

# NEW LAWS ESTABLISHING INDEPENDENT REGULATORY AGENCIES IN THE INDIAN WATER SECTOR: Long Term Implications for Governance

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## Abstract

*Independent Regulatory Agencies (or IRAs)<sup>3</sup> are new governance mechanisms introduced at the state level in the Indian water sector through special laws, which bring in comprehensive and fundamental changes in governance of the sector. This paper aims at examining these changes and their impact on the governance of the sector as well as on the interests of the 'non-dominant' sections of society.*

## Keywords

Water Sector Reform, Independent Regulation, India, Reform Laws, Water Governance

The paper focuses on the five aspects of the structure and functioning of the IRAs as defined by the laws: Process of Formulation of the Laws, Selection of Members of IRAs, Composition of IRAs, Procedural Matters in the Functioning of the IRAs and Substantive Matters in the Functioning of the

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<sup>3</sup> Independent Regulatory Agencies is a term to denote a category of organizational mechanisms which are given the "regulatory" functions and are supposed to be "independent" of the state. Such agencies can take different organizational forms in different sector across countries such as an "Authority" or "Commission" in the case of India.

IRAs. The findings are based on the analysis of the three laws and inputs received through interactions with members of key stake-holding groups in the water sector. On the basis of key findings, the paper concludes that the IRA laws effectively disenfranchise non-dominant sections of the society. The new water 'entitlements' regime to be established by these laws would near-permanently quash hopes of non-dominant sections of getting access to water. The changes brought in the governance system would not only delegitimize the IRAs themselves, but would also seriously jeopardize smooth and efficient governance of the sector. The emerging situation in the state of Maharashtra, however, indicates some possibility of positive change.

## Background

Like many other developing countries, India initiated broad-based economic reform in 1991, in the wake of a brief period of monetary crisis. The economic reform brought in a long list of changes in infrastructure sectors, which are often described as fundamental, comprehensive, and irreversible. The sectoral reform included a set of measures—which are referred to as (organizational) 'restructuring' of the sectors—that involved comprehensive and fundamental changes in the roles, responsibilities, authorities and relationships among the main actors in the sectors. Restructuring measures also included equally fundamental institutional changes in the form of changes in basic principles, norms and procedures concerning key matters of governance of the sectors. Restructuring measures—both organizational and institutional—were primarily aimed at eliminating the monopoly of the state in governance of the sectors and simultaneously, facilitating entry and a significant role for private interests in the sectors.

The rationale underlying reforms and restructuring is too well-known to merit detailed elaboration here. The rationale argued that the state had monopolized and taken control over all the governance roles, including the responsibilities of policy-making, provision of services or goods (which included implementation and making executive decisions) and regulation of governance.<sup>4</sup> This led to serious erosion in the overall efficiency and effectiveness of governance, severely affecting the overall performance of the agencies in the sectors and precipitating the financial crisis that crippled most infrastructure sectors. Hence, the state should do what it could do effectively and leave other roles to other agencies, including the private sector agencies. Based on this line of thinking, the prescription was three-fold: (a) divesting all responsibilities from the state other than that of policy-making, (b) entry of private sector agencies for taking over the function of provision and the responsibilities that come with it (i.e., implementation and making executive decisions), and (c) establishment of independent regulatory agencies (or IRAs) (Wagle and Dixit, 2006).

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<sup>4</sup> Here, regulation of governance essentially means monitoring the other functions of the governance (i.e., policy-making and implementation/ making executive decisions) and ensuring that the relevant laws, rules and norms are adhered to. It also includes arbitration.

This broad generalized story of infrastructure sectors fits very well to sectors like electricity.<sup>5</sup> The story of the water sector has some variations, though the main-stay of the story remains more or less the same. The main root of these differences is the distinct nature of water as a resource. It is a resource that cannot be generated; it existed before the entry of the state and the state can only increase the scale of its tapping and distribution. The presence of the state in the Indian water sector certainly grew by leaps and bounds in the post-independence era, especially through a large number of dams and irrigation projects—of different types and different scales—that largely tapped water from the pre-existing sources. This type of intervention by the state made water available in a larger proportion, in many cases, to a limited number of (and new) water users, by encroaching upon the water use and rights of traditional beneficiaries of old water sources (Thakkar, 2009). This naturally gave rise to intense contestation over water, creating a strong politics among a large number of stakeholders with substantial stakes. Other reasons apart, the contestation and politics over water gave rise to various movements and struggles demanding rights over water or to gain control over water. The contestation and politics also attracted a large number of academic and other researchers—not only engineers and economists but sociologists, political scientists and anthropologists—who not only created a significant body of knowledge but also significantly contributed to informed awareness among policy-makers and implementers about the benefits and costs of the prevailing model of development of the water sector. The analysis of the problem existed right from the 1980s (Wade, 1980; Wade and Chambers, 1980; Datye and Patil, 1987). One cannot resist comparing this with the situation in the electricity sector. In absence of intense contestation, strong politics and independent research, the energy sector suffers from myopic vision and autocratic rule of engineers and economists in the mainstream institutions of the sector. This, to some extent, is also true for the water sector, despite the active involvement of social movements and researchers, especially, social scientists (PRAYAS, 2007a).

The informed awareness due to contestation, politics and independent research gave rise to demands and pressure for reforms in the water sector well before the sectoral reform in other infrastructure sectors were envisaged by the mainstream agencies. Two examples of responses by the mainstream agencies to these demands could be cited. First, these mainstream agencies accepted the ‘principle of participation’ and promoted participation of farmers in irrigation management, which in fact, was the traditional practice in many Indian states. Second, the mainstream agencies have also accepted the principles of Integrated Water Resources Management (IWRM), which bring an integrated perspective and planning approach to the water sector. This, however, is not to claim that these reform measures had perfect designs or that they were widely implemented across the country, or that they were successful in achieving underlying objectives. Further, though these reform initiatives were progressive in nature, the same did not guarantee the results expected by the demands for reforms made by civil society actors.

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<sup>5</sup> A comparison with electricity sector is made in this paper on more than one occasion since the IRAs in the water sector are modeled around those in the electricity sector. For example, the quasi-judicial nature of IRA, composition of IRAs and the functions like tariff determination are modeled around the electricity sector IRA. For the same reason, the regulatory agencies from the other infrastructure sectors are not discussed in this paper.

The reforms in the water sector are now entering a new phase, which seem to be driven by the 'sectoral restructuring' model followed in the other infrastructure sectors. The cornerstone of this phase of the reform is establishment of new organizations called 'independent regulatory agencies' or IRAs. Though there has been discussion on IRAs in the water sector for some years, in India, the progress until now has been slow and their spread has been limited. The first-ever state-level water sector IRA was established in the Indian state of Maharashtra in 2005. In 2006, the state of Arunachal Pradesh passed a similar law. In 2008, the biggest Indian state, the state of Uttar Pradesh (UP) passed an IRA law and is in the process of establishment of the IRA. The state of Andhra Pradesh followed suit and enacted an IRA law in August 2009. The IRA tide, for various reasons, is expected to gather more force soon and spread to the other states (PRAYAS, 2009c). Other states and sponsoring international agencies like the World Bank have been watching the progress of the IRA in Maharashtra (Briscoe and Malik, 2007). Considering the rather smooth working of the Maharashtra IRA for almost four years, these agencies will now move into the next stage of spreading the IRAs to other states. The wide spread of electricity sector IRA across the country, in two stages, exhibit a similar trend. An indication of such transition to the next stage could be seen in the strong recommendation to form state water IRAs—on the lines of Maharashtra—in the XI<sup>th</sup> Plan Period (2007-12) Report by the 'Expert Group on Water Resources' appointed by the Planning Commission (Gol, 2006). Another important favorable factor is the financial provisions and conditionality pertaining to establishment of IRAs in agreements for water sector projects funded by the World Bank in different Indian states. (WB, 2001, 2005b, 2006)

### Conceptual Framework and Research Design

This paper relies on a framework suitable to investigate the theme mentioned in the title of the paper. The paper looks at the possible implications of the new agency of governance as well as the new IRA laws. The argument is that the IRA laws are bringing in comprehensive, fundamental and often 'near-irreversible' changes in the governance of the sector. By creating a new governance agency vested with crucial roles, responsibilities and wide powers, the IRA laws introduce organizational restructuring in terms of rearrangement of roles, responsibilities, powers, interrelationships and accountability connections among the main entities involved in the sector. Apart from restructuring of the organizational arrangements, the IRA laws also give rise to new matters for governance of the water sector. For example, the laws introduce the concept of 'entitlements' and introduce a governance system (comprising of rules, norms, procedures and organizational mechanisms) required to govern the entitlements. Further, the IRA laws introduce new principles of governance and emphasize or de-emphasize certain other principles in the sector. For example, the IRA laws emphasize on the principle of financial sustainability and full recovery of costs through tariff, deemphasizing the principles of 'cross-subsidy' or 'affordability' in the process. In the light of these new principles, some of the old concepts and aspects or matters of governance will acquire new meaning and will create new demands not only on the governance system but also on the stakeholders. For example, tariff was earlier seen largely as 'charges to be paid by *beneficiaries* to the extent possible (affordable) for them'. However, in new circumstances, the tariff is an instrument for ensuring full recovery of costs of the utility from the *consumers*, and hence, financial sustainability of utility. This change puts new demand on the utility to

calculate and justify annual revenue requirement (ARR) as well as cost and service efficiency. At the same time, it requires civil society organizations to participate, in an informed and analytically sound manner, in exercises like assessment of ARR as well as monitoring of cost and quality of service.

The paper traces different types of changes in the governance system brought in by IRA laws in terms of governance principles, norms, procedures, organizational arrangements and accountability-relationships. It also assesses the implications of these changes for the capacity of different stakeholders to influence the governance of the sector. The main concern of the paper is the implications of the reform for ‘non-dominant’ stakeholders<sup>6</sup> such as common citizens, poor consumers and non-consumers. The paper attempts to ascertain possible impacts of IRA laws on capacities of the ‘non-dominant sections’ to influence the governance process in the sector. These are to be contrasted with the capacities of the dominant stakeholders such as the state governments, state bureaucracy, the World Bank, the corporate sector and the mainstream political parties.

The research objectives for the paper are the following:

1. To assess implications of the new IRA laws in terms of changes in: (a) norms, principles and procedures of governance of the water sector, (b) rules, responsibilities, powers and interrelationship among the main stake-holders in the sector
2. To examine possible impacts of these changes in the governance system, primarily on the ‘non-dominant’ sections of the society.

The primary research method used is the analysis of the content of the relevant laws from the three states that have enacted laws to establish IRAs in the water sector. The authors have been involved in diverse activities, in addition to research around the theme of water sector regulation. During these activities, the authors have been able to engage in personal conversations, communications as well as informal interviews with representatives of different stake-holding groups. The inputs acquired through these are also used in the paper. Moreover, the authors have drawn from the understanding and insights gained by one of them during the research, analysis and advocacy work on electricity sector regulation for more than a decade.

For the purpose of analysis, the main data used are the laws of the three states in India—viz., Maharashtra, Uttar Pradesh (UP) and Andhra Pradesh (AP)—that define and establish the IRAs in the water sector in these three states. The full names of these laws are: (a) Maharashtra Water Resources Regulatory Authority Act, 2005 (GoM, 2005), (b) Uttar Pradesh Water Management and Regulatory Commission Act, 2008 (GoUP, 2008), and (c) Andhra Pradesh Water Resources Regulatory Commission

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<sup>6</sup> For the purpose of this paper, “non-dominant” stakeholders would also include: civil society organizations (CSOs), non-party political organizations, small political parties, and organizations of other ‘non-dominant’ stakeholders like farmers. They are considered “non-dominant” because they have very low level of influence on the governance processes in the sector in contrast with “dominant” sections such as the state government agencies, mainstream politicians, bureaucrats, the corporate sector, IFIs and consulting firms.

(draft) Act, 2009 (GoAP, 2009). The law of the fourth state that has enacted IRA law, Arunachal Pradesh (ArP) (GoArP, 2006) is not considered separately here as it is almost a section-to-section copy of the Maharashtra IRA law.<sup>7</sup>

For the assessment of these three laws with the perspective described above, the laws are divided in groups of provisions that define different aspects of the structure, processes and functioning of the IRAs. These also include the process of formulation of IRA laws. The paper identifies five main aspects (along with seventeen sub-aspects) for this purpose: (a) Formulation of IRA Laws, (b) Selection Procedure for Members of IRAs, (c) Composition of IRAs, (d) Functioning of IRAs: Procedural Matters, and (e) Functioning of IRAs: Substantive Matters. Provisions from the three laws pertaining to each of the aspects are analyzed to see how the provisions will change different elements of the governance system. For analysis of the impact of these changes in the governance system on the interests of the 'non-dominant' stakeholders, the paper looks at the same five aspects.

## **Analysis and Findings**

### **Formulation of IRA Laws**

#### Process of Formulation of the Law

The structure and functioning of the IRA are defined through a special law enacted for the purpose of creating the IRA in each of the three states. Hence, the process of formulating or drafting the law is critical not only for shaping its structure and functioning but also for determining its credibility among the stakeholders. The following observations bring out critical elements of the process of formulating the IRA laws as conducted in the four states.

First, there has been no prior disclosure of the bills or public consultations on contents of the laws with stakeholders while drafting the IRA laws in the three states of Andhra Pradesh, Uttar Pradesh and Arunachal Pradesh. There was no indication from the respective governments of their intentions to bring in such bills, except in the case of Andhra Pradesh. The State Water Policy (SWP) of Andhra Pradesh that was published a few months before the bill was introduced did mention the IRA. However, there was no official disclosure or consultation on the policy before or after its publication (GoAP, 2008; GoM, 2003; GoUP, 1999). Government of Maharashtra published its SWP in 2003. But the first draft of the IRA bill could be traced back to 2002<sup>8</sup>. So even though the SWP came after the first draft of the IRA bill, there is no mention of IRA in the SWP, despite the SWP being the official mechanism for discussing and disclosing the intentions and plans of the government.

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<sup>7</sup> Hereafter, in the paper, the law in Arunachal Pradesh is referred only when the process of preparing the law is discussed. However, the Arunachal Pradesh Law is not referred to separately when the content of the laws are discussed since it is similar to the law in Maharashtra.

<sup>8</sup> The draft in Marathi language is available with the authors.

Second, the Maharashtra government conducted consultations on the draft of the bill. These consultations were limited to a small number of NGOs and were conducted in an unaccountable manner. The representatives of the civil society organizations complained that they were not provided any copies of the minutes or proceedings of these consultations.<sup>9</sup> The copies of the proceedings obtained by the authors using the Right to Information Act, show that no detailed or comprehensive proceedings were prepared after these consultations. The proceedings do not record presence of many civil society representatives who attended the consultations; neither is there any mention of the suggestions or comments they made. This indicates the lack of seriousness of the government regarding the consultations and the suggestions from the participants. These consultations are used by the MWRRA, the state government, the World Bank and other supporting agencies to claim participatory process and gain legitimacy for the law (WB, 2005a). There are significant differences in the draft presented for discussion in the consultations and the bill that was presented in the legislature. The comments and suggestions given in these consultations were also not incorporated in the final bill.<sup>10</sup>

Third, the manner in which the bill was introduced and passed in the legislative assembly was objectionable. In Maharashtra, the bill was introduced and passed by 'voice vote' as one among the sixteen bills introduced and passed in the last hour of the last day of the assembly session (Sainath, 2005). As a result, there was hardly any debate on the particular bill inside or outside the legislature.

The three state governments of Uttar Pradesh, Andhra Pradesh and Arunachal Pradesh apparently did not feel the need to consult the other stakeholders. This clearly indicates that the processes of formulation of the IRA laws in all the four states were opaque, non-participatory and unaccountable.

The formulation and enactment processes nipped in the bud any possibility or opportunity to common citizens, water users or poor sections of society to influence the structure, compositions or functioning of IRAs. As a result, a lot of suspicion was created about the intentions of the government, which led to alienation of civil society and organizations of other stakeholders. This alienation has eroded legitimacy of the IRA and its credibility and acceptance among most stakeholders, including political representatives<sup>11</sup>. It has also adversely affected awareness and interest about the IRA among stakeholders, affecting their willingness to participate in processes initiated by IRA. The success of measures and decisions by IRA critically depends on participation of these stakeholders.

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<sup>9</sup> This is based on inputs from interview with one of the office bearer of a non-ruling political party, who participated in the consultation on the draft MWRRA bill.

<sup>10</sup> This is based on analysis of: (a) the various drafts of the bill, (b) the proceedings of the consultations procured through Right to Information, and (c) interviews of people who participated in the consultations.

<sup>11</sup> This is clear from various responses of political parties and other stakeholders during consultation meetings organized by MWRRA on water tariff. It was found that after repeated efforts by CSOs and claimed efforts by MWRRA there was very low turnout of political parties or their representatives in the consultation meetings. Those who participated took a strong position on the very credibility of MWRRA and the process initiated by them.

### Credibility of Organizations Involved in Formulation of the Laws

The nature of the process adopted for passing the IRA laws thus defines not only structure and functioning of IRAs but also affect their credibility and acceptance. Equally important is the credibility of the organizations who are involved in the formulation of the laws.

Primarily two agencies are involved in formulation of the IRA laws. The first is the state government, which is often seen by civil society as the conduit for vested interests, operating through administrative and political functionaries<sup>12</sup>. A variety of individuals and civil society organizations seem to perceive that the primary cause and main culprit behind the current problems in the water sector is the government<sup>13</sup>.

The second agency involved is the World Bank, which is seen by a large section of media, political establishment and CSOs as an agency that is not only arrogant and condescending towards the host country and its people, but also as an agency pushing an anti-people agenda of privatization<sup>14</sup>. The privatization agenda is claimed to be based on a 'fundamentalist pro-market ideology' and driven by foreign interests, especially those of multinational corporations (Dwivedi et al., 2007).

With such a public image, these agencies are handicapped in securing credibility and acceptance for any product of their joint action from the outset. Their actions and the impressions they created during the process of formulation of the IRA laws further aggravated the problem.

First, in none of the states, grounded analysis was carried out to investigate: (a) suitability of the IRA as a solution to local or state-level water problems, (b) suitability of other options for resolution of the problems, or (c) possibility of variation in the design of the IRA pushed by the World Bank and borrowed from the electricity sector. Therefore, it is perhaps also not surprising that there hardly is any fit between the IRAs and the sectoral vision held by the state governments. Possibly, as a result, SWP of Maharashtra does not have any mention of the IRA.

Second, even the top officials and political functionaries involved in the formulation of the IRA laws openly, though informally, complain about the 'tremendous' pressure exerted by the World Bank to completely accept its model while formulating and enacting the IRA laws<sup>15</sup>. There are crucial differences

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<sup>12</sup> This has been repeatedly shared by senior state-level and national-level activists during consultations on the theme of IRA.

<sup>13</sup> Opinion and remark to this effect have been repeatedly expressed in formal and informal consultations with civil society organizations and individuals.

<sup>14</sup> This is how these two organizations (viz., government and WB) are described by a large section of CSOs, media-persons, and representatives of the farmers' organizations during the consultations and workshops.

<sup>15</sup> The interviews of the top officials have brought out this complaint repeatedly. While participating in seminars and workshops organized by research institutions, officials from various states like Maharashtra, Tamil Nadu, Andhra Pradesh and Uttar Pradesh have described their efforts to fight the pressures from the World Bank.



in the drafts of the bill put forth by the Government of Maharashtra at two stages of the process. In an earlier draft of the bill, there was not even a single reference to proposed provisions introducing 'market' principles in water rights (such as tradable entitlements). But, the final bill passed in 2005 clearly specified entitlements as use-rights that can be traded through a market mechanism<sup>16</sup>. The main features that are common (with some variations) to the three IRA laws—determination of "Entitlements", Trading of Entitlements, and Tariff determination—are the core reform recommendations in the discourse and policy documents authored or published by the World Bank (World Bank, 2005a; Briscoe and Malik, 2007).

Third, the 'Water Sector Improvement/Restructuring Projects,' funded by the World Bank (WB), are being implemented or in the pipe-line in various states—including Maharashtra, Andhra Pradesh and Uttar Pradesh (World Bank, 2005b, 2001, 2006). The official documents related to these projects clearly mention establishment of IRA as a condition (with varying degrees of compliance specified) for providing the loan to Uttar Pradesh and Maharashtra. In fact, the website of the 'Bank-Netherlands Water Partnership Program' (BNWPP) clearly shows that a technical assistance was provided to the state of Maharashtra for institutional reforms, including preparation of draft MWRRA Act (BNWPP, 2003). However, the state government officials in formal and public meetings tend not to mention about the conditionality or the technical assistance and hence, underplay the role of WB<sup>17</sup>.

The public image of these organizations as well as their actions and the impressions they created during the process of formulation of the IRA laws have serious implications; for example, in the form of severe erosion of credibility and acceptance of the laws and their products (i.e. the IRAs) in the minds of a large section of stakeholders, including civil society and organizations of other stakeholders such as farmers and urban consumers. The alienation created by this lack of credibility has resulted not only in the lack of acceptance and support, but also, in fact, turned into open and large-scale antagonism when the Maharashtra IRA tried to conduct hearings on the Tariff Approach Paper<sup>18</sup>.

### **Selection Procedure for Members of IRAs**

This section discusses the selection of members of the IRA. This selection is a key aspect because independence and performance of the IRA critically depends on the quality and capability of its

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<sup>16</sup> This is based on the comparative analysis of the MWRRA Act, 2005 and the draft bill circulated in 2002.

<sup>17</sup> This is based on the response given by MWRRA officials in a conference organized in Pune to a question on role of WB in MWRRA law. This is also based on the information available at various official websites of the government and MWRRA.

<sup>18</sup> This was recorded in process documentation done by authors of the consultation meetings conducted by MWRRA on its Tariff Approach Paper. While the antagonism partly resulted from the content of the Approach Paper, it was also rooted in the distrust of the state government, WB, and the IRA.

members. The public image of the IRA and its members is created by the manner in which they are selected, and on this basis, they will be pre-judged before they have any chance of performing their tasks.

### Composition of the Selection Committee

All three IRA laws provide for a special Selection Committee to identify candidates, assess them and recommend two names per vacancy in the IRA to the agency making the final selection. Though the logic of having the Selection Committee or its special role is not indicated in the law, the idea seems to be that a separate and special selection committee would be a mechanism to ensure independence and autonomy of the chairperson and members of the IRA from 'political interference'. It needs to be noted that the term 'independence' here is used to indicate 'independence' from the state, and more precisely, from interests that operate through political and administrative functionaries of the government. It is interesting to look at the composition of the Selection Committee and the procedure employed for selecting the candidates in this light.

The composition of the Selection Committee seems to be largely similar in all the three laws. In the case of Maharashtra, the Selection Committee is comprised entirely of top-level officials from the state bureaucracy. This includes the Chief Secretary (the top-most level civil servant) of the state as well as 'Secretaries' (the top-most official in departments) of about eight departments in the state government. The final selection is, however, done by the Governor of the state, who is not part of the executive branch of the state government, but, who often follows advice from the government.

In the case of the IRA law in Andhra Pradesh, the composition of the Selection Committee is the same as that of Maharashtra. The only difference is that the Committee includes Secretaries of only three (instead of eight) departments of the state government.

In the case of the law in Uttar Pradesh, the Selection Committee is comprised of the Chief Secretary of the state, Secretaries of two departments of the state government and the Chairman of the Central Water Commission. Importantly, the Director of the Indian Institute of Management at Lucknow (the capital of the state) is also a member of the Selection Committee. However, the final selection of the members from the two candidates suggested by the Selection Committee will be done by the state government itself.

In comparison, the composition of the Selection Committee for the Central Electricity Regulatory Commission (at the federal level) includes one non-governmental member (Reference: Section 78-1, 78-3 of E-Act), while the Selection Committee for the state-level Electricity Regulatory Commission is headed by a retired judge of the High Court (Reference: Section 85-1 of E-Act) (GoI, 2003).

Though the law in Uttar Pradesh tries to temper bureaucratic monopoly (that existed in other states) by inclusion of one outsider, it is very clear that the top-level bureaucracy at the state level has dominance in membership and hence, there is a danger that it could exercise higher control over the Selection

Committee. The situation is worse in the case of the laws in Maharashtra and Andhra Pradesh due to the absence of provision for inclusion of an outsider.

In this regard, the argument for bureaucracy, as per our analysis, is that the top-level bureaucrats are entrusted with this responsibility because the bureaucracy is the only institution (not involving politicians) that has three qualifications needed in order to be vested with the responsibility and authority of selecting members of an independent agency, which is going to make economically and politically critical decisions. These three qualifications of the top-level bureaucrats include: (a) clear constitutional legitimacy, (b) well-defined public accountability, and (c) long-standing stakes in governance and government.

Simultaneously, however, and as noted above, the same bureaucracy is also seen by segments of the public and civil society as a conduit for interference by vested interests, which the IRAs are expected to curtail. Handing over the responsibility of selection to top-level bureaucrats from that bureaucracy may thus be regarded as contradictory. The bureaucrat-dominated selection Committees for IRAs in water sector have ended up selecting retired bureaucrats in an overwhelmingly large number, even on the posts of 'experts' where members from other organizations could have been selected.

The makers of the IRA laws in the water sector had, before them, the IRA laws in the electricity sector. The electricity IRA law tried to avoid the monopolistic control by state-level bureaucracies of the Selection Committee. However, this aspect gained very limited following in the water sector. The water IRA law in Andhra Pradesh that came after the law in Uttar Pradesh did not bring in the provision of one member from an independent institution that had been part of the IRA law in Uttar Pradesh.

The domination of the Selection Committee by one set of stakeholders is likely to preclude reflection of the perspectives and preferences of other stake-holding groups. As a result, the IRAs may become as lop-sided as the Selection Committees, with possibly adverse implications for the functioning of IRAs as well as for the outcome of their functioning.

A serious effect of such a lop-sided structure of the Selection Committee is the suspicion, alienation and lack of interest among the other stakeholders that it generates. These stakeholders start looking at IRAs as an agency turned by the top-level government officers into an agency for post-retirement accommodation for their retiring colleagues<sup>19</sup>.

### Process of Selection of Members of IRA

As discussed in the case of the process of formulation of the laws, the manner in which any process is conducted significantly affects the quality, credibility and acceptance of the product of the process. This

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<sup>19</sup> A prominent leader of the farmers in Maharashtra publicly made a direct remark to this effect, while addressing the MWRRA members during the consultation organized by MWRRA in Pune on 21<sup>st</sup> January 2010.

is also true in the case of the process of selection of members of the IRA by the special Selection Committee. The following are some observations on the process of selection of IRA members.

First, there are no provisions in any of the IRA laws that lay down a concrete procedure for selection of chairmen or members of the IRAs. Neither are there any rules framed by the government or other institutions which lay down a detailed procedure including the criteria of selection or mechanisms of transparency. The law in Uttar Pradesh contains some provisions in this regard (Sections 6-3, 6-6, 6-7) which provide for some qualitative criteria related to performance, ability and integrity of the candidate members. The provisions also require the person being considered for selection to disclose information regarding possible conflict of interest as well as to report relevant information to the Selection Committee. The law in Uttar Pradesh also includes a provision asking the state government to make rules laying down the procedure for selection and appointment of the chair and members, a provision not included in the laws in Maharashtra or Andhra Pradesh. The Maharashtra and Andhra Pradesh laws are silent on the procedure to be adopted for selection of candidates.

Second, none of the laws have a provision for allowing participation of members of other stake-holding groups in the affairs of the Selection Committee. However, such participation could have been solicited at various stages and in various degrees. For example, there is no provision in the law for the Selection Committee to invite the public in general or members of other stake-holding groups to suggest names for candidates (minimal level of participation, at the initial stage of the process). The Selection Committee is also not mandated to conduct public hearings on the list of recommended candidates as done in other countries for critical posts (very high level of participation, at the last stage of the process). There certainly are some costs of different mechanisms for participation, but they should not be dismissed before considering the benefits.

Finally, there is no provision to ensure accountability of this high-power committee. There is not even the minimal provision in any of the IRA laws for preparation of a post-facto report by the Selection Committee on the procedures adopted for identification, assessment and finalization of the candidates for the post of IRA members. Neither are there any legal provisions for voluntary or automatic disclosure of such a report of the selection procedure to the legislature or public.

The above suggests that the procedure for selection of members of IRA is opaque, non-participatory and unaccountable, effectively giving a blank cheque to the top-level bureaucrats dominating the Selection Committee. As a result, suspicion and alienation created due to the composition of Selection Committee are aggravated further, bringing into increased danger the credibility and acceptance of the IRA and its orders.

### **Composition of IRAs**

Any governance agency is significantly influenced by the capabilities and performance of its members. In this section, observations regarding provisions in the three laws relevant to capacity and performance of their members are discussed.

### 'Reservation' for Chairman's Post

The IRA is headed by the Chairperson, who enjoys special powers given by the law. Hence, it is important to assess the eligibility criteria for the Chairperson.

In the Maharashtra law, the eligibility criteria limit the choice of Chairman to either the current or a former Chief Secretary of the state or a person of equivalent rank. Under the law in Uttar Pradesh, choice is to be made from the former state Chief Secretaries or former Secretaries to Government of India, or any equivalent post with experience of departments related to water. These eligibility criteria for the post of the Chairman of the IRA are further evidence of the concerted efforts by the top-level state bureaucracy to exercise control over the IRAs. Under the law in Andhra Pradesh, provisions are similar to those in the Maharashtra law, but also include the option of selecting a person of eminence in the water sector with a proven track-record. It is not clear why the lawmakers in all the three cases thought that the primary category of the persons who are eligible for this high-stature post is the group called 'former Chief Secretaries'. Only the law makers in Andhra Pradesh felt that there are other categories of possibly eligible candidates for the post.

Such eligibility criteria for the post of the Chairman of the IRA provides further evidence of the concerted efforts by the top-level state bureaucracy to exercise control over the IRAs, severely eroding, in the process, credibility and acceptance of the agency and its outputs.

### Experts as Members of IRAs

The Maharashtra IRA law, the oldest in the water sector, is somewhat vague on the eligibility criteria for members of the IRA. It just requires 'experts' in water resources engineering and water resources economy, leaving the meaning of 'expert' open for interpretation. In none of the three laws, the eligibility criteria for the members of IRA explicitly require retired bureaucrats in these posts. Rather, the criteria mention expertise in technical and economic matters pertaining to the water sector as the primary eligibility criterion. This keeps the doors open for experts from outside the government, such as people from academia, corporate sector, consultancy companies or independent professionals in the field.

The law in Uttar Pradesh is explicit in opening the door for experts from organizations other than the government, including the private sector, banks, academia and research institutes. It is also explicit in listing the desired specializations in different areas and sub-sectors such as drinking water, ground water, agriculture and land management. The IRA law in Uttar Pradesh has made provisions for four members apart from the Chairman, as against two members in the case of the IRAs from Maharashtra and Andhra Pradesh.

The IRA law came in Andhra Pradesh after the law in Uttar Pradesh was enacted. The lawmakers in Andhra Pradesh did not draw anything from the law in Uttar Pradesh in this regard and remained satisfied with provisions very similar to those in the Maharashtra law.

