state (national and State) to vociferously advocate a particular normativity as informing the role of the state in economic activity, be it Indira Gandhi's version of an interventionist state or that of the post 1991 regulatory state, had to confront the reality of a powerful society, and the ability of the dominant coalition to influence the state (national and State) to do its bidding. In Andhra Pradesh's electricity sector, this translated into the resource being prioritised to cater to the rich farmers to the detriment of the industrialists and the underprivileged. Thus, the dominant coalition representing the rich farmers, bureaucrats and technocrats was able to undermine the Reform Act 1998 and the corresponding institutional changes through alternate institutional reorganisation resulting in legal pluralism.

However, the same does not necessarily imply that institutions do not have a role in the regulation of economic activity and promoting equitable resource allocation. It is argued that the Indian state (national and State) must deploy institutions within a much larger strategy aimed at engaging the whole gamut of actors in the regulatory space. The same calls for regulatory interventions to engage the sectoral dynamics, rather than insulate and confine them to a rigid predefined institutional framework. Institutions and their mandate must be

designed to accommodate and mediate the competing notions of the role of the state in economic activity. It is argued that such an approach helps acknowledge the self-regulating processes and engage them. The next section elaborates this approach in the context of Andhra Pradesh's electricity sector.

#### **9.4. Regulation as Engaging Spatial Dynamics and Mediating Actor Relationships**

The spatial approach to sectoral regulation that is discussed in this section is premised on acknowledging the semi-autonomous nature of the Indian state and its relative weakness vis-à-vis the dominant coalition. It differs from the Bank's approach of insulating economic decision making from the larger social and political dynamics by institutionalising a particular normativity. In the context of the present discussion pertaining to the electricity sector this approach translates into four specific interventions, namely: acknowledging the inter-institutional tensions; the nature of the political discourse and the underlying power-play of the dominant coalition; the role of deliberative politics before the Commission and a more nuanced understanding of the way the sectoral participants organise themselves, as reflected in the HLC's recommendations. It incorporates elements of the HLC's recommendations, Dubash and Morgan's observation regarding the role of the deliberative processes in strengthening regulatory oversight; and the need to make deliberations associated with regulatory decision-making part of the larger political discourse as opposed to the present scenario of limiting them to deliberations within the regulatory institution, i.e. the Commission. This translates into the following suggestions.

#### 9.4.1. Strengthening the Institution of the Regulator, i.e. the Commission

The Commission, as established by the Reform Act 1998, is presently co-opted into the larger sectoral bureaucracy and technocracy. A conscious attempt has to be made to effectively put a ban on appointments through deputation and employment of retired contractual employees. One of the suggestions that has been mooted is the creation of an all India (national) 'Regulatory Service' to train a distinct cadre of personnel with an understanding of the activity of regulation and the technocratic wherewithal presently in the exclusive domain of the State-owned utilities. Also, the fact that it will be a national level service helps exploit the tensions between the national state and the States, given the national state's endeavour to establish a regulatory state and the State level state resisting such an attempt. This will allow the Commission to develop a distinct independent identity and reduce, if not totally eliminate the influence of the State government.

The second suggestion to strengthen the institutional independence of the Commission would be to implement the HLC's suggestion of a judicial appointee heading the Commission. This is to prevent the present practice of bureaucrats regulating bureaucrats and the resultant shortcomings of self-regulation. As observed in the review of appellate cases arising from the orders of the Commission, the judiciary has always been critical of the functioning of the Commission and the erosion of the Commission's independence. Unlike the bureaucrats who merely associate the Regulatory Commission with career progression, higher status and salaries, a judicial appointee is not affected by such considerations. Such an approach also

compliments the larger scheme of constitutional checks and balances and leverages the inter-institutional tensions.

The third suggestion to strengthen the institutional framework of the Commission would be to strengthen the deliberative processes as suggested by Dubash and Morgan (2013). No doubt, as observed by the civil society interveners and farmers and consumer groups, the deliberative processes before the Commission are a big leap forward in comparison with the secretive SEB. However, the nature and scope of deliberations appear to differ over time. Further, though the number of submissions as noted by Dubash (2013) appear numerous, Madduri (2014) observes that they are merely repetitions of the submissions of a select few. This is primarily because of the highly technocratic and complex nature of the tariff setting process and the associated deliberations. The generation of an effective debate on regulatory issues before the Commission requires an increase in the capacity of civil society and consumer rights groups to participate in the deliberative processes. This will in turn ensure that the Commission functions in accordance with its statutory mandate.

#### 9.4.2. Making Regulatory Deliberations Part of the Larger Political Discourse

It is argued that there is a need to deliberate regulatory issues such as quantum of tariff and quality of power supplied in the political discourse influencing electoral outcomes. This suggestion does not endeavour to dismiss mass politics as being irrelevant. It acknowledges that mass politics in India reflect the popular expectations from the state and infuse the normativity of interventionist state. It does, however, call for a more nuanced political

discourse surrounding the pricing and allocation of electricity for a more equitable allocation of the resource. Such an approach acknowledges that the foundational issue for sectoral regulation in Andhra Pradesh is the underlying social and economic inequalities allowing the constituents of the 'dominant coalition' to influence the state to act on their behalf, amongst other means, by influencing political preferences. However, insulating economic decision-making through legislated institutional autonomy is not a solution, given the semi-autonomous and permeable attribute of the Indian state and its propensity to be influenced by the dominant social forces.

Mukherji (2014), in his empirical study on agricultural electricity consumption patterns in Andhra Pradesh, established that it is the rich landlords who benefit from free electricity, rather than the marginal and small farmers. However, during the 2004 elections, Naidu's rational analysis regarding sectoral fortunes and the possibility of supplying quality electricity for longer hours if it were subsidised, rather than YSR's claim to free electricity, fell on deaf ears. As predicted by Naidu, free electricity was qualitatively poorer and was supplied late in the night and for a much shorter time than required by farmers. Had the regulatory deliberations regarding the quality of supply and associated costs been made part of the discourse of 'mass politics', the electorate, especially the small agriculturalist, would have understood the true implications of their voting preferences. In terms of social hierarchy, the upper castes are also the landlords. It is argued that making regulatory deliberations part of the larger political discourse will also raise awareness and give legitimacy to the demands of the oppressed. This will also generate a dialogue to resist the demands of the rich landlords, whilst also enabling equitable and qualitative

provision and utilisation of the scarce resource. This way, the discourse in the arena of 'mass politics' will strengthen the deliberations within the regulator.

#### 9.4.3. Acknowledging the True Nature of Sectoral Organisation and Adopting an Incremental Approach to Sectoral Reform

The re-aggregation of the disaggregated utilities, mimicking the institutional structure of the SEB, is reflective of the larger bureaucratic and technocratic consensus regarding the sectoral organisation. As observed by Marina Kurkchyan (2009), the way an institutional transplant is internalised reflects the true nature of a society. The members of the HLC were aware of this organisational structure and were of the view that the same emerged from the state's role in sectoral coordination and conflict management. Accordingly, they advised an incremental approach to disaggregation of the SEB and proposed that the SEB be retained as a holding company to coordinate the activities of generation, transmission and distribution performed by subsidiaries. The HLC advocated a cautious approach to privatisation and was of the view that privatisation could wait till such time as the utilities developed the internal capacity to manage their affairs. It was also acutely aware of the nature of employee resistance and prescribed a policy of rewards in the nature of employee stock options and greater employee engagement prior to disaggregation.

The Bank's approach, implemented through the Reform Act 1998, however, wanted to follow a pre-set accelerated schedule for sectoral disaggregation. It is observed that the immediate disaggregation of the SEB also resulted in a dispersal of internal managerial capacity, prompting a re-aggregation through the institutional process of APPCC. The government order constituting the

APPCC, amongst other reasons, clearly states that the said arrangement is to support the newly formed distribution companies, which have no prior experience in matters pertaining to power procurement and facilitate a smoother transition. The absence of any tangible benefits but for talk of career progression within the disaggregated entity, which was likely to be privatised, resulted in the employees taking a rigid approach to their service conditions. The tripartite agreements ensured the continuation of governmental service conditions, making the unbundled utilities less attractive for private investment. The uncovering of the alternate institutional processes mimicking the erstwhile SEB, the absence of adequate managerial expertise to function as a corporate entity, evidenced by increasing dependence on consultants, and the inability to ward off State government's interventions point to the prudence of HLC's incremental approach to reform through co-optation and the capacity building of the utility's employees. The present institutional organisation mimics the pre-reform patterns. It is therefore suggested that the State government revisit the reform process and adopt incremental measures along the lines suggested by the HLC, so as to better implement the principles of corporatisation and commercialisation.

The unique regulatory attributes of every jurisdiction (Haines 2003) determine the way regulatory models are received and implemented (Merry 2006; Kurkchiyan 2009). The Bank sponsored regulatory reforms endeavoured to regulate the Indian state. However, the normative and institutional elements of the Bank's global 1993 Policy were moulded to the way the Indian state organised itself in response to the democratic expectations and the interests of the dominant coalition. This resulted in a 'less than intended' consequence

i.e. the inability to give effect to the statutory mandate reflective of the global model and emergence of legal pluralism in sectoral state law. The foregoing analysis establishes the limitations of regulatory globalisation and the need for formulating regulatory interventions by taking local knowledge and societal dynamics into consideration.

## **Annexure I**

To,

The State Public Information Officer,  
Andhra Pradesh Electricity Regulatory Commission,  
A P E RC, # 11-4-660,  
4 th Floor, Singareni Bhavan,  
Red Hills, Hyderabad - 500 004.

Respected Sir

Subject: Application for Information Under the Right to Information Act, 2005.

The following information is sought from your organisation under the provisions of the Right to Information Act, 2005. Part II of the Andhra Pradesh Electricity Reform Act, 1998 provides for the constitution of the Andhra Pradesh Electricity Regulatory Commission. Section 3 Clause 2 prescribes that there shall be Two Members and One Chairman. The Andhra Pradesh Electricity Regulatory Commission (Appointment of Chairman and Members) Rules 1999 provides for the selection procedure of the Chairman and Members of the Commission.

The applicant hereby requests the information in the format specified below, with relation to the qualifications and career information of the Members and Chairmen of the Andhra Pradesh Electricity Regulatory Commission prior to their appointment as Members and Chairpersons as per the records of the Andhra Pradesh Electricity Regulatory Commission and also certain

information pertaining to their tenure in office. The statutory provisions mentioned in the preceding paragraph provide for appointment of one Chairman and two Members. For the sake of clarity the positions of members have been demarcated as Member 1 and Member 2.

**The information is being sought for the period July 22<sup>nd</sup> 1999 till 10<sup>th</sup> October 2014.**

<b>Sl.No.</b>	<b>Position</b>	<b>Name of Person Officiating</b>	<b>Tenure in Post</b>	<b>Details of Qualifications and Position/Employment Prior to Appointment</b>	<b>Time Period(s) Position was Vacant.</b>
1	Chairman				
2	Member 1				
3	Member 2				

With regards

Adithya Krishna Chintapanti

A-23(2-2-18/31)

Durgabai Deshmukh Colony

Hyderabad – 500013

## Annexure II

Date:

To,  
The State Public Information Officer,  
Andhra Pradesh Electricity Regulatory Commission,  
A P E RC, # 11-4-660, 4 th Floor, Singareni Bhavan,  
Red Hills, Hyderabad - 500 004.

Respected Sir

Subject: Application for Information Under the Right to Information Act, 2005.

The following information is sought from your organisation under the provisions of the Right to Information Act, 2005. The Andhra Pradesh Electricity Regulatory Commission (Method of Recruitment and Conditions of Service of Officers and Staff) Regulations, 1999; The Andhra Pradesh Electricity Regulatory Commission (Method of Recruitment and Conditions of Service of Officers and Staff) (First Amendment) Regulation, 2006; and The Supplementary Regulation to Principal Regulation (No.3 of 1999) of Andhra Pradesh Electricity Regulatory Commission (Method of Recruitment and Conditions of Service of Officers and Staff) Regulation, 2013 , have governed the sanctioned strength, method of recruitment and conditions of service of the Officers and Staff of the Andhra Pradesh Electricity Regulatory Commission.

The applicant hereby requests the following information in the format specified below divided into queries following the sanctioned strengths, staffing patterns and mode of recruitment as specified by the 1999 regulations and subsequent amendments and supplementary regulations. **The information is being sought for the period July 22<sup>nd</sup> 1999 till 10<sup>th</sup> October 2014.**

**Query 1.** Please provide information regarding all officers recruited/appointed /promoted/officiating in the following posts as enumerated in the Andhra Pradesh Electricity Regulatory Commission (Method of Recruitment and Conditions of Service of Officers and Staff) Regulations, 1999 as amended by The Andhra Pradesh Electricity Regulatory Commission (Method of Recruitment and Conditions of Service of Officers and Staff) (First Amendment) Regulation, 2006 for the time period **July 22<sup>nd</sup> 1999 till July 30<sup>th</sup> 2013.**

Sl. No	Post of Officer	Name of Officer	Nature of Appointment. Please specify the following: a. Regular basis. b. Contract services c. On deputation. d. Others (Please Specify)	Tenure in the post.	Prior employment or position held. Or Parent Department/Organisation if on deputation.	Position occupied or employment after relinquishing charge. Or Department or Organisation deputed to after relinquishing charge.	Time Period(s) Position was Vacant.
	Commission Secretary						
	Director Engineering						
	Director/Law						
	Director/Tariff						
	Director/Administration						
	Adviser to Commission (Post 1)						
	Adviser to Commission (Post 2)						
	Adviser to Commission (Post 3)						
	Joint Director/Engineering						
	Joint Director/Law						
	Joint Director/Tariff (Accounts & Financial Analysis)						

	Joint Director /Tariff (Economics)						
	Joint Director /Tariff (Engineering)						
	Joint Director /Information Technology						
	Deputy Director/Transmission						
	Deputy Director/Distribution (Post 1)						
	Deputy Director/Distribution (Post 2)						
	Deputy Director /Law (Post 1)						
	Deputy Director /Law (Post 2)						
	Deputy Director/Tariff (Accounts & Financial Analysis)						
	Deputy Director/Tariff (Economics)						
	Deputy Director / Tariff (Engineering)						

	Deputy Director/Information Technology						
	Deputy Director/Personnel						
	Deputy Director/Pay and Accounts						
	Deputy Director/Consumer Assistance						
	Deputy Director /Media (Till 24.04.2006). Executive Assistant to Commission Secretary (From 25.04.2006)						
	Personnel Officer						

**Query 2.** Please provide information regarding all officers recruited/appointed /promoted/officiating in the following posts as enumerated in the Andhra Pradesh Electricity Regulatory Commission (Method of Recruitment and Conditions of Service of Officers and Staff) Regulations, 1999 as amended by The Andhra Pradesh Electricity Regulatory Commission (Method of Recruitment and Conditions of Service of Officers and Staff) (First Amendment) Regulation, 2006 and the Supplementary Regulation to Principal Regulation (No.3 of 1999) of Andhra Pradesh Electricity Regulatory Commission (Method of Recruitment and Conditions of Service of Officers and Staff) Regulation, 2013 for the time period **July 30<sup>th</sup> 2013 till 10<sup>th</sup> October 2014.**

Sl.No	Post of Officer	Name of Officer.	Nature of Appointment. Please specify the following : a. Regular basis. b. Contract services c. On deputation d. Others (Please Specify)	Tenure in the post.	Prior employment or position held. Or Parent Department/ Organisation if on deputation.	Position occupied or employment after relinquishing charge. Or Department or Organisation deputed to after relinquishing charge.	Time Period(s) Position was Vacant.
	Commission Secretary						
	Director/ Engineering						
	Director/ Law						
	Director/ Tariff						
	Director/ Administration						
	Joint Director/ Engineering						
	Joint Director/ Law						
	Joint Director/ Tariff (Accounts & Financial Analysis)						
	Joint Director/ Tariff (Economics)						
	Joint Director/ Tariff (Engineering)						

	Joint Director/ Information Technology						
	Deputy Director/ Transmission						
	Deputy Director/ Distribution						
	Deputy Director/ Law						
	Deputy Director/ Tariff (Accounts & Financial Analysis)						
	Deputy Director/ Tariff (Economics)						
	Deputy Director/ Tariff (Engineering)						
	Deputy Director/ Information Technology						
	Deputy Director/ Personnel						

	Deputy Director/ Pay & Accounts						
	Deputy Director/ Consumer Assistance						
	Executive Assistant to Commission Secretary						
	Deputy Director / Planning & Power Procurement						
	Deputy Director / Legal Procedures						

With regards  
Adithya Krishna Chintapanti  
A-23 (2-2-18/31)  
Durgabai Deshmukh Colony

## Annexure III

### Detailed analysis of Class I Category Appointments to the Commission between July 22<sup>nd</sup> 1999 till 10<sup>th</sup> October 2014.

#### a. Commission Secretary

The additional desirable qualifications for the post of Commission Secretary includes 'knowledge or experience in a regulated industry or with a regulatory body in Power Sector'.<sup>269</sup> This appears to have ensured the appointment of persons with a governmental background either from the State administration or State owned utilities. Five persons have been appointed as 'Commission Secretary' in the period under reference and all appointments either have been on contractual basis or on deputation. Barring one appointment from the Income Tax Department, all appointees are from the State owned electricity utilities, i.e. the erstwhile APSEB or APTRANSCO and the state owned distribution company (APCPDCL).<sup>270</sup> There was a shift from contractual appointment of retired personnel to appointment by deputation after 2004. This resulted in Secretaries reverting to their respective posts in the State owned electricity utilities after completing their term in the Commission.<sup>271</sup>

#### b. Director Engineering

The minimum qualifications comprise a degree in electrical or power engineering and twenty years of engineering experience, with at least five

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<sup>269</sup> 1999 Regulations, Appendix I.

<sup>270</sup> T.B.Narasimha Rao from APSEB (Contract – 11.10.1999 to 15.06.2003); S. Surya Prakasa Rao from APSEB (Contract – 16.06.2003 to 11.04.2007); G.V.Nagesh from A.P.TRANSCO (Deputation- 12.11.2007 to 30.11.2008); M.Ravindra Sai from Income Tax Department (Deputation – 10.07.2009 to 12.04.2011); and M.D.Manohar Raju from Andhra Pradesh Central Power Distribution Corporation Limited (Deputation – 20.08.2011 to 10.10.2014).

<sup>271</sup> G.V.Nagesh from A.P.TRANSCO (Deputation- 12.11.2007 to 30.11.2008); M.D.Manohar Raju from APCPDCL (Deputation – 20.08.2011 to 10.10.2014)

years of managerial experience in 'large power utilities with generation, transmission and distribution facilities'.<sup>272</sup> It is argued that the minimum criteria of 20 years' experience and belonging to 'large power utilities with generation, transmission and distribution facilities' appears to exclude those associated with the private sector, which has no presence in transmission and distribution segments. The information provided by the Commission confirms the same. In fact, but for a brief two year stint by a person on deputation from a national public sector undertaking,<sup>273</sup> all the personnel appointed to the post of Director Engineering, i.e. six out of seven postings, were either on contract or deputation from the State owned power utilities.<sup>274</sup> The initial two appointments were on a contract basis.<sup>275</sup> All the subsequent appointments, i.e. after 2004, were on deputation,<sup>276</sup> leading to circulation of personnel between the Commission and the state owned power utilities.

c. Director Law

The minimum qualifications for appointment as Director Law is a degree from a recognised university, eligibility to practice law, with a minimum fifteen-year professional experience or experience in the State/national government or that of a Judge of a District Court. Additional qualifications include knowledge of

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<sup>272</sup> 1999 Regulations, Appendix I.

<sup>273</sup> K.Pratap, from Power Grid Corporation of India Limited on deputation from 29.08.2005 to 18.08.2007.

<sup>274</sup> The word State Public Sector Utilities is used to denote both the erstwhile APSEB and its successor unbundled entities of A.P.TRANSCO, A.P.GENCO and the four DISCOMS.

<sup>275</sup> V. Rama Rao from APSEB (Contract – 12.10.1999 to 02.01.2002); V. Siva Prasad Rao from APSEB (Contract – 09.05.2002 to 08.05.2005)

<sup>276</sup> K.Pratap from Power Grid Corporation of India Limited (Deputation - 29.08.2005 to 18.08.2007); S. Ramanuja Rao from APSPDCL (Deputation – 23.08.2007 to 28.02.2009); P.V.Subrahmanyam A.P.TRANSCO (Deputation- 04.07.2009 to 28.02.2011); D.R.Vishwanath Rao A.P.TRANSCO (Deputation – 31.10.2011 to 31.10.2012 ); M.Sathya Murthy A.P.TRANSCO (Deputation – 07.12.2013 to 31.03.2014 thereafter on Contract 01.04.2014 to 10.10.2014 , though subsequently reappointed on contractual basis his original appointment was on deputation basis therefore his posting is considered as on deputation for this analysis.

the power sector, experience in legal advice in commercial issues, amongst others. It is surprising that the Director Law does not need to have specific knowledge of laws of the power sector as a minimum qualification, however legal services under the State or Central government and the judicial services is one of the essential criteria. A perusal of the appointees indicates that all the appointees are retired District Judges, retired from the State's Judicial Services and appointed on a contractual basis.<sup>277</sup>

d. Director Tariff

The minimum qualifications for the position are a doctorate in economics or degree in electrical or power engineering.<sup>278</sup> It also requires a minimum of fifteen years' experience as a professional economist or engineer, which must include five years in a managerial position involving professional staff. Two persons have held the position of Director Tariff at the Commission in the period under reference. The first appointee was initially brought on deputation to the Commission from the Industrial Development Bank of India Limited and subsequently given a regular appointment and retired from the post on 31.12.2008.<sup>279</sup> The position was filled by a candidate from the State owned power utility.<sup>280</sup> This was the first appointment to the position after 2004 and

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<sup>277</sup> The appointees in the time period under reference are all retired officers of the State's Judicial Services appointed on contract. They are V. Veera Raghavan (13.10.1999 to 25.04.2001 & 24.06.2001 to 07.05.2003); D.S.Prasad (16.06.2003 to 15.11.2005); K.Rajagopala Reddy (20.04.2006 to 19.04.2009); K. Sanjeevarao Naidu (28.10.2009 to 30.04.2013).

<sup>278</sup> It is interesting to note that to be Director Tariffs one needs a doctorate in economics or degree in engineering which are two very different disciplines and also degrees of academic achievement. Also prior experience in developing tariffs in public utilities is likely to make the post an exclusive preserve of the State Owned Power Utilities.

<sup>279</sup> Dr.Geeta Gouri (Deputation from IDBI 04.01.2000 to 31.12.2003 – Regular appointment 01.01.2004 to 31.12.2008).

<sup>280</sup> The appointment was on contract basis. L.Manohar Reddy from APCPDCL 21.11.2011 to 10.10.2014.

the choice of candidate reflects the broader trend in appointing personnel from the State owned utilities.

e. Director Administration

The minimum qualifications for appointment are a degree from a recognised university, fifteen years' experience in an administrative post associated with human resources development. The additional qualifications include experience in managing a government organisation and knowledge of government accounting and budget procedures. Therefore, though a purely human resources management position with no additional requirement for technocratic functioning of the Commission, the additional qualifications makes prior governmental experience desirable. There have been two appointees, the first appointed on a contractual basis was from the State owned Transport Corporation<sup>281</sup> and the next director was from the State's Commercial Taxes Department and appointed on a regular basis.<sup>282</sup> This is the only Director level post that has been filled by a regular appointee for a significant period of time. The same also indicates that the filling up of posts with officers on deputation from the State public sector power utilities is a deliberate decision.<sup>283</sup>

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<sup>281</sup> S.Venkata Narayana, from the Andhra Pradesh State Road Transport Corporation between 11.10.1999 to 19.11.2002 .Mr.Narayana passed away when in office.

<sup>282</sup> C. Rama Krishna, regular appointee from 02.06.2003 to 10.10.2014.

<sup>283</sup> 1999 Regulations, Regulation 8 (b); 2013 Supplemental Regulations, Regulation 4.

## Annexure IV

### Positions in the Officer Cadre of the Commission

1999 Regulations (No. of sanctioned positions mentioned in square brackets)	2013 Supplementary Regulations to the 1999 Regulations. (Positions correspond with the officers sanctioned strength)
<p><b>(a) Officers</b></p> <p>(i) Commission Secretary [1]</p> <p>(ii) Director Engineering [1]</p> <p>(iii) Director/Law [1]</p> <p>(iv) Director/Tariff [1]</p> <p>(v) Director/Administration [1]</p> <p>(vi) Adviser to Commission [3]</p> <p>(vii) Joint Director/Engineering [1]</p> <p>(viii) Joint Director/Law</p> <p>(ix) Joint Director/Tariff (Accounts &amp; Financial Analysis) [1]</p> <p>(x) Joint Director /Tariff (Economics)</p> <p>(xi) Joint Director /Tariff (Engineering) [1]</p>	<p><b>Class - A Category – 1</b></p> <p>(a) Commission Secretary</p> <p>(b) Director/ Engineering</p> <p>(c) Director/ Law</p> <p>(d) Director/ Tariff</p> <p>(e) Director/ Administration</p> <p><b>Category –2</b></p> <p>(a) Joint Director/ Engineering</p> <p>(b) Joint Director/ Law</p> <p>(c) Joint Director/ Tariff (Accounts &amp; Financial Analysis)</p> <p>(d) Joint Director/ Tariff (Economics)</p> <p>(e) Joint Director/ Tariff (Engineering)</p> <p>(f) Joint Director/ Information Technology</p>

(xii) Joint Director /Information Technology[1]	
(xiii) Deputy Director/Transmission[1]	
(xiv) Deputy Director/Distribution[2]	<b>Category - 3</b>
(xv) Deputy Director /Law [2]	(a) Deputy Director/ Transmission
(xvi) Deputy Director/Tariff (Accounts & Financial Analysis) [1]	(b) Deputy Director/ Distribution (c) Deputy Director/ Law
(xvii) Deputy Director/Tariff (Economics) [1]	(d) Deputy Director/ Tariff (Accounts & Financial Analysis)
(xviii) Deputy Director / Tariff (Engineering) [1]	(e) Deputy Director/ Tariff (Economics)
(xix) Deputy Director/Information Technology [1]	(f) Deputy Director/ Tariff (Engineering)
(xx) Deputy Director/Personnel [1]	(g) Deputy Director/ Information Technology
(xxi) Deputy Director/Pay and Accounts [1]	(h) Deputy Director/ Personnel (i) Deputy Director/ Pay & Accounts
(xxii) Deputy Director/Consumer Assistance [1]	(j) Deputy Director/ Consumer Assistance
(xxiii) Deputy Director /Media [1]	(k) Executive Assistant to Commission Secretary
(xxiv) Personnel Officer [1]	

	<p>(l) Deputy Director / Planning &amp; Power Procurement</p> <p>(m) Deputy Director / Legal Procedures</p>
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