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Political Economy of Neo-Governments+

Neo-governments are the result of extended delegation - from the people to the legislature to the executive to the neo governments. Given the complex issues relating to neo-governments as new mechanisms of governance, their design and location have to be an integral part of a larger vision and unifying goal of public interest.

INTRODUCTION

Neo-governments (SEBI and SEBI-like institutions) are a class of body corporates mostly created by the statutes. They provide public goods in public interest just as the government does. They have responsibilities - consumer protection, development and regulation - similar to those discharged by the government. They have powers - legislative, executive and judicial - similar to those of the government. They resemble government in many respects, yet they are not the 'government'. They are, in a sense, governments within the government, imperium in imperio, and carry out governance on behalf of the government in a pre-defined framework. They are epistemically known as 'regulators' as their responsibilities include regulation, though they are formally described as authority, commission, board, council, etc.

It is a misnomer that neo-governments are standalone regulators; they have responsibilities that go beyond regulation. For example, SEBI has the mandate to protect the

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+ This is an edited version of the Institute of Chartered Financial Analysts of India (ICFAI)Silver Jubilee Lecture delivered at New Delhi on March 14, 2011.

The *raison d'être* of neo-governments is to hit the moving targets. This is possible only if the law evolves continuously in tandem with the environment to meet the emerging deficiencies, accommodate new products and market designs, deal with innovative transactions by the market participants and improve the safety and efficiency of operations in the market by overcoming the legislative lags.

interests of investors in securities and to promote the development of the securities market, in addition to regulating the same. However, it is mostly termed as the regulator of the securities market because it is predominantly responsible, though not exclusively, for its regulation. Many others, such as stock exchanges, depositories, SROs, and even market intermediaries, which are not called regulators as such, also undertake some kind of regulation of the securities market. Further, while SEBI undertakes extra-regulatory activities, such as investor protection and market development, these are not its exclusive domain. The government, NGOs, the market participants, and even the general public also often undertake activities in these areas.

The traditional statecraft has limitations in certain circumstances. Take the example of modern securities market which evolves continuously. To address effectively the issues of the dynamic nature in such a market, the government has set up a neo-government, namely, SEBI, and equipped it with the necessary powers, expertise and processes, and resources commensurate with the requirements of the task. Being encouraged by the success of this approach, the government has been creating and nurturing neo-governments and sharing governance in various areas with them. The rise of neo-governments to share governance with the government is now a hard reality and the governance through neo-governments constitutes the most important governance reforms in the last few decades.

Neo-governments in the areas of securities market (Securities and Exchange Board of India), insurance (Insurance Regulatory and Development Authority), education (All India Council for Technical Education), electricity (Central Electricity Regulatory Commission), telecom (Telecom Regulatory Authority of India), competition (Competition Commission of India), petroleum and gas (Petroleum & Natural Gas Regulatory Board), airport (Airport Economic Regulatory Authority of India), warehousing (Warehousing Development and Regulatory Authority) etc. are now well established. Such institutions in the areas of pension, commodity derivatives, railways, shipping, civil aviation, mines, automobiles, etc. are at different stages of formation. They are mushrooming in the eagerness of the respective administrative ministries to set up their 'own' neo-governments in response to the particular circumstances of the moment. The list is a long one and growing, yet they differ structurally and functionally from one another. This paper cites, for illustration, mostly examples from SEBI, which is one of the most prominent and evolved neo-governments in India.

There are significant advantages of governance through neo-governments. Neo-governments generally do not share the *'social'* obligations of the government; nor are they subject to the pressures of *'interest'* groups. They build expertise matching the complexities of the task and evolve processes to enforce authority rapidly and proactively.They provide the same level playing field to both government and non-government participants. However, there are also significant concerns. They suffer from democratic deficit as they are not directly accountable to people or their representatives. Government continues to remain accountable for the governance carried out through them, which poses a classic example of the principal-agent problem. In case of exigencies, government is called upon to explain and carry out the rescue operations.The integration of legislative, executive and judicial powers with the same body, which runs counter to the doctrine of separation of powers, raises public law concerns.

Governance through neo-governments is still evolving. Every administrative ministry is experimenting with issues such as composition of neo-government, relation between the government and the neo-government, the finances of neo-government, scrutiny of quasi-legislative and quasi-judicial activities, etc. There is a need for a comprehensive review of the experience so far of this mode of governance and use the learning to improve the spacing and design of the neo-governments within the constitutional schema to make them more effective and address the felt concerns. Based on the review, critical overarching principles may be written into a charter to guide the establishment as well as operations of the neo-governments irrespective of the sphere of governance. This charter would be something similar to the Companies Act, 1956, which provides for all aspects of the company, from its incorporation till its liquidation, its operations, management and governance, etc. irrespective of the kind of business it is in.

The charter would contain the thumb rules. It should ordinarily provide for: (a) a conducive legal framework to enable the neo-government to enforce authority promptly and proactively, (b) appropriate level of independence in terms of resources and

powers to enable the neo-government to build the capability and processes commensurate with the task, (c) institutional mechanism to ensure accountability of the neo-government to avoid its possible failure,(d) internal architecture of the neo-governments to avoid intra-institutional bargains, (e) effective partnership among the government and the neo-governments to work in unison for a common purpose, and (f) spacing of a neo-government *vis-à-vis* government and other neo-governments to avoid gaps and overlaps in coverage and shifting of responsibilities in times of crises. While this paper deals with all of these, it is not a substitute for either a formal review to be undertaken or a formal charter to be put in place by the government.

a. Conducive Legal Framework

There are broadly two forms of law, namely, 'almost complete' and 'almost incomplete'. The former endeavours to enact the law with perfection, which can deal with all the possible circumstances for a long time. An example of such form is the Indian Penal Code enacted way back in 1860. Take the definition of 'theft' given therein, which has not been amended yet. Any activity satisfying the ingredients specified in the said definition is construed as theft. Once the legislature lays down the definition of 'theft' and prescribes the penalty for it, it is for the executive to administer the law. In case of any violation, the executive or the affected party brings it before the judiciary which penalizes the accused, if it is satisfied that it was a case of theft and there is sufficient evidence to the effect that the accused has committed it beyond all reasonable doubts. If any deficiency is noticed while administering or enforcing the law, the legislature amends it, though normally with a time lag. In this form of law, there is almost complete separation of powers among the governmental agencies - the legislature frames the laws; the executive administers and the judiciary enforces them. Till about a century back when the environment was some what dynamic, the governments used this form of law for governance.