The experience of the IRAs in the electricity sector suggests that, those who occupy the positions of 'expert' members also come largely from government departments. The positions of economic experts are often occupied by officers from the IAS or IRS cadres<sup>20</sup>. The positions for technical experts are generally filled by retired senior engineers from government agencies. The preference seems to be for individuals from the state technocracy, preferably top retired officers from the state government's utility or department. Occasionally, a technocrat from the central (all-India) cadre is accepted, but mostly under pressure.

The example set by the electricity sector seems to have been picked up by the water sector IRA in Maharashtra. The seat of the Chairman of this IRA is occupied by a retired Chief Secretary from the state; that of the Member (Economic) is occupied by a retired IAS officer from the state cadre. The post of Member (Technical) was occupied by a senior technocrat from the central government agency, who has now retired. The post has been filled up by the retiring Secretary of the state irrigation department who is an engineer. It is noteworthy that, in the case of electricity IRA in the state, after retirement of the Member (Technical) who came from the central technocracy, the post was recently filled up by the retiring top official of the state electricity distribution company.<sup>21</sup>

It could be argued that the IRAs, who, at least for the present, have to regulate state-owned utilities, can make good use of the knowledge and experience of a former top 'boss' of the state utility/department. However, a counter-argument could be made that the retired top 'boss' of the state-owned utility or department, when he becomes a member of the IRA, acts as a conduit for vested interests to make entry into the IRA. This is especially problematic when the IRAs do not have effective accountability relationships towards stakeholders or citizens.

Despite its merits and demerits, it seems that the trend is now set that the IRAs become the half-way houses for government bureaucrats or technocrats *en route* to retirement.

#### "Political" Representative or Stakeholders' Representative

As per the IRA laws, the chairperson and members of the IRAs are selected by virtue of their administrative experience or their professional expertise. However, none of the IRA laws in the water sector provide for membership for a representative of stakeholders. This follows from the understanding that the 'substantive' decisions (like tariff determination) should be made by the experts in the field. The IRA laws also do not provide for membership to any 'political appointee' or elected representatives, which could be traced to the argument that the IRAs should be free from partisan

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<sup>20</sup> Indian Administrative Services (IAS) or Indian Revenue Services (IRS).

<sup>21</sup> In interviews with officials of the Maharashtra government, the authors were informed that a previous occupant of the post of the Governor in Maharashtra was instrumental in bringing outside technocrats into the Maharashtra IRAs in the electricity and water sectors. He is now replaced, and the next occupants in the both these positions are, as shown, retired top officials of the concerned state agencies.

political interests (Brown et al., 2006). However, techno-economic decisions pertaining to the issues of costs, tariff and entitlements unavoidably have serious socio-political effects and impacts, which techno-economic experts may not be able to understand or deal with effectively.

The law in Maharashtra and Andhra Pradesh has a provision for appointment of special invitees. In Maharashtra, special invitees are expected to represent the five river basins in the state and are not expected to be 'experts' per se. These invitees do not have voting power; they are expected to be consulted. However, one of the special invitees from Maharashtra shared with the authors that he was not consulted during the process of hearings on the Tariff Approach Paper<sup>22</sup>. In fact, one of the invitees opposed the tariff process by MWRRRA during his presentation in a public consultation meeting organized on 12<sup>th</sup> February 2009.

This absence of representation to stakeholders gives more credence to the concern that the needs and expectations of the 'non-dominant' sections would not get due attention in the functioning of the IRA.

#### Lack of Experts in Social, Institutional or Cultural Aspects

There is no provision to include experts on social, cultural, institutional, or governance related areas in any of the IRA laws. This is startling in view of the fact that governance and regulation of a sector like water—which has seen intense contestation—deeply involves social, cultural, institutional and governance-related aspects. It is difficult for members with technical or economic training to look into social, cultural, political or institutional matters.

In summary, it could be said that, 'reservation' of the post of the Chairman as well as occupation of the experts' posts by senior state bureaucrats underscore the dominance of IRAs by the state-level bureaucracy. Further, while economic and technical experts are supposed to get a place on the IRA, experts from other equally important and relevant areas remain excluded. Similarly, there is no representation on IRA for the other stake-holding groups. In short, the particular composition of the IRA reflects continued neglect and failure to bring in concerns other than techno-economic concerns and perspectives of 'non-dominant sections'.

#### **Functioning of IRAs: Procedural Matters**

This section analyses the provisions in the IRA laws pertaining to the functioning of the IRAs, beginning with assessment of changes brought about by the IRA laws in procedural matters as regards to decision making and accountability of decision-makers. Further, it also assesses implications of these changes for the governance of the sector and on the interests of the non-dominant sections. The last sub-section looks into some substantive matters pertaining to the functioning of the IRAs.

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<sup>22</sup> Based on a personal communication of the authors with one of the invitee member.

### Basic Functional Characteristics of IRAs

This subsection looks at the basic characteristics of the functioning of the IRAs. IRAs are the agencies carrying out governance functions but are not government departments / utilities; nor are they the judicial agencies (courts) strictly deciding on the conflict by interpreting the law.

The functioning of IRAs could be described as 'quasi-judicial', 'adjudicatory' and 'adversarial' in nature. IRAs are 'quasi-judicial' because they are not courts, but still conduct their business in a similar manner. They act as courts in basing their decisions on interpretation of the law in the light of the evidence brought before them. However, IRAs do not follow judicial procedures 'strictly'; for example, they do not stick to the law of evidence in accepting and assessing the evidence brought before them in the same strict manner as a formal court.

Functioning of IRAs is also described as 'adversarial' because its procedures primarily involve providing evidence by a stakeholder to prove one's own argument or to prove the arguments of other parties as incorrect or lacking factual basis or being illogical. This focus on 'contestation' is contrasted with the procedure wherein negotiations and arriving at compromise by both the parties is the main element.

Further, the term 'adjudicatory' means that the IRAs will give their judgment (orders/ decisions) by making the decision primarily on the basis of evidence brought before them. In doing so, they will decide which arguments and prayers (demands) are acceptable and which are not. In normal circumstances, while arriving at the decision, these agencies are not bound to go beyond what is presented to them, on their own, or search for additional evidence. This, in a sense, absolves them from any implications of their decision for the sector, utility, or other stakeholders, as long as their judgment is reasoned.

In addition to these three characteristics, the IRAs are expected to consider only 'techno-economic' evidence, while making decisions on techno-economic matters like entitlements and tariff. Techno-economic evidence include evidence based on: (a) factual data and information on technical and economic matters, (b) findings of methodologically-sound analysis of such data, and (c) conclusions arrived at through logical arguments based on the information and findings of such an analysis. In other words, the IRA cannot consider 'political' demands or emotive appeals as basis of their decisions.

These basic characteristics of the functioning of the IRA have serious implications for the governance of the sector, as these characteristics, together, put huge demands on any stakeholder who wants to plead or put before the IRA its viewpoint in order to influence the decisions by the IRA.

First, to effectively plead its case or present its view-point, the stakeholder has to possess good understanding and skills related to judicial procedures, even though the IRA is said to be a quasi-judicial agency. Second, it needs to have capabilities, resources, and skills not only to collect and present the necessary techno-economic evidence but also to refute and counter the evidence presented by the 'opposing' party. Third, the stakeholders need to have capabilities, expertise, resources, and skills necessary to analyze the techno-economic data or evidence presented by the opponents and present its



findings in a 'professional' manner. Alternatively, the stakeholders should have economic resources to hire experts with all this knowledge, skills, capabilities and expertise.

This is a tall expectation, especially from non-dominant sections such as common citizens, poor consumers or even the ordinary CSOs or organizations of other stakeholders. In contrast, the government, the corporate sector and other such resourceful stakeholders do possess such expertise and skills in-house or have resources to hire them. Effectively, these basic characteristics of functioning of the IRAs put the non-dominant sections of society at a distinct disadvantage when it comes to effectively representing their views in the decision-making and regulating process.

### Provisions for Procedural Accountability

In order to make IRAs a governance agency independent of 'political interference', efforts are made to keep them completely insulated from political organizations, political processes and political actors. While this insulation might protect IRAs from interference by elected politicians, it also makes IRAs devoid of any direct or indirect 'political' relationships or linkages with citizens that would allow these citizens to extract 'political accountability' of IRAs (Brown et al., 2006). It could be argued that as the IRAs are primarily involved in making decisions on technical, economic and financial matters, there is no need of such 'political accountability'. The counter argument to this would be that the IRAs need to have strong linkages (direct or indirect) of political accountability with citizens as the technical, economic and financial decisions they make do have serious social and political (and even environmental) implications, affecting certain sections of society as well as the society as a whole.

Going beyond the argument for broader 'political accountability' of the IRA towards citizens, an agency making such critical decisions needs to have accountability for its decisions at least towards the stakeholders and at least on techno-economic grounds. The law does not provide for any explicit linkage or relationship between stakeholders and members of IRAs that would allow the stakeholders to extract accountability from the members of the IRA. In the absence of any accountability relationship with either the citizens or stakeholders on any grounds, the IRA is unlikely to obtain public legitimacy and credibility as these normally have a symbiotic and reciprocal relationship with accountability.

In this situation, the only source for obtaining legitimacy for the IRA is the IRA law that provides the mandate to members of the IRA to discharge such critical functions. This, then, means that legitimacy from this source can be obtained only through strict adherence to the provisions providing explicit mandate and also to those (even implicit) specifying limits of this mandate. In this sense, the members of IRA are indirectly accountable to stakeholders through their (i.e., members') adherence to legal procedures and norms. In comparison with the earlier term 'political accountability', this type of accountability is termed here as 'procedural accountability'. The provisions in the law for ensuring 'procedural accountability' will, thus, define the extent of legitimacy enjoyed by the IRA members. Stricter the provisions for procedural accountability, higher would be the level of accountability of the IRA members and higher would be the legitimacy and acceptance of the IRA and its members among stakeholders.

When it comes to the interests of 'non-dominant' sections, we also need to assess whether the provisions for procedural accountability in the laws are within the reach of these non-dominant sections. For the analysis of the IRA laws in the water sector on this point, the Electricity Act 2003 is used as the standard bench-mark (Gol, 2003). This is because it is one of the most-debated laws and is a trendsetting law, especially for the water sector IRAs. The following is based on a detailed exercise of comparison between the three IRA laws and the Electricity Act 2003 or the E Act (PRAYAS, 2009d). Beginning with the provisions related to transparency in the procedures of IRA, the comparative analysis throws up the following observations.

The E-Act contains an almost ideal type of provision for procedural transparency. "The State Commission shall ensure transparency while exercising its powers and discharging its functions" (Reference: Section 86-3 of the E Act). This provision provides for mandatory requirement and unrestrained scope for transparency. The water IRA laws in Maharashtra and Andhra Pradesh has no provision mandating concrete measures for transparency. This curtails the possibility of development of mechanisms in the Conduct of Business Regulations (to be prepared by the IRA) for ensuring transparency in the functioning of the IRA. The law in Uttar Pradesh does not contain a provision mandating transparency in procedures. In contrast, it contains provisions, which require that information obtained by the IRA with respect to any person or business shall be treated as 'classified' and shall not be disclosed by commission without consent of the person or business, except for information related to tariff (Reference: Section 18-1, 18-2 of the law in Uttar Pradesh). The law also includes a general provision making all information in possession of the regulator confidential which is to be furnished to any person or agency only with the permission of the regulator (Reference: Section 18-3 of the law in Uttar Pradesh). These provisions are categorized under a separate heading of 'Restriction on Disclosure of Information' (Wagle and Warghade, 2009a; PRAYAS, 2009a).

For public participation in the procedures and processes conducted by the regulatory agency, the E-Act requires public participation in the tariff process (Reference: Section 64-3). The Maharashtra water IRA law contains a somewhat weaker provision requiring 'ascertaining of views of beneficiary public' before determining tariff (Section 11-D). A similar provision is not included in the law in Uttar Pradesh (PRAYAS, 2007b)<sup>23</sup>.

The main function of the IRA in the electricity sector is to determine tariff. In the water sector, the IRAs are entrusted with decision-making on additional and equally crucial matters such as 'determining water entitlements,' 'review and approval of projects' and 'preparing and monitoring of state water plan'. None of the three laws have any provision for 'public participation or consultation' during the processes for making decisions on these crucial matters. It is noteworthy that the E-Act has a provision for public consultation in preparation of the National Electricity Plan (Section 3-4), while the water IRAs in the three states are empowered to make decisions on the above mentioned crucial matters without informing citizens or water users, with the exception of the decision on tariff in Maharashtra.

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<sup>23</sup> There is no provision for determining tariff in the Andhra Pradesh water IRA law.

Regulations prepared by the IRA itself govern the conduct of its own business and its own functioning. This is the special authority given to the IRA in order to protect its independence from the government. Hence, the regulations and the process of formulating these regulations become a key issue determining procedural accountability of the IRA. The publication of the draft regulation would thus be a key element, which would generate debate among stakeholders and public debate prior to finalization of the regulation. In this regard, the E-Act requires: “All regulations made by the state commissions shall be subject to condition of the prior publication” (Section 181-3). In contrast, none of the water IRA laws has a provision requiring ‘prior publication’ of draft regulations prepared by the respective IRA for implementation of the law. The laws for Maharashtra and Andhra Pradesh do provide for ‘prior publication’ of rules to be prepared by the state government for implementation of the law. Such a provision is absent in the law in Uttar Pradesh.

One of the main ways to achieve procedural accountability of IRAs is to make the ‘reasoned order’ mandatory. The reasoned order is the order by the IRA (articulating or documenting its decision) that takes cognizance of all the points raised before the IRA in the matter under consideration. The reasoned order is also required to explicitly state the reasons for rejection or acceptance of each point raised before the IRA. This ensures that an IRA does not only take cognizance of the arguments of all the stakeholders appearing before it, but also that the decisions of the IRA is in adherence to the provisions of the law and based on logical reasoning. The preparation of the ‘reasoned order’ involves considerable time and effort, which can act as a deterrent. However, it is of strategic importance for achieving procedural accountability.

The E-Act includes provisions which make it mandatory for the IRA to provide reasons in writing for all crucial regulatory decisions (Section 15-6-b, 24-1, 64-3-b). There is no such provision in the water IRA laws of Maharashtra and Andhra Pradesh. However, the law in Uttar Pradesh makes it obligatory on the IRA to issue its decisions, directions or orders accompanied with reasons behind the same (Section 10(4)).

In the absence of mandatory provisions for ensuring procedural accountability, barring some exceptions, there is no formal or legal deterrent to prevent unwarranted use of the discretionary power and unaccountable behavior by members of the water sector IRAs. This, the authors suggest, may affect the credibility of the newly-formed institutions and may pose a risk to the interests of the ‘non-dominant’ sections of society.

### **Functioning of IRA: Substantive Matters**

Apart from procedural matters, provisions in the three IRA laws related to substantive matters in functioning of the IRAs are equally crucial in shaping the governance of the sector. In this section, provisions pertaining to some substantive matters in the functioning of the IRAs are analyzed in brief.

### Creation of “Rights” on Water

The law in Maharashtra and Uttar Pradesh contain provisions for determination and distribution of water ‘entitlements’ to groups and individual water users. Entitlements are usufructuary rights: rights to *use* water but not to *own* water or its source. Once determined, an entitlement will become a private use-right of a group or individual. We see it as a ‘private’ right because there will be no public control other than the restrictions put by the IRA law, regulation or conditions put forth by the IRA while determining or distributing entitlements. Also, it is argued by the World Bank (WB) that water entitlements will enjoy the same legal certainty as land and property rights. Hence, such a right becomes an important instrument for promoting water markets in the form of tradable entitlements (WB, 2005a). Thus, though prima-facie it appears as a use-right, entitlements operationally lead to a regime of private property rights.

The Maharashtra law states that, without entitlement, no one will be allowed to use water (except for certain small water sources). Access to water, thus, becomes dependent on the capacity to secure water “rights”, which will not be equally easy for everyone, particularly for marginal groups, as they generally have poor access to administrative processes. On the positive side, the distribution of water entitlements would create restrictions on *ad hoc* diversion of water from different water sources by government agencies to dominant water users. Similarly, water users situated at the tail-end of the irrigation canals would stand a better chance of securing their due share of water once entitlements are distributed to these farmers.<sup>24</sup>

### Cognizance of Equity Concerns While Creating “Rights”

The most critical issue related to the entitlements of water is who will get the rights? In other words, on what grounds these rights will be determined or allotted? There are some serious concerns in this regard.

The IRA laws seem to accept only landholders in the command areas of irrigation projects as possible entitlement holders. Families that do not own land in the command areas will not be entitled to get rights. Neither would families outside the command areas (both land-holding and landless) have any entitlements. Further, the Maharashtra IRA is legally bound to follow the provisions in the State Water Policy which gives higher priority to industrial water users in comparison to agricultural water users.

There is no effort or space in the law to question or redress existing water distribution. It is well documented that dominant groups like large farmers in canal irrigation or large industrial complexes for instance have cornered large shares of available water (Mollinga, 2003; PRAYAS, 2009c). Without provisions for questioning or redressing existing spatially and socially unequal patterns of water distribution, the law may end up legitimizing current unjust distribution of water in favor of dominant stakeholders (Warghade and Wagle, 2009).

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<sup>24</sup> This is based on comments made during consultations by Civil Society Organizations.

### Flexibility in Criteria for “Rights” in the Law

As per literature in the field of administrative law, in many instances, the provisions in the administrative type of laws are generally broad and non-specific, as their main function is to provide a broad policy framework, which would remain relevant for diverse ground conditions across the geographic areas under its jurisdiction and over a long time period (Sathe, 2006). Articulation of the specifics within this framework is done by the particular agency empowered through the law (for example the IRA) in the form of subordinate legislation (like rules and regulations) which can be changed comparatively easily. However, the IRA laws tend to freeze specifics of various substantive issues, such as water tariff and water entitlements, in the body of the laws themselves. As an example, the Maharashtra law has provisions articulating very detailed criteria for determination of water entitlements. For example, the law has mandated adherence to the principle of ‘land-based and proportionate’ water entitlements. As a result, the political debates created by the social movements over ‘water rights to landless’ may remain unacknowledged and public decision-making on the principles underlying definition of entitlement and allocation is pre-empted.

### Scope for Review of Distribution of Entitlements

The IRA laws of Maharashtra and Uttar Pradesh have no provision for mandatory periodic review of entitlements. Review can be undertaken only if required and in extraordinary circumstances. This effectively makes the initial distribution of entitlements near-permanent. This is critical in view of the possibility of the initial distribution of entitlements being unjust. In such a situation, the non-dominant sections may not stand any chance of getting entitlement or access to water through a public process.

### Trading of Entitlements

Once created, entitlements or usufructuary rights can be easily traded formally or informally. Only the Maharashtra law includes a provision for trading of water entitlements through a market system. At present, trading as per the provisions of law in Maharashtra is restricted within the same category of use and on a seasonal basis. This means that a water entitlement for irrigation cannot be traded to an industrial or urban user; and trading among irrigation users can be done only for one season at a time. Though this bars long-term trading, it allows for diversion of water to contract farming companies. Considering the concrete steps taken towards promoting contract farming through amendments in Maharashtra Agricultural Produce Marketing (Development and Regulation) Act, there is a possibility of steady increase in contract farming in the state. On this background, it is suggested that the contract farming companies, due to their financial might, will buy water entitlements from adjoining poor farmers. Such a diversion of water entitlements from poor farmers to contract farming companies will pose a threat to livelihood sustainability of these farmers (PRAYAS, 2009c).

The more serious and widely shared apprehension expressed by many farmers’ organizations and CSOs is that this is just a beginning and gradually the restrictions on trading would be relaxed, opening the doors for wide-spread trading of water entitlements at the cost of the interest of the non-dominant

sections of society<sup>25</sup>. This apprehension is based on the connection seen by these organizations between the role played by the World Bank (WB) in pushing for establishment of IRA laws containing these provisions and the strident position the bank takes on these issues in its literature. Enactment of IRA Laws in Maharashtra, Uttar Pradesh and Andhra Pradesh can be traced to conditionality in the water sector improvement/ restructuring projects funded by the WB. The available literature on 'water entitlement system' also suggests that WB has been in the forefront in recommending the setting-up of such systems. The literature emanating from the WB on 'water entitlements' is very emphatic in recommending creation of 'water markets based on the distribution of entitlements' (World Bank, 2005a; Briscoe and Malik, 2007).

One of the key objectives of such a market, as cited in the WB literature, is to 'allow transfer of water from low-value use to high-value use'. The WB literature also cites the examples of Chile and Australia where such a system is operational. While citing the example of Chile, the literature suggests that, in such a system, government determines the entitlements initially and market redistributes these subsequently<sup>26</sup>. However, critical studies of such a market-linked water entitlement system in Chile, suggest a negative trend in net water entitlements of farmers and resulting in deterioration of livelihoods of farmers due to such market operations (Romano and Leporati, 2002). It has been shown through empirical assessment of Chilean water markets that the model is not compatible with integrated water resources management (IWRM) and the idea that it will benefit the peasants and poor farmers has failed (Bauer, 2004).

#### Water Tariff: Clear Prioritization of Cost Recovery Principle

The IRA laws in Maharashtra and Uttar Pradesh contain the first-ever legal provision sanctifying the principle of 'cost recovery' in the water sector in India. This principle was hardly implemented in the water sector, though there is some mention of the principle in policy document (GoM, 2003). The emphasis on making this principle as part of the legal obligations can be linked with the emphasis in the discourse towards the principle of water as an 'economic good'.

In the Maharashtra law, the list of the 'costs to be recovered' through the tariff from the water users is restricted to the Operation and Maintenance (i.e. O & M) costs. The law in Uttar Pradesh goes a step ahead and includes 'depreciation charges' and 'cost of subsidy' in the list of costs to be recovered through tariff.

The World Bank literature on water sector reform argues for gradual increase of cost recovery (World Bank, 2005a; Revels, 2005). In this literature, six levels of cost recovery are considered, starting with 'no recovery' (Level 1) to 'recovery of O&M costs' (Level 2) and then gradually elevating the level to 'recovery of profits on investments' (Level 6). The State Water Policies of Maharashtra and Uttar Pradesh mention gradual recovery of capital costs as a goal for the future (GoM, 2003; GoUP, 1999).

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<sup>25</sup> This is expressed in the state-level consultations organized on the issue of water entitlements in Maharashtra.

<sup>26</sup> Also refer to Saleth and Ariel, 1999

The apprehension raised by civil society organizations is that the level of cost recovery as mandated in the law would be gradually elevated, as evident in the law in Uttar Pradesh (PRAYAS, 2009c). This increase would gradually make the tariff unaffordable to poor sections of society, especially, small farmers, thus encouraging sale of the entitlements to users ready to pay higher prices. Unaffordable tariff may not only reduce access of non-dominant sections to water, but, in extreme cases, may also create pressure from non-dominant sections for relaxing the restrictions on the trading of entitlements as it would give them better price.

It is important to note that all the three laws are silent on tariff subsidy to poor. The root of this silence could be traced to the argument that small and marginal farmers who would be eligible for subsidy in water tariff (revised tariff based on cost-recovery principle) are so large in number that it would be financially infeasible to lower their tariffs to a large extent<sup>27</sup>.

### Regulation of Costs and Service

One of the main areas of contribution by the electricity sector IRAs at the state level has been to reduce costs and reduce losses in order to improve the economy and efficiency of the sector. This is also expected to reduce the tariff burden on the consumers.

In the case of the water sector, though the laws in the two states require IRAs to ensure recovery of full costs while determining and regulating tariff, there is no attention to improvement in efficiency of operations or reduction in expenses or reduction in losses. This turns the IRAs into 'cost recovery apparatuses' (PRAYAS, 2009b; Wagle and Warghade, 2009b). As the experience of the electricity sector suggests, in the absence of cost reduction and improvement in service, the IRAs will find it extremely difficult to increase tariff. The victims of the double impact of increasing tariff and falling efficiency and service standards would be the non-dominant sections, as the dominant sections would make themselves immune by creating 'islands of efficiency'. Such islands of efficiency could be established by the dominant sections by developing their own water resources (such as done for city of Mumbai) or by developing their own distribution system (like piped system). Thus, the dominant sections would isolate themselves from the predicament faced by non-dominant sections.

### **General Conclusion and Some Recommendations**

This paper analyses the three state-level IRA laws in India for the water sector. The analysis used the framework presented in Section 2 of the paper, which mainly comprised of two objectives and the five key aspects of the structure and functioning of the IRAs. The key findings are the following.

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<sup>27</sup> This apprehension was expressed by a senior government official during consultations of Approach Paper on Bulk Water Tariff prepared by MWRRA.

### Critical View-Point

The analysis of the process of formulation of the IRA laws brought out vividly the opaque, non-participatory and unaccountable nature of the process as well as the low levels of credibility of the organizations involved in the formulation of these laws. These two factors together, are likely to adversely affect credibility and acceptance of the IRAs in the minds of a broad section of stakeholders. The resulting alienation, it is suggested, will erode the interests and willingness of these stakeholders to participate in the functioning of the IRA, thus seriously affecting the quality and acceptability of the orders and decisions from IRAs. The plausibility of such a scenario can be inferred from the low level of response from different types of stakeholders to the MWRRA's invitation to participate in the consultation process on the issue of bulk water tariff<sup>28</sup>.

In the selection process of IRA members, monopolization of the Selection Committee by top-level state bureaucrats, combined with an opaque and unaccountable process of selection is likely to result in similar adverse impacts such as: (i) Monopolization of the IRAs by retired government bureaucrats and technocrats, (ii) dominance of the economists and engineers in IRAs, and (iii) absence of the representatives of the other stakeholders. These three factors will also lead to the neglect—on the part of the IRAs—of the concerns and perspectives of the non-dominant sections of society.

The analysis of procedural matters in the functioning of the IRAs indicates similar problems. The analysis of the basic functional characteristics of the IRAs demonstrates that the IRAs, in their present form, are structurally and functionally biased against the non-dominant sections of the society. Moreover, very weak provisions for procedural accountability in the IRA laws not only erode legitimacy of the IRAs, but may also allow discretionary and unaccountable behavior of IRA members, with the danger of harm to interests of the non-dominant sections.

In terms of substantive matters, the IRA laws create 'private', tradable, near-perpetual rights that legalize and give permanence to the existing distribution of water, which is unjust on several counts. These rights would work against interests of the non-dominant sections, quashing hopes for equitable and fair sharing of water. In addition, the 'cost recovery principle', the principle of 'ascending level of recovery' and neglect of regulation of costs and service-quality may soon make the tariff unaffordable and services effectively unavailable to non-dominant sections of society.

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<sup>28</sup> This is clearly evident from near-total absence of any sort of response from mainstream political parties, elected representatives, local government bodies and other key stakeholders to the MWRRA's consultation on Tariff Approach Paper. Out of 861 copies of approach paper sent by MWRRA to stakeholders almost 360 were sent to elected representatives at the state level (figure from the presentation made by MWRRA on 21<sup>st</sup> January 2010 at Pune) and about 200 to local government bodies and other stakeholders. However, very few political and local representatives were present at the hearings, largely in the individual capacities. Political parties have not issued any public statement on this critical issue. Other stakeholders also did not participate in large numbers. Participation of civil society—though not very impressive in quantity and quality for various reasons—could largely be attributed to mobilization by some non-party political organizations which are part of a broad coalition emerging in the state of Maharashtra.



These findings, when viewed together, lead us to the conclusion that the changes in governance of the water sector brought about by the IRA laws will significantly affect ability of the non-dominant sections of society to influence the governance processes and protect their interests. This will effectively lead to their disfranchisement as far as governance of the water sector is concerned.

Apart from disfranchisement in governance, the non-dominant sections face another equally important threat. The analysis of provisions related to the substantive matters in the functioning of the IRAs demonstrates that, through creation of near-perpetual and tradable entitlements, access to water may be effectively denied to a large section of non-dominant sections of society. This analysis also shows that, even if the non-dominant sections get limited access to water, they may be priced out soon due to the unaffordable tariff. Disfranchisement in governance will make it more difficult for non-dominant sections of the population to fight against these threats.

Finally, the analysis shows that the IRAs are in danger of losing their legitimacy, credibility and acceptance among a large cross-section of stakeholders, because of the way in which the IRA laws have shaped the structure and functioning of the IRAs. This may lead to alienation of these stakeholders, who will not be willing or interested in actively participating in the governance processes and procedures conducted by the IRA, thus negatively affecting the quality and acceptance-level of the orders and decisions of IRAs. Considering that the IRAs will be the key governance agency in the sector, the overall governance of the sector will be negatively affected as a result.

### **The Way Forward**

The foremost recommendation with regards to the IRA laws that follows from the analysis presented in the paper is that the IRA laws need to be located in sound framework of principles of water governance. The pro-market approach, taken in other infrastructure services like electricity or telecom, will lead to severe implications for the interests of the non-dominant sections, if the same is applied in water sector. Hence, principles and measures like ‘full cost-recovery’ or ‘tradable entitlements’ need serious rethinking before they become part of mandatory provisions in IRA laws.

It is necessary to restate here that the three water IRA laws and the principles that they bring in are not grounded in local discourse and local demands related to water sector. So such principles should not be included as part of the IRA legislation before the nature and implications of these principles are widely discussed and debated among the various stakeholders, including the non-dominant sections.

Another major area of recommendation that emerges from the analysis is related to the ‘procedural accountability’ of the IRAs. The analysis clearly shows that there are certain ‘good practices’ related to IRAs available in policy instruments or literature that need to be integrated in water sector. For example, the blanket provision for transparency in E-Act (refer section 3.4.2 of this paper) can be replicated in other IRA laws in water sector. Similarly, the provision for ‘reasoned order’ including in water IRA law in Uttar Pradesh is worth replicating in other IRA laws (refer section 3.4.2 of this paper). There are many other ‘good practices’ that can be learnt through cross-comparison of procedural accountability

measures in different infrastructure services' regulation. A comprehensive cross-comparison should be undertaken of such measures for its adaptation in water IRA laws<sup>29</sup>.

### Ray of Hope

Developments in Maharashtra over the last two years (since 2008) indicate a different possibility. After publication of the Tariff Approach Paper by MWRRRA, a broad coalition of diverse civil society organizations gradually emerged. The coalition comprised expert NGOs, farmers' associations, grassroots political movement around water issues, environmental activists working on water issues, non-party political movements and political parties with progressive agenda. As per the analysis of the authors, this coalition has been successful in forcing the debate on socio-political considerations as well as participatory processes in regulatory procedures. The members of coalition have been successful in exerting significant influence on functioning and decision making of the IRA in Maharashtra.

The coalition has also started debating and gearing-up for activities aimed at bringing in many amendments and changes in the state water policy as well as the IRA law. Though, this presents a possible way out of the current dismal situation, such activities do face serious barriers. Apart from managing the political dynamics and perspective level differences among members of the coalition, the issues of techno-economic, legal, analytical capacities as well as human and financial resources still persists.

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<sup>29</sup> For a detailed discussion, refer to Prayas submission to MWRRRA (PRAYAS, 2007b) and Electricity Governance Toolkit (Mahalingam et al., 2006).

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