

RTPS LEGISLATION AS UBIQUITOUS REGULATION: AN EXAMINATION OF REGULATORY TECHNIQUE AND OUTCOMES

- Jinal Dadiya*

ABSTRACT

I examine Right to Public Services (RTPS) legislation as a regulatory technique to achieve certain policy outcomes in the provision of public services. Noting that the state enjoys a monopoly over the provision of most public services notified under RTPS laws in India, I contrast the Indian regulatory trend with the European practice of subjecting public services to market competition. The RTPS approach appears to closely resemble that of ubiquitous regulation, as espoused by Shleifer, as a substitute to judicial or market based enforcement. In the interest of evidence-based policy reform, I suggest criteria for the accurate evaluation of the impact of RTPS laws in India. I also recommend the simultaneous conduct of a feasibility study to evaluate whether the regulatory method of market competition can easily be transplanted within the Indian context, to supplement and complement the existing approach of ubiquitous regulation.

INTRODUCTION

While public authorities have historically been involved in the performance of essential services for citizens, the concept of *Public Services*¹ has only found recent legal articulation. The passage of Right to Public Services (RTPS) laws by various state governments has led to the formulation of a concept of Public Services which public authorities have a duty to efficiently perform, and to which citizens have a right to timely access.

The performance of essential services has traditionally been considered a fundamental duty of the state; and has been intrinsically linked to theories of its origin and legitimacy. Contractarian theory describes the origins of state to lie in peoples' agreement to establish political institutions that would remove the difficulties (ranging from those of coordination to those of survival) faced by them while living in a state of nature. The resolution of such problems, therefore, is an essential duty of the state. The modern state performs these duties by discharging essential public functions, and providing essential Public Services to its citizens. A failure to perform such functions is, then, a breach of a state's fundamental obligations to its citizens. For a variety of

* Associate, Public Policy and Regulatory Affairs, Shardul Amarchand Mangaldas and Co., India.

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¹This paper uses the term Public Services as a composite category of all services that are performed by the government for its citizens, in its ordinary course of business. Welfare services, such as those of free housing, education and healthcare are not considered part of concept of Public Services.

reasons, the performance of such essential functions is treated as an obligation of the state alone; even though the state may outsource such functions to private persons. As such, Public Services may either be provided directly, or through the private sector, to citizens. Ultimate accountability for any shortcomings in the provision of Public Services, therefore, lies with the state.²

Recent regulatory trends suggest that the introduction of market-based principles of competition may lead to greater efficiency in the provision of public services.³ Accordingly, some governments have privatized these services, resulting in some success. Nevertheless, there are some desirable outcomes for which the state's retention of a monopoly over the provision of essential have sought to be justified.⁴ For instance, the state's monopoly over the provision of services such as the railways is considered necessary in the interest of justificatory outcomes such as universal accessibility and affordability. The state's decision to retain a monopoly over a certain service or to outsource its provision also depends on the nature of the service to the provided.

Despite the emergence of an efficiency case for privatisation in the provision of public services, the Indian state has retained a monopoly over the provision over most services. In this paper, I consider RTPS legislation⁵ as a regulatory substitute for market competition in the provision of Public Services in India. For this, I examine the choice of *ubiquitous regulation* as the regulatory technique adopted by RTPS laws, in order to ensure that all citizens have efficient and timely access to Public Services. I then suggest criteria for the evaluation of RTPS laws, to evaluate their prudence as regulatory techniques to substitute market competition.

REGULATING PUBLIC SERVICES

Articulation of Public Services as a legal concept

It was only towards the end of the first decade of the 21st century that regular services performed by the government received legislative articulation as *Public Services* to which citizens had claim rights to timely access. Prior to that, citizens' access to specific government services was regulated by enabling statutory frameworks under which public authorities were entrusted with the provision of such services. For instance, the Drugs and Cosmetics Act, 1940 (*DCA*) lays down procedural guidelines relating to the issue and refusal of licenses for the import and manufacture

²See generally Joseph E. Stiglitz, 'Foreward', in Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 2001).

³Anthony Ogus, *Regulation: Legal Reform and Economic Theory* (OUP 2004).

⁴Ibid.