Of late, the environment has become very dynamic. The change that used to take centuries earlier is coming about in months, or at best in years. Former Chairman of SEBI, Mr. C. B. Bhave reportedly likened governance challenge in this environment *to a flight that has developed snag at 30,000 feet and it is too late to land and too dangerous to continue flying. The options are limited, "Fly, we must. Repair, we must.*"The governance response to this has been establishment of neo-governments empowered by 'almost incomplete'form of law. This form believes that it is not possible to visualize all the possible circumstances and provide for the same in the legislation. Here, the legislations tend to be skeletal, but have the potential to deal with all the possible circumstances, including unforeseen emergencies.The separation of powers is blurred - the same entity is vested with the quasi-legislative, executive and quasi-judicial functions so that it can enforce the laws proactively and preferably before any harm has been done.

An example is the Securities and Exchange Board of India Act, 1992. It empowers SEBI to register and regulate not only the intermediaries listed in the Act, but also such other intermediaries who may be associated with the securities market in any manner. This allows SEBI to regulate the intermediaries who are not listed in the Act, should the need arise in future and also the new intermediaries that may emerge in future, without an amendment to the law. At the time of enactment, the legislature could not possibly visualize all intermediaries who all would need to be regulated in future. Similarly, the Act mandates SEBI to take such measures as it considers fit to protect the interests of investors with an illustrative list, as at the time of enactment, it could not visualize all possible measures that might prospectively become necessary. This enables SEBI to undertake innovative measures to respond appropriately to the circumstances at hand. For example, SEBI recently secured disgorgement of illegal gains from the fraudsters and disbursed the same among the victims. It debarred certain individuals from becoming directors of listed companies. These measures are not explicitly mentioned in the illustrative list.

The Act also confers on SEBI substantial powers of delegated legislation (quasi-legislative) to make subordinate legislation (regulations) to fill the gaps in laws and to deal with the matters of detail, which rapidly change with time. While the SEBI Act is about ten pages, SEBI has framed regulations running into thousands of pages. This enables it to strike the moving targets at the right time and at the same time, keep the laws relevant. The Act further confers on SEBI the enforcement, including quasi-judicial, powers to enforce the laws made by the legislature and also by itself. In particular, it can by regulations cast obligations on participants and dispense civil penalties for failure to discharge the said obligations. As a consequence, if SEBI considers a particular conduct undesirable, it can within no time outlaw the same through regulations and enforce such regulations. It does not have to wait for the legislature to outlaw any conduct or create an offence through legislations. Nor does it need to seek judicial concurrence for levying a variety of penalties (except prosecution) on the accused. This form of law is eminently suitable for markets which evolve very fast and the authority needs to respond faster with preventive and remedial measures.

As stated earlier, the *raison d'être* of neo-governments is to hit the moving targets. This is possible only if the law evolves continuously in tandem with the environment to meet the emerging deficiencies, accommodate new products and market designs, deal with innovative transactions by the market

participants and improve the safety and efficiency of operations in the market by overcoming the legislative lags. The law should enable the neo-government to expeditiously issue a variety of innovative - administrative and quasi-judicial - preventive, remedial and penal - measures matching the conduct of the participants.This requires an almost incomplete legal regime where the neo-government, which has a better understanding of the environment, has adequate powers of subordinate legislation within the basic frame of the statute and also the powers to enforce the laws proactively and promptly.

While SEBI mostly operates under an incomplete legal regime and that explains its success to a large extent, many neo-governments are not that lucky.They often need prior approval of the government to make regulations. In many cases, they do not have the power to take enforcement actions against the miscreants or penalize them.Often, the neo-government and the Government have powers to make subordinate legislation to carry out the purposes of the statute that has created the neo-government. Occasionally, the neo-government does not have complete authority over the area it governs. For example, SEBI and Ministry of Finance have authority to make subordinate legislation to carry out the purposes of the SEBI Act. SEBI does not have full authority to make subordinate legislation on certain important aspects of the securities market such as recognition of stock exchanges, requirements of listing, delisting of securities, etc. This partly explains different standards, for example, for listing of a government company and a private sector company and distorts the level playing field. These hinder the effectiveness of neo-governments.

b. Independence of Neo-governments

'Independence',as applied in the context of neo-governments,is often misunderstood. It certainly does not mean independence from the laws of the land. Nor does it mean independence from the standard checks and balances evolved over time for the exercise of powers. As much as one may wish, a public agency has to discharge its responsibilities within the frame work of the law and be accountable for its performance. In fact, in a democratic mode of governance, no public agency is independent. Strictly speaking, a system delivers its best only if all its parts have harmonious co-existence and no part seeks independence from the others. In a sense, dependence on one another is a source of strength; vigilance by others keeps one always on toes and prevents failure.Full independence carries along with it the obvious danger of a public agency drifting away from the people and,possibly,even from the very objectives for which it is established.

In a system, only those who can shoulder accountability deserve to be independent. Hence accountability and independence go hand in hand and the mechanism to ensure these needs to be provided together. If an entity is to be held accountable for its performance, it must be independent in terms of resources and capacity and the manner of using resources towards its objectives.A related issue is credibility. Independence is not always granted; it is often earned. Unless an institution establishes its credibility, it cannot claim 'real' independence even if the statute provides for it! It takes years, sometimes decades to build credibility. Central banking the world over, for example, undertook painstaking efforts for decades to earn the level of its independence that it enjoys today. This does not mean that a neo-government should not have any independence to start with. Independence and credibility need to feed on each other in a virtuous circle.

The protagonists of governance by neo-governments believe that neo-governments need to be 'independent' to professionally discharge their responsibilities. They believe that without functional independence in regulatory space, neo-governments would be encumbered by socio-political or legacy constraints and may not be in a position to take 'objective' decisions. Functional independence entails powers, financial resources and capacity commensurate with the regulatory responsibilities. Neo-governments discharge extra-regulatory functions as well where, perhaps, the nature and degree of independence sought is different, as these are not their exclusive prerogatives. Here, neo-governments are just one of the players (the government may have multiple arms performing these tasks) while in the regulatory space they are the umpires. The umpires must be independent - but armed with the knowledge, including the knowledge that their independence is restricted to the game on the field, and that they are accountable for the exercise of their independence.

Government shares governance with neo-governments. This

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does not make the latter the agents of the former. Neo-government is, however, a part of the government and carries on governance in a statutory framework.The legislature and judiciary scrutinize its activities as much as they do those of the executive. In fact, the executive and the neo-government carry out governance in a particular area subject to oversight/scrutiny of the legislature and the judiciary and the statute does not make explicit provision for oversight of the neo-government by the executive. For example, the Government of India (Allocation of Business) Rules, 1961 assign policy relating to regulation and development of securities market and investor protection to Department of Economic Affairs, while the SEBI Act, 1992 entrusts SEBI with the responsibilities to protect the interests of investors in securities and to promote the development of, and to regulate the securities market. Even the SEBI Act, 1992 empowers both Department of Economic Affairs and SEBI to make subordinate legislation to carry out the purposes of the Act.This kind of arrangement puts the executive and the neo-government on the same side as partners in governance, and therefore, the latter is generally considered an extension of the executive. The relationship between these two has important bearing on the independence of the neo-government.

Let us look at the regulatory domain of the neo-governments. Statutes often empower them to discharge most of their responsibilities without recourse to the executive or the government. Many of them make subordinate legislation dealing with matters under their jurisdiction. They issue various kinds of directions in the interests of the market and the customers. They carry out executive responsibilities such as registration, inspection, investigation, etc. They determine and initiate enforcement actions appropriate to the alleged violations. They raise resources to discharge their regulatory functions. They build human resources matching their responsibilities. Their staff enjoys immunity from suit, prosecution or other legal proceedings in respect of actions taken by them in good faith. These statutory provisions, wherever available, promote the independence of the neo-governments and leave little scope for 'interference' in the regulatory arena. Viewed in this context, most neo-governments in India are fairly independent, though in different degrees.

Under the democratic form of government, the legislature scrutinizes the executive and the quasi-legislative activities of the executive. It also scrutinizes such activities of the neo-governments. It is, however, expected to scrutinize only the quasi-legislative and the executive activities of the neo-governments and the quasi-judicial activities of the neo-governments should be beyond its scrutiny. However, it is difficult at times to clearly classify every activity of a neo-government into water tight compartments and to restrict the legislative scrutiny to the quasi-legislative and the executive activities of the neo-governments. Further, a particular matter may have been dealt with administratively upto a point and determined thereafter quasi-judicially. In such cases, it is difficult to demarcate the aspects of the matter which can be scrutinized by the legislature. If proper care is not exercised, the legislature may inadvertently scrutinize quasi-judicial activities which would undermine the independence of neo-governments.

Neo-governments undertake quasi-legislative, executive and quasi-judicial measures - a reason why their powers, as well as image, sometimes get magnified. But given the exalted position of the legislature and the judiciary in the Indian Constitution, independence is not sought in respect of quasi-legislative and quasi-judicial activities of neo-governments. It is considered normal if the regulations and orders of neo-governments are modified or set aside by the legislature/the judiciary, as the case may be. In fact, the statute itself provides the manner and extent of legislative and judicial intervention in the quasi-legislative and the quasi-judicial activities of neo-governments. However, a gentle nudging from the executive has the potential of being perceived as impinging on the independence of the neo-government and, hence, the independence of the neo-governments essentially boils down to independence from the executive.

The Constitution assigns a particular subject to the union legislature. The business allocation rules assign the executive responsibilities relating to the subject to an executive unit, namely, ministry. However, the legislature, by a statute, assigns regulation, development and customer protection matters related to the subject, to a neo-government, and clothes it with quasi-legislative, executive and quasi-judicial powers subject to the oversight of the legislature and the judiciary,without actually curtailing the responsibilities of the ministry. The said statute, however, empowers the ministry to constitute the neo-government and supersede it if the latter fails to discharge functions to its satisfaction. It also empowers the ministry to give directions on policy matters to the neo-government and make rules to further the objectives of the

statute. It requires the ministry to respond to the legislature on all matters relating to the subject for and on behalf of the neo-government. The ministry places the activity reports- the annual report, the annual accounts, the regulations, etc.- of neo-governments before the legislature for scrutiny. It is accountable to the people through the legislature on all matters relating to the subject, even if it is governed by the neo-government. It discharges these responsibilities in the absence of explicit powers of oversight over the neo-government. In exercise of these responsibilities, it engages in constant interaction with the neo-government. The interaction, if not properly calibrated, could be construed as 'interference'.

The ministry is usually perceived to have the ability to influence the decision and policy of a neo-government. One reason is its presence on the governing board of the neo-government. The views of the representative(s), being the nominee(s) of the Minister who is accountable to the legislature, usually carries relatively more weightage in the decision making process. Besides, government is a market participant and is subject to pulls and pressures. It may not always be possible for the representative to take an objective position in all matters involving government. It is better that the board of the neo-government does not have any nominee from the ministry, particularly when it has recourse to give directions to the neo-government. For that matter, it may not have any nominee at all, because a nominee invariably espouses the interests of the entity which has nominated him.

The board of a neo-government needs to have a mix of part-time and full time members. Part-time members are necessary to obtain the industry knowledge/feedback from the people who are otherwise engaged on full time basis in industry/profession and are not willing to come on full time basis on the board of the neo-government. They are also necessary to bridge the democratic deficit the neo-governments suffer from. However, care has to be taken to avoid any kind of conflict of interest. The board also needs to have a mix of members from different disciplines relevant to the subject governed by neo-government. For example, the board of SEBI needs to have members who have excelled in the disciplines such as economics, finance, law or accountancy or have demonstrated capacity in dealing with problems relating to securities market. This kind of composition of the board would promote independence of neo-governments and avoid undue influence on the decision making by neo-governments.

The ministry appoints the chairman and other members of the governing board of the neo-government as well as determines their terms of appointment. The statutes or the rules made thereunder generally provide for the selection procedure for such persons and the maximum duration of the term, and empower the ministry to terminate the appointment before the expiry of the term. The ministry generally has powers to relax these rules, for example, to grant a term longer than that is provided in the rules. The term of an appointment, the termination of the appointment before the expiry of the term, the extension of the term,or even granting a second term depends solely on the subjective satisfaction of the ministry and have the potential to prevent a person from taking a position extremely unpalatable to the ministry. A reasonable and secure tenure, similar to those available for constitutional functionaries, would go a long way to promote independence of the neo-governments. The statute should provide an objective, structured process for appointment and termination of services of persons on the governing boards of neo-governments. Ideally, these matters should be dealt with by a ministry, which does not deal with the subject governed by the neo-government. It is desirable that a new ministry is set up to look after the establishment matters of neo-governments; as such matters relating to PSUs are looked after by the Department of Public Enterprises. A Regulatory Selection Board can be constituted online with PESB to select chairman and other members to the boards of neo-governments.

The ministry can also influence a neo-government through its power to issue directions in matters of policy which the neo-government is bound to comply with and to reconstitute or supersede the neo-government. These powers, though necessary, must be sparingly used. The statute should, therefore, provide an objective, structured process for issuing directions to neo-government, or superseding it in specified circumstances. Such provisions, along with those for legislative and judicial scrutiny, would balance accountability with independence.Thus, the legislature, the ministry and the judiciary should intervene in the working of the neo-governments, but in a transparent manner and to the extent permitted in the statutes.

Independence critically depends on the provision of resources matching the responsibilities. A neo-government cannot exercise its authority independently if it is dependent on somebody for its sustenance. While some neo-governments have adequate and independent sources of income, some others are not that fortunate. Some raise resources and use the same for meeting their objectives, while others turn the same over to the government and depend on budgetary allocation for their expenditure. Irrespective of their potential to raise resources, neo-governments need financial autonomy, though there are various ways to secure it. Entities like Comptroller and Auditor General of India (C&AG) are effective because they have financial autonomy, even though they do not have adequate and independent sources of finance. The neo-government should have resources from those sources which do not conflict with its professional delivery. For example, the fines levied by a neo-government should not come to its

coffers. Otherwise, the neo-government may prefer to impose a higher monetary penalty than warranted or prefer monetary penalties to other kinds of more effective penalties.

The independence also depends on the availability of human resource at the disposal of the neo-government. If the available human resources do not have the professional capability to determine the issues objectively, it would not be able to withstand the perceived or actual influence from various quarters, not necessarily from the ministry. For example, if it does not have an adequate understanding of an issue, it would get carried away by noisy, often articulate, suggestions made by the vested interest groups. Unfortunately, many neo-governments compensate their employees at par with the government employees and often recruit employees on deputation from government sector. This often fails to attract the right talent adequate for the task and develop a cadre of professionals in the neo-government who would upgrade themselves continuously to meet the challenges of dynamic environment.

Quite often, the compensation of the chairman and the members of the boards of the neo-governments are linked to that of the government employees. This reduces the catchment area to the people who are willing to work for government salaries. Further, a serving officer has to resign from service before joining as chairman or member of the board of a neo-government. Though desirable, this reduces the catchment area further. To add salt to injury, most of these people are not paid full salary attached to these positions; they are paid salary minus pension, even though they work full time. This largely explains why these positions are held mostly by retired people, that too, often with government background, who are willing to work out of love for the country, for half the government salary. These are very dynamic and stressful positions and require young leaders with proven track record in the area relevant for the neo-government.

The neo-governments in India are generally independent in varying degrees, although there is scope for greater independence (not absolute independence) for all of them. What surely needs improvement is the public perception about their independence. If a neo-government brings in a measure which is not liked by some market participants, they generally use their influence to seek intervention of the government to persuade or influence the neo-government to withdraw or modify the measure. During the initial and formative days of SEBI, whenever a measure was initiated, it was common for the affected market participants to seek government intervention. On one such occasion, the then SEBI Chairman Mr. G. V. Ramakrishna is stated to have remarked: "The way to Mittal Court (then SEBI office) from Dalal Street is not via North Block (the head quarters of Ministry of Finance)". This happens because of the perception that the affected parties can protect their interest if they can adequately influence the government. To the extent the vested interest groups succeed in their endeavours, this perception gets reinforced.

Further, the courts in India pass thousands of orders every day or set aside the orders passed by lower judiciary. These hardly get reported in media and rarely criticized for appropriateness. These rather serve as learning tools for professionals. The losing party respects the orders even while appealing against the same before the higher judiciary. Unfortunately, the same is not true of a quasi-judicial order passed by a neo-government. The affected parties at times resort to media campaigns against such orders of the neo-governments as well as the functionary who has passed the orders. This happens because of the perception that the orders of the judiciary cannot be influenced, while that of a neo-government, which is considered an extension of the ministry, can be. The judiciary has earned this kind of credibility over centuries of impartial and objective work, while neo-government is a new kid in the block. The neo-governments need to demonstrate objectivity and impartiality in their orders for years and the public needs to notice such objectivity and impartiality.

c. Accountability of Neo-governments

The government is ultimately accountable to the people for governance through the neo-government. Since the neo-government is not directly accountable, it may not always be as sensitive to the consequences of its omissions and commissions. This calls for a well-crafted accountability mechanism to avoid possible failure of the neo-government. However, this does not call for a well-crafted control mechanism over the operations and the management of the neo-government. It is important to note that accountability is not synonymous with control and less of autonomy. In fact, the higher the level of autonomy, the greater is the accountability and *vice versa.* In other words, the accountability should be commensurate to the level of autonomy.

Current accountability arrangements in India focus mainly on their role as regulators, probably because they are so perceived. Through the administrative ministries, the neo-governments lay on the table of the Parliament subordinate legislation, annual report detailing their activities and performance, and statement of accounts audited by the C&AG. The departmental standing committees scrutinize their activities while approving their demand for grants or the demand for grants of their administrative ministries, as the case may be. They are obliged to carry out the policy directions of the government. In the face of substantial failure, the government has the power to reconstitute the neo-governments under specified circumstances by following a

special procedure. Their orders are subject to appeal, generally before a tribunal, with provision of judicial review to the Supreme Court.

There are comparable bodies in other countries. A case in point is the Securities and Exchange Commission in the USA. It is required to consult the stakeholders and the public, and reveal the associated costs and benefits, while making subordinate legislation. Its budget as well as the subordinate legislation with important bearings needs to be pre-approved by the Congress. It appears before the Congress twice a year and gives testimony before the congressional oversight committees as often as required. The Government Accountability Office generally assesses its performance in terms of its objectives and efficiency and reports to the Congress. It seeks administrative sanctions from an administrative law judge. It refers matters to the Justice Department for launching prosecution before the District criminal court. Another neo-government, namely, the Commodity Futures Trading Commission, has to even justify its continuation every five years before the Congress. The accountability arrangements are well laid out in the UK, where a 'private limited company' acts as the Financial Services Authority (FSA). It reports to the Parliament through the Treasury and the Director General of Fair Trading keeps a watch from the sidelines on the conformity of the FSA's regulatory actions. It publishes an annual performance account of the fairness and effectiveness of its own enforcement process, half-yearly performance account for service standards and customer satisfaction, quarterly performance account on business plan milestones, etc.

There are certain standard arrangements that advanced jurisdictions have adopted for ensuring the accountability of the neo-governments. These include: (a) *ex-ante* accountability such as consultation with the public and the stakeholders before taking an action, (b) *ex-post* accountability such as reporting actions already taken, (c) explanatory accountability such as disclosure of the rationale of the actions, (d) procedural accountability such as adhering to standards of procedural fairness and transparency, and (e) performance accountability such as achievement in terms of objectives. The accountability arrangements rest on five main planks: (a) articulation of the responsibilities, objectives and targets against which the neo-governments may be held accountable, (b) provision of powers, resources and capacity of the neo-governments matching their assigned responsibilities, (c) assignment of the affairs of the neo-governments to competent people who are comfortable with the accountability arrangements, (d) identification of stake holders to whom the neo-governments may be accountable, and (e) education of the stake holders about the manner of ensuring the accountability.

With the growing reliance on the neo-governments for governance, it is important to follow a holistic approach to

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building a uniform system of accountability. As stated earlier, neo-governments are not averse to being accountable to the legislature and the judiciary. They, being extensions of the executive, have hesitation to be accountable to the executive, even though the executive head is accountable to the legislature for the actions and inactions of the neo-government. The trend in advanced jurisdictions is to give neo-governments almost complete autonomy from the executive and make them accountable to the legislature and the judiciary directly as much as possible. The executive should man the neo-governments with capable people who value independence and are comfortable with the accountability arrangements, and make provision for resources matching their responsibilities. The judiciary may exercise oversight over the quasi-judicial activities of the neo-governments through dedicated specialized tribunals with provision for further appeals to the Supreme Court. This would help rapid review of regulatory actions, develop case laws and enforce discipline in the quasi-judicial process followed by neo-governments. This would enable an aggrieved party to access a quick, efficacious and inexpensive mechanism to secure justice.

The Legislature may exercise general oversight over the quasi-legislative and the executive activities of neo-governments. Given the number of neo-governments across the economy and the volume of their activities, and the pressure on Legislature to deliberate the various Bills brought before it, the Legislature needs to set up legislative committees, each of which would exercise oversight over a few neo-governments on its behalf. The committee should engage professional agencies to monitor and review on an ongoing basis the working of the neo-governments *vis-à-vis* that of others in its peer group within the country and overseas, and submit reports for its consideration. It may examine the subordinate legislations, the reports submitted by the neo-governments on their working and the reports submitted by professional agencies on the working of the neo-governments and make its recommendations.The neo-

governments may have opportunity to explain their conduct and performance to the said committee. The committee and the neo-governments should meet at regular intervals, instead of having event specific meetings which could be clouded with impressions from the event.

Government may create a new department, called Department of Neo-governments, for developing standards/best practices for establishment of neo-governments, including accountability arrangements, developing standards for rule making and enforcement of rules by them, and for promoting the best practices across the neo-governments. The crux of the issue is to spell out *ex-ante* the mechanism of accountability to the legislature, the executive, the judiciary and the other stakeholders at large and to institutionalize the same along with matching resources and capability so that it does not suffer from subjectivity.The legislature and the judiciary must ensure that the executive and the neo-governments adhere to those standards and best practices. The neo-governments may disclose all relevant information to their stake holders and take their inputs for making laws and their decision making process may be transparent to the public and the media. They may disclose their performance in different areas on various parameters at periodic intervals, as they often require the regulated entities to do. The government and neo-government should educate the stakeholders about the accountability mechanism pertaining to the neo-governments.

d. Architecture of Neo-governments

There have been skeptics of neo-governments from early on. Particularly relevant was the powerful argument advanced by George Stigler in the early 1970s about regulatory capture. In its simplest form, it was argued that the regulatory agencies would come to espouse the cause of the industry which they are supposed to regulate rather than the cause of the consumers whom they are supposed to protect. Regulatory capture and regulatory bargaining in a multi-regulatory environment provided a strong concoction for their lethargy and consequently regulatory collapse in the run up to the recent financial crisis. The regulators not only supported the conflict-of-interest-ridden organisational structures and product over-innovations of the high street but also adopted 'feather-touch' regulation and oversight of these entities and their activities. The important lesson from the financial crisis is that the neo-governments need to build their capability to withstand the influence of the regulated.

They also need to build capacity that would inspire the confidence of the consumers and the regulated. Their expertise must be such that their findings enjoy deference from judiciary, something similar to the doctrine of deference in the USA. The Judiciary should not disturb the professional findings of a neo-government unless it is *malafide*. They should have professional decision making process based on adequate research and consultation with the stakeholders. They should undertake at periodic intervals self-assessment of their own performance and disseminate the outcome of such assessment. They should disclose their performance against pre-set benchmarks quarterly, semi-annually and annually. They should continuously rebuild the oragnisation to meet the dynamism of the market they oversee. This will build credibility of the organization.

The neo-governments are extremely powerful creations by their design and stature. They have quasi-legislative, executive and quasi-judicial powers rolled into one, while in statecraft these functions have been separated into legislative, executive and judicial functions and assigned to separate agencies to facilitate mutual checks and balances. The neo-governments, therefore, derive extra-ordinary powers arising from the fusion of quasi-legislative, executive and quasi-judicial powers. The Supreme Court made an interesting observation in the context of SEBI's powers in the case of *Clariant International* v. *SEBI* (AIR 2004 SC 4236): *"The SEBI Act confers a wide jurisdiction upon the Board. Its duties and functions thereunder, run counter to the doctrine of separation of powers. Integration of power by vesting legislative, executive and judicial powers in the same body, in future, may raise a several public law concerns as the principle of control of one body over the other was the central theme underlying the doctrine of separation of powers".* Though the Constitution of India does not envisage strict separation of powers, it does indeed make horizontal division of powers among the legislature, the executive and the judiciary. In keeping with the spirit of the constitutional provisions, every neo-government must ensure that its three wings exercise quasi-legislative, executive and quasi-judicial powers with independence and without intra-institutional bargaining and, thereby, avoid potential public law concerns prognosticated by the Supreme Court.

One critical function of neo-governments is making Regulations. Most of the statutes creating neo-governments are silent about its process. For example, the SEBI Act, 1992 merely states that the regulations shall be made in the interest of investors and markets and after the notification of the regulations, the same shall be laid on the tables of the Parliament. Even though it is not a statutory requirement, many neo-governments have evolved a transparent and consultative process to make regulations. SEBI, for example, has a large number of standing advisory committees to deliberate on the evolving issues and their possible resolution. It also appoints ad-hoc committees on specific issues. It generally issues a concept / discussion paper before or after consultation with the standing advisory / ad-hoc committee concerned. It sometimes

organizes workshops of stakeholders to elicit their feedback. It examines the feedback on concept/discussion papers internally or through the advisory committees. In exceptional cases, a revised concept/discussion papers is put out seeking another round of comments/feedback. This consultation process brings ground reality and makes the decisions sound and acceptable by the regulated. Based on the examination of feedback, it formulates an agenda note proposing the necessary regulations. The Board of SEBI considers the agenda and approves the proposed regulations with appropriate modifications. While the board agenda and minutes are available in public domain, the decisions are conveyed through a press release on conclusion of the board meeting and the necessary regulations are issued thereafter through a gazette notification. This process need to be strengthened further by making the comments of the neo-government on each feedback available in the public domain, as has been done recently by the Airport Economic Regulatory Authority, and public hearing of the proposed regulations, as is being done by the SEC. This process need to be emulated by all the neo-governments.

Another critical function is the initiation and the disposal of the enforcement actions. The Act and regulations made thereunder generally do not provide the process. Nevertheless, the neo-government should ensure that the process is just and fair. This means that the accused should have adequate notice, provisions of documents/evidence relied upon by the neo-government, and reasonable opportunity to defend. If an accused believes that the authority may be biased or interested, he should have the option to seek a change of the authority. In fact, the Code of Ethics for Chairman and Members of SEBI Board provides this facility to the accused. The authority disposing of the enforcement action should be free from bias, including official bias. An authority, which has ordered or supervised the investigation into the matter, may be tempted to punish the accused even if there is not enough evidence. This bias is avoided in SEBI where an authority, other than the one who has initiated the proceeding, disposes of the proceeding. The case of the authority, who has initiated the proceeding, is presented by an Advocate or a Presenting Officer before another authority who disposes of the proceeding, after hearing the accused.

This could be formalized by the neo-governments setting up dedicated quasi-judicial units and posting officers to that department on a tenure basis. These officers must have a long experience in dealing with the problems relating to the area and undergo intensive training to deal with quasi-judicial matters. During the said tenure, they would do only quasi-judicial work, in addition to participating in board matters, as may be required. They would hear both the operational department(s) who have alleged the irregularity and the accused and, then, pass appropriate orders. This would be akin to the process before the Administrative Law Judge where the representatives of the SEC and the accused present their case. These officers would move back to operational departments after the expiry of the said tenure. This would ensure that quasi-judicial officers do not carry any official bias while they remain abreast with the technical knowledge.

There must be time-lines for completion of every activity of the neo-government. It must dispose of any application from market participants, such as for registration, within a specified time. It must complete the various processes such as inspection, investigation, enquiry, audit, etc., in a time bound manner. It must initiate appropriate enforcement actions immediately on conclusion of the fact-finding process. It must conclude the enforcement actions expeditiously because delay defeats justice and causes hardships to the accused as well as the victims.The accused is looked down with suspicion and practically ostracized from the market till the conclusion of the proceeding. The waiting for conclusion of the proceeding occasionally becomes more painful than the worst penalty the proceeding may warrant. The neo-governments occasionally issue interim orders which often operate as penalty before conviction. The accused suffers the interim directions till the conclusion of the fact-finding process and also the enforcement actions emanating therefrom. Interim orders must be avoided to the extent possible and such orders must cease to have effect after the passage of a certain time. The authority should dispose of the enforcement actions by issuing speaking orders which should be disseminated on the web-site.

The statute often empowers a neo-government to initiate a number of enforcement actions simultaneously for the same act of irregularity. For example, if an irregularity has been committed by an intermediary, the SEBI Act, 1992 empowers SEBI to initiate an enquiry proceeding, which may lead to

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suspension/cancellation of the registration of the intermediary concerned. It may initiate an adjudication proceeding which may lead to imposition of monetary penalty. It may also initiate section 11B proceeding leading to issue of an order directing a wide variety of preventive/remedial measures. In addition, it may initiate prosecution before the competent court. In fact, wherever it considers appropriate, it initiates a combination of these proceedings. If SEBI is not conscientious, every irregularity could attract multiplicity of proceedings and imposition of multiple penalties against the same person for the same offence, though it is not uncommon for these multiple proceedings resulting in conflicting outcomes. This is in addition to penalties levied by self-regulatory organizations, such as the stock exchanges against the brokers, for example. Further, since the securities laws are in addition to, and not in derogation of, any other laws, an accused may be subjected to enforcement actions simultaneously under the securities laws as well as other laws. Ideally, on completion of the fact finding process, the executive unit of the neo-government should file a charge sheet and present its case, through a presenting officer or an Advocate, before the quasi-judicial unit, which would follow the principles of natural justice and pass appropriate orders. These orders may provide for preventive/ remedial measures, monetary penalties and/ or suspension/ cancellation of registration. Besides, if considered necessary, the neo-government may approach appropriate courts for criminal sanctions.

The neo-governments must endeavor to write regulations in plain English. Despite this, different people would derive different meanings from the same provisions. The economic agents would be taking huge risks if they take decisions based on their understanding of law, even if, most often, their understanding turns out to be correct. They can have some comfort if they can get some kind of guidance or advance ruling from the neo-government where there is not enough legal certainty about the applicability of the particular provisions or the obligations thereunder.Though not a perfect one, the SEBI (Informal Guidance) Scheme, 2003 provides some comfort to market participants in this regard.

A neo-government needs to recognise that it alone does not have the exclusive jurisdiction over extra-regulatory activities and that it is only a part of the governance ecosystem. It must, therefore, actively seek the support of the government and other neo-governments involved as well as the market participants while pursuing extra-regulatory activities. For example, no single agency can do by itself enough in the area of financial literacy. This requires pooling of resources and promoting public-private partnership. Similarly, a neo-government should seek co-operation from the government and the other neo-governments while pursuing its regulatory objectives. It must, in turn, extend its support and co-operation to the government and the other neo-governments whenever called upon to do so. It must establish harmonious relationship with the government and the other neo-governments as it would not be able to deliver effective governance on its own.

We have to bear in mind that the neo-governments are popularly known as regulators in their respective areas. This can create perverse incentives in the sense that these agencies focus only on regulation and not so much on the other objectives formally assigned to them and the public too evaluates their performance only in the area of regulation. As a result, either they do not perform that well in extra-regulatory areas or their performance in those areas are not noticed. Further, quite often, they have apparently conflicting objectives. Most neo-governments have the mandate to protect the consumers and to develop the market. It is possible that a measure which promotes market development may not necessarily promote consumer protection. As a result, a neo-government may not take any developmental initiative which has the potential to adversely affect the interests of the consumers. This defeats the very purpose of creation of the neo-governments. They need to pursue all their objectives simultaneously and manage the conflicts skillfully.

e. Partnership with Government

As illustrated earlier with an example, both Department of Economic Affairs and SEBI have jurisdiction over the securities market. Even the SEBI Act, 1992 empowers both to make rules and regulations respectively to further the objectives of the Act. This overlap leaves scope for duplicity and inconsistency in the measures and shifting of responsibilities at the time of crisis. More importantly, this gives an impression that the market participants can pursue their objectives with either of them. In the early days of SEBI, the affected regulated entities used to take the first available flight to North Block with every significant restriction that it imposed on them. This happened because many genuinely believed that SEBI was subordinate to the ministry, it has no option but to act the way the ministry wishes, and the ministry had a legitimate role in the matter. In order to

reinforce the independence of the neo-governments and to promote harmonious relationship between the ministry and the neo-government, it is useful to discourage such attempts by the regulated entities.

This is difficult to achieve in practice as the ministry is called upon to explain the conduct and performance of the neo-government before the legislature and the government has the responsibility to deliver the governance in the area assigned to the neo-government. For example, the Ministry of Finance is called upon to explain to the Parliament the developments in the securities market, including the performance of SEBI, even though the government has assigned the governance of securities market to SEBI. Further, the ministry quite often receives complaints of citizens against economic agents regulated by neo-governments and also neo-governments themselves. In such cases, the ministry faces a dilemma. If it does not intervene in the matter, it runs the risk of being perceived as ineffective or insensitive to citizens. If it calls for a report or seeks certain actions from the neo-government, it is construed as interference. Given the precarious position of the ministry *vis-à-vis* the neo-government, the latter must never put the former in a spot.

One option is to allow the neo-governments to explain their quasi-legislative and the executive activities directly to a parliamentary committee, which may, after consideration of all issues, give appropriate advices. The committee may evolve a structured mechanism to receive inputs on matters of policy from the stakeholders and intervene, in a transparent manner, in such matters after hearing the neo-government. Another option is to ensure that the neo-governments have staff who have competence and integrity and who inspire confidence among the citizens. The ministry can then forward the complaints to the neo-government and allow it to take action as it may consider appropriate. Still another could be that the ministry abdicates / refrains from using its powers of making rules, except on the administrative matters of the neo-government. This requires a well calibrated co-ordination between the government and the neo-government and understanding and mutual respect for each other.

One objective of the governance through the neo-governments is to improve efficiency which is not otherwise possible within the usual statecraft. It is imperative to let the neo-governments have their own processes and procedures, that enhance efficiency, to deal with a matter, rather than adopt the processes and procedures followed by the government. Sometimes, however, the government expects and the neo-governments follow, either on account of inertia or fear of going wrong, the processes and procedures established in the government. For example, the circumstances may warrant an immediate advertisement in the press in the interest of the consumers. The government process requires it to be issued through DAVP. If this process is followed, the advertisement may not appear in papers immediately and thereby defeat the very purpose of the advertisement. Therefore, the neo-governments need to evolve their own process, with adequate checks and balances to avoid any possible misuse, of issuing advertisements. Similarly, the neo-governments need to develop specialized skills matching the tasks by breaking away from the HR policies of the government. Their effectiveness would remain a challenge if they were to compensate their staff at par with the government employees. They should have their own recruitment processes and pay structures to attract and retain the talent appropriate for their task.The agencies like C&AG, CVC, CBI should insist on adherence to the standards and the practices evolved by neo-governments and/or by the Department of Neo-governments.

The neo-governments have defined boundaries in terms of products, participants, and geographies and have limited powers and responsibilities. Certain situations may demand exercise of powers beyond these boundaries or exercise of more powers than those available with them. This realization comes only with practical experience. For example, a neo-government may need telephone call records of some persons to establish their involvement in a fraud. It may need certain information from another agency - domestic or overseas - to unravel the design of the fraudsters. It may need to follow up on the activities of a certain entity overseas. It may need powers to issue interim directions pending enquiry or investigation. In such cases, the government, which is sovereign, needs to support the neo-governments by ensuring that the neo-governments get the powers to do these things and facilitate them by bringing together the various agencies for a common purpose in the public interest. Similarly, the development of the market needs the co-operation of many agencies. For example, the development of the corporate debt market needs support of the central government, the state governments, and many neo-governments. In such cases, the government needs to not only extend its support, but also garner the support of the state governments and the concerned neo-governments.

Let me now turn to the conflict of interest arising from the government's dual role of a policy maker and a market participant. Quite often, the government-owned enterprises participate in the market and compete with the private enterprises. It may not always be possible for the government to treat the PSUs and the private enterprises at par and there is a possibility that the market would view the government policies and regulations with suspicion that they promote the interests of the PSUs. This is one of the main reasons why the government established neo-governments to oversee the activities and markets where PSUs also participate. This builds

the perception that both the PSUs and the private enterprises have the same level-playing field. The PSUs, who are creations of the same government which has created the neo-government and who are historically accustomed to special treatments, at times seek and secure exemption from compliance with some of the regulations of the neo-governments. Let us take an extreme example of how this can potentially happen. Let us say a PSU has issued a class of securities on certain terms in compliance with the securities laws. As the market conditions change, it may find such terms unfavourable. But it cannot change the terms of issue under the securities laws. However, the legislature can enact a new law to change the terms of issue applicable to the PSUs. While the legislature can enact overriding laws in public interest, such an approach undermines the governance through neo-governments. Another example is the implementation of corporate governance standards. SEBI is not enforcing these standards on listed companies because many PSUs do not comply with the same. Occasionally, the PSUs, because of their parentage, often demonstrate a higher level of compliance with the regulations prescribed by the neo-governments. Once the PSUs lead the way, the others fall in line. This facilitates easy acceptance of reforms and new regulations.

Government has not laid down the standards for the establishment and the operations of the neo-governments. Every administrative ministry invents a model based on its expectations from the neo-government. As a result, the structure of neo-governments differs widely. For example, for some neo-governments, there are dedicated tribunals to scrutinize their orders and act as appellate authorities, while for the others, there are no such mechanisms. In some cases, the government itself is the appellate authority against the orders of the neo-governments. Similarly, some neo-governments have their own independent budgets,while the others depend on grants from the government. Some neo-governments have representatives of the government in their governing boards, while some others do not have such representation. Some neo-governments have only whole time members, some others have mostly part-time members. While some degree of flexibility is necessary, there is a need for some overarching principles that would guide the establishment as well as the operations of the neo-governments. In this respect, the executive agency framework of the UK may provide some useful guidance. This format may also cover the best practices to be followed by a neo-government. For example, it may be specified that all regulations need to go through a standard consultation process and that the neo-governments need to have a certain defined standard of transparency in their operations. This has been done very explicitly in the Airport Economic Regulatory Authority of India Act, 2008. This Act requires the authority to ensure transparency while exercising its powers and discharging its functions by (a) holding consultation with all the stakeholders, (b) allowing all stakeholders to make their submissions and (c) making all decisions of the authority fully documented and explained. Department of Neo-governments can adopt the best provisions and practices based on the experience and incorporate those into the charter to serve as a guide for the ministries.

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f. Co-operation among the Neo-governments

Government has been creating neo-governments for every possible niche area. Let us look at the financial markets. Traditionally, businesses were clearly differentiated - banks offered banking services, insurance companies offered risk sharing, securities companies offered resource allocation and employers provided pension - an entity carried on only one kind of business. This established entity-based regulation and separated the supervisory structures along the business lines. Thus, we have RBI as the primary regulator for banking, IRDA for insurance, SEBI for securities markets and PFRDA for pensions. Add commodity derivatives, and we have one more market regulator, namely, FMC. The number increases further if we add the administrative ministries associated with each of these regulators and the authorities responsible for the governance of each kind of market participants. To complicate the matrix, a few authorities jointly and concurrently regulate certain segments. For example, MoF, MCA, RBI and SEBI regulate different aspects of securities markets simultaneously. There are also sub-regulators, such as NABARD and NHB, and general regulators, like Competition Commission of India (CCI) as well as regulators at the central and the state level. A large number of self-regulatory organizations (SROs) and industry bodies, who litter the regulatory canvas, share the responsibility of regulation with the primary regulators.

In the recent decades, the economies of scale and scope together with deregulation and globalization have blurred the legal and geographic boundaries between markets in banking,

securities, insurance and pension. Consequently,we now have financial supermarkets - entities that simultaneously engage in activities that come under the purview of multiple regulators. This prompted a shift to activity-based regulation: an entity carrying on three different businesses is simultaneously regulated by three different sectoral regulators as well as many administrative ministries, general regulators, sub-regulators and SROs. Thus, the regulatory architecture of the financial sector in India is as complex as it could be.

The matrix of markets, products and participants in different segments – banking, insurance, securities and pensions at different layers – sub-national, national and supra-national, exhibit considerable overlaps, gaps and twilight zones. This overlap leaves scope for duplicity and inconsistency in regulations and shifting of responsibilities at the time of a crisis. Such overlap has often ended up in the courts, such as the dispute between the CERC and the FMC over the development and the regulation of the market for 'power'. It occasionally leads to prescription of competing standards such as in the area of corporate governance by SEBI and the Ministry of Corporate Affairs. On the other hand, there are instances where no regulator takes any initiative because it is the responsibility of many regulators. For example, we do not yet have a framework for grooming and regulating investment advisers, who operate in the jurisdictions of many regulators. There have been problems with regulatory gaps also. For example, taking advantage of the gaps, plantation schemes merrily collected thousands of crores of rupees from innocent investors in the mid-1990s and the debate on who would regulate such schemes went on till a sort of scam broke out. We have twilight zones when a market or product has many elements and these elements are under the jurisdiction of different regulators. This sometimes leads to quarrels between the regulators: in one such instance involving determination of the regulatory jurisdiction over a financial product (ULIP), the then Finance Minister, Mr. Pranab Mukherjee lamented in Parliament that the regulators were quarrelling like petulant children and the government had to step in through an ordinance.

Further, there is a potential for tension between the general regulators and the specialized regulators. While one deals with a particular market, another may deal with one aspect of every market. For example, the CCI deals with competition issues in all markets while SEBI deals with all aspects of the securities market. Both these regulators may wish to have independence to determine the pace and manner in which to usher in competition into the securities market. Such determination by one would amount to 'interference' in the domain of the other. The neo-governments need to develop inter-institutional arrangements, which are made publicly available so that the market participants are aware of the respective jurisdictions.
There are certain infrastructures, which if developed, will be useful for all the segments of the financial markets. From the perspective of each neo-government, private benefits fall short of private costs resulting in underinvestment in such infrastructure and consequentially underdevelopment of the market. Cooperation among the neo-governments has the potential to overcome such problems, as it would help look at public benefits and public costs of such infrastructure more objectively and holistically. For example, every neo-government in financial markets tends to under-invest in financial literacy; the problem can be addressed if they work together. Further, some activities require efforts of many neo-governments. We would not be having a flourishing exchange-traded currency derivatives market today but for the very fruitful co-ordination between RBI and SEBI. Similarly, we would not be able to take the proceedings relating to a financial sector scam, the tentacles of which spreads over the entire financial market and even beyond, to a successful logical end, if every neo-government takes a limited view of the irregularity in its jurisdiction only.

Every neo-government follows a unique approach or process. This distorts the level-playing field and creates arbitrage opportunities. For example, one neo-government may develop market for a product by laying down a conducive market design, while another may develop the market for an essentially similar product by soliciting business for the same. Similarly, one neo-government may cancel the registration of a market participant, while another may impose a monetary penalty for a similar kind of irregularity. One may follow judicial process to dispense penalty, while another may follow administrative process. Different neo-governments have laid down different standards and processes for the participants and their activities. Though the standards need to differ based on the nature of the activities, there are certain fundamental standards common to all of them. For example, a market participant has to be a fit and proper person. Unfortunately, we do not have this requirement in all segments of the financial markets. At times, similar products get different treatments in different jurisdictions because these are so permitted or so promoted by two different neo-governments. Similarly, we have different degrees of outsourcing, self-regulation, transparency, consumer protection, etc., which contribute to regulatory arbitrage.

One extreme solution is to have one neo-government for the entire financial sector, another for all utilities, etc.,to avoid the issues arising from multiple neo-governments. If this argument is extended further, we could end up having only one neo-government for all kinds of activities / markets. This would, however, deprive us of the advantages of domain expertise of the neo-governments. The aim should be not to have too many neo-governments, nor too few. There is a need for neo-governments for reasonably compact areas and the

responsibilities among them need to be demarcated as clearly as possible. Gaps and overlaps need to be avoided to the extent possible. Despite extreme care, it would still not be possible to contain the neo-governments in water-tight compartments. They as well as the government would need to complement one another. This would require an institutionalized approach to coordination at multiple levels among the neo-governments and between the government and the neo-governments. This has been achieved recently in the financial sector through the establishment of Financial Stability and Development Council (FSDC) consisting of the government and all the neo-governments.

Conclusion

Governance through the neo-governments is still evolving. There is yet no comprehensive review of this model of governance in India. The reviews elsewhere seem to indicate that while such agencies have been successful in securing better protection of the customers, in a few cases their work has become disconnected with the objectives of the elected governments. The impression prevails that some of the neo-governments in India have earned credibility at par with constitutional bodies. In an article in Wall Street Journal dated November 23, 2010, the author Sadanand Dhume observed:"Unlike many developing countries, India has a record of sustaining credible institutions, among them the Supreme Court, the Election Commission and the Securities and Exchange Board of India." Nevertheless, there is a need for a comprehensive review of the experience so far of governance through the neo-governments and use the learning to improve the location and design of the neo-governments to make them more effective.

Neo-governments are the result of extended delegation: from the people to the legislature to the executive to the neo-governments. Given the complex issues relating to neo-governments as new mechanisms of governance, their design and location have to be an integral part of a larger vision and unifying goal of public interest. Even with a charter in place, the administrative ministry needs to be more than a visionary in designing and spacing each new neo-government or in restructuring an existing neo-government. However, a neo-government should be created only after it is considered the most appropriate delivery mechanism based on a business review. It should cease to exist on completion of every fifth year unless it is extended by a Reauthorization Act after a legislative evaluation of its working in the preceding five years and of the need for its continued existence in the changed environment.
The Constitution of India does not explicitly recognize the neo-governments as a mechanism for governance. When governance through the local self-governments was considered necessary, the Constitution was amended to explicitly recognize them and specify their responsibilities, including their autonomy and accountability arrangements. Perhaps, the time now has come when a clear Constitutional provision may be considered to explicitly recognize the neo-governments and provide for an appropriate and uniform autonomy-accountability framework for them. While deciding their 'space' in the constitutional schema, it would be ideal to define the 'autonomy' arrangements of the neo-governments *vis-à-vis* the three organs of the State - the legislature, the executive and the judiciary. Similarly, it would be useful to specify the 'accountability' arrangements for the neo-governments *vis-à-vis* the various stakeholders.This is necessary to clear the cobweb of the 'practical' aspects of independence, avoid the institutional tensions, and minimise the transaction costs in an increasingly information asymmetric world. ■

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