⁵This paper generally refers to all Right to Public Services laws enacted by state legislatures, and the rules made thereunder as RTPS legislation or RTPS laws, interchangeably.

of certain drugs and cosmetics by *State Licensing Authorities*; and individual applicants who fulfil the required criteria can enforce their right to obtain such licenses under the framework of the DCA.⁶ Similarly, the *Registration of Births and Deaths Act, 1969* provides for the appointment of registrars to register all births and deaths within a limited duration of their occurrence; and a registrar's failure to register a birth or death may be subject to a nominal fine under the provisions of the statute.⁷ However, with the advent of RTPS legislation, several public functions such as those of licensing drugs and registering births and deaths are now classified into the newly created category of Public Services.

Despite this legal articulation, the concept of Public Services has not substantively been defined in law. RTPS Acts enable state governments to include specific services to be regulated within their framework by notification.⁸ One of the early drafts of the Model Right to Public Services Bill published by the Ministry of Law and Justice defined a deficiency in service to include shortcomings in the manner of performance of duties and functions by public authorities that were '*required to be performed under any law for the time being in force*' or which were '*undertaken during appointment contract of employment or otherwise*'.⁹ Nevertheless, the RTPS laws of most states have only led to the notification of the first category, and usually do not include services that the government performs on a contractual basis. Nevertheless, it must be noted that the Gujarat (Rights of Citizens to Public Services) Act, 2013 defines services to include '*all goods and services, including functions, obligations, responsibility, or duty, to be provided or rendered by a public authority*', while permitting the state government to notify services to come within the ambit of the legislation.¹⁰ Despite the inclusive definition of services, only statutory obligations of public authorities have been brought within its ambit, by way of notification. The right to the performance of services under RTPS legislation, therefore, is derived from another primary obligation owed by the state to its citizens. Therefore, RTPS may be viewed as a secondary right of enforcement, existing in the presence of a primary right to service; and while the primary right-conferring statute does not resemble a modern contract, it plays the role of a contract for services between the citizens and public authorities, for such provision.¹¹ In this regard, it may be noted that social services provided by the state (such as government hospitals or schools) are not covered by RTPS laws in India.

⁶See generally, Chapter III, Drugs and Cosmetics Act, 1940.

⁷See specifically, Sections 7 and 23, Registration of Births and Deaths Act, 1969.

⁸By way example, see Section 2 of the Karnataka Sakala Services Act, 2011, Section 2 of the Bihar Right to Public Services Act, 2011, and Section 2 of the West Bengal Right to Public Services Act, 2013.

⁹Section 2, Model Right to Public Services Bill published by the Ministry of Law and Justice.

¹⁰Section 2, Gujarat (Rights of Citizens to Public Services) Act, 2013. This definition is similar to the definition of Public Services in the now lapsed The Right of Citizens for Time Bound Delivery of Goods and Services and Redressal of their Grievances Bill, 2011.

¹¹Jean Hampton, *Hobbes and the Social Contract Tradition* (CUP 1986).

Retention of Government Monopoly in the Provision of Public Services in India

Most services notified as Public Services under RTPS laws are performed by the government alone. Even in sectors where the provision of services has been privatised, the private players providing them have not been subject to the rigours of market competition.¹² At the same time, when the State does outsource the provision of Public Services, it rarely continues to compete with private players while providing such Public Services.

According to traditional economic approaches, the state's retention of any monopoly must be accompanied by some justificatory outcomes such as economies of scale, prevention of duplication of services, the prevention of cream skimming, and the need to ensure a constant supply of essential public goods.¹³ In addition, the state's monopolistic provision of Public Services must be in harmony with its political obligation of providing its citizens with substantive access to essential services. For instance, the Indian state's monopoly over the national railways has been justified on account of the high costs of maintaining a railway system, the need to ensure an adequately wide spread of the railway network, and the national priority of providing affordable railway services to all persons in the country.¹⁴ These grounds justify the state's monopoly over the creation of such services, while also ensuring that the state meets its political and constitutional objectives towards all citizens. According to Levin and Tadelis, the State's ultimate objection should lie in the provision of quality services to all citizens. They broadly interpret quality to indicate a situation of higher gross surplus of services. According to an example used by them, the quality of street repairs in a given city is higher if all potholes are fixed in a timely manner. They link the efficient provision of services to the timely provision of service – an approach which appears to have been adopted by the RTPS framework in India.¹⁵

REGULATORY TECHNIQUES FOR THE PROVISION OF PUBLIC SERVICES

Market Competition in the Provision of Services of General Interest in the EU

In the EU, services provided by the government to its citizens, either directly, or through the intervening actions of non-state actors, are classified as services of general interest (SGI). They

¹²V. Ranganathan, *Electricity Privatisation Revisited: A commentary on the case for new initiatives in India*, 24(9)(1996) Energy Politics 821.

¹³Ibid 3.

¹⁴Russel Pitman, *Competition issues in restructuring ports and railways including brief consideration of these sectors in India*(2009) 9(2) International Journal of Regulation and Governance 121.

¹⁵ Jonathan Levin and Steven Tadelis, *Contracting for Government Services: Theory and Evidence from US Cities*, (2010) XVIII (3), THE JOURNAL OF INDUSTRIAL ECONOMICS, 507.

include 'market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations,'¹⁶ therefore including those services which may be obtained upon the payment of a fee. Based on whether the nature of the relationship between the service-provider and the citizens is of an economic nature, i.e. whether a fee is collected for the provision of the service, SGIs are classified into the two categories of Services of General Economic Interest (*SGEI*) and non-economic services. SGEIs include water, energy supply, communication, transport, and postal services, and non-economic services include security, justice, compulsory education, health care and social services.¹⁷ Therefore, it appears that the European concept of SGEI is largely similar to the Indian concept of Public Services. The Protocol on Services of General Interest (Protocol 26) of the Lisbon Treaty, places significance on the ensuring of quality, safety and affordability, equal treatment, universal access, and user rights in the provision of SGEIs.

While non-economic services are exempt from European economic law, SGEIs are generally subject to principles of competition law and the common European market, unless there is a reason to exempt their applicability. While there is an obligation upon member states of the EU to open the market for the provision of SGEIs to non-state and private players, exemptions are carved out in cases where the creation of monopolies is necessary for the proportionate pursuit of public interest goals, such as the stated goals identified by Protocol 26. However, there is a general hypothesis in favour of the liberalisation of most services, which suggests that the more exposed and deregulated an SGEI is to international competition, the greater are the chances of its achievement of stated goals. This hypothesis has found some empirical validity in the EU, with greater service efficiency being explained by the transfer of public utilities to private ownership, and the consequent elimination of inefficient players.¹⁸ This does not, however, mean that all instances of privatisation of SGEIs have led to greater efficiency, or the achievement of stated goals. Nevertheless, in general, there is an observed trend of the opening-up of markets leading to an increase in the allocative and investment efficiency of utility providers, greater customer-friendliness in utility providers, easier accessibility, and lower prices in most sectors.¹⁹

The European trend, therefore, seems to be that of opening-up its markets for SGEIs to market competition and private players, unless sectoral requirements justify restrictions upon such competition. Even then, the restrictions on market competition must be proportionate to the public interest goals sought to be achieved by them. While the details of how such

¹⁶Adrienne Heritier, *Public Interest Services Revisited*, (2002) 9(6) *Journal of European Public Policy* 995.

¹⁷European Commission, *Services of General Economic Interest*, http://ec.europa.eu/competition/state_aid/overview/public_services_en.html accessed 30th June, 2017.

¹⁸Ibid 17.

¹⁹Ibid 17.

proportionality is evaluated lie beyond the scope of this paper, it is important to note that the European approach is that, in the absence of exceptional factors, there should be least restriction upon market competition, in order to achieve the goals of quality, safety and affordability, equal treatment, universal access, and user rights.

Here, it may be noted that the European concept of SGEIs is broadly similar to the Indian concept of Public Services; both include essential services which are performed by the government for its people, often upon the payment of a fee. However, while market competition forms the general rule, and monopolies are an exception in the European provision of SGEIs, India appears to be following the reserve policy, where state monopoly is the general rule in the provision of Public Services, and market competition is an exception.

RTPS and the Ubiquitous Regulation of Public Services in India

As an alternative to market competition, RTPS legislation attempts to achieve stated goals through the retention of the state's monopoly over provision of Public Services. Shleifer explains that market mechanisms often fail to achieve desired outcomes regulatory due to uncertainties in the enforcement of market agreements. While his analysis is based on the example of market contracts, he makes the wider argument that judicial enforcement does not always, by itself, lead to the efficient realisation of specific regulatory outcomes. He identifies courts' inability to resolve disputes cheaply, predictably, and impartially as the reason for such inefficiency. He recommends that aspects of judicial enforcement should be complemented and supplemented by ubiquitous regulation, governing all aspects of the conduct of an activity. His technique of ubiquitous regulation refers to the homogenisation of requirements of appropriate conduct through the formation of detailed rules. Ubiquitous regulation can take a variety of forms including those of prescribed precautions, licensing requirements, inspection requirements, penalties, disclosure rules, procedures of dealing with conflicts of interest etc. Through such standardisation of conduct, ubiquitous regulation offers a more efficient alternative to judicial enforcement, insofar as specific regulatory outcomes are sought to be achieved.²⁰

Indian RTPS laws and rules include detailed provisions in order to meet the given objectives of (a) assurance of service, (b) service delivery within stipulated time, (c) holding designated officers accountable, (c) establishment of a system of grievance redressal, (e) a system of penalty/fine for delays and denials in service.²¹ For this, they provide detailed rules relating to how applications

²⁰Andrei Shleifer, 'Efficient Regulation', *National Bureau of Economic Research*, WORKING PAPER 15651 <http://www.nber.org/papers/w15651>

²¹Ashok Kumar Sircar, *Right to Public Services Laws*, (2012)31(18) ECONOMIC AND POLITICAL WEEKLY 23.

for Public Services must be submitted, processed, and accepted/rejected.²² For instance, the West Bengal Right to Public Services Act, 2013 specifies that notified Public Services must be provided within a stipulated period of time, which shall commence on the date when the required application is submitted to a Designated Officer or authorised subordinate. It also provides that the Designated Officer must either accept or reject the application within the stipulated period of time, and in case of rejections, record the reasons for not providing the service, and intimate them to the applicant.²³ Bihar's RTPS rules provide for the online submission, and automatic processing of applications.²⁴ The RTPS laws of most states include detailed provisions relating to the accounting of public holidays within stipulated time periods, issue of acknowledgements to applicants, and display of information on notice boards among other things.²⁵ These provisions supplement the primary, right-conferring statutes under which specific Public Services are were created. For instance, the Registration of Births and Deaths Act includes provisions relating to the processing of applications for providing birth and death certificates. Registration officers must now act in accordance with both the Registration of Births and Deaths Act, and the applicable RTPS laws while discharging their obligations. By specifying the manner and duration in which applications for the provision of specific Public Services must be processed, RTPS laws establish standards of acceptable conduct for Designated Officers in the provision of Public Services. Further, by introducing a culture of fines and penalties for non-compliance, RTPS laws attempt to strictly enforce their mandated behaviour among designated officials. A primary focus of the Karnataka Guarantee of Services to Citizens Act, 2011 is that of bringing about an attitudinal change in enforcement officials.²⁶ Accordingly, RTPS laws in India may be considered as ubiquitous regulation, as described by Shleifer.

The essential nature of Public Services highlights that access to them should not be limited by judicial uncertainties in enforcement. Further, the government's political obligations to ensure assured access to Public Services indicates that their enforcement should not, as a trend, be left to abstract, long-winding, and expensive judicial processes. According to Shleifer, ubiquitous regulation results in an overall reduction of enforcement costs because the facts that need to be verified at the time of judicial evaluation, are already standardised, by regulatory homogenisation. His approach suggests that the questions brought to the judiciary at the time of enforcing

²²See generally, West Bengal Right to Public Services Act, 2013.

²³See Report on National Consultation on *Strengthening Delivery and Accountability Frameworks for Public Services*, 8-9 December, 2012.

²⁴Ibid 22.

²⁵See for instance West Bengal Right to Public Services Act, 2013.

²⁶*Karnataka Guarantee of Services to Citizens Act, 2011 (Sakala Services Act)* available at http://www.bjp.org/images/pdf_2012_h/sakala_introduction_shri%20suresh%20kumar.pdf accessed 30th June, 2017.

individual claims are merely factual, and involve little interpretation. For instance, in cases where workplace accident compensation is to be determined, the court need not to interpret whether the accident was caused by negligence on part of the employer, and can merely ascertain, from a checklist, if the factory floor had the required number of fire exits, if there was proper spacing between machines, if the workers were wearing helmets. Similarly, ubiquitous regulation in the provision of Public Services saves judicial time in the determination of questions such as: what period may be considered as reasonable for the provision of such services, whether it is essential for the relevant public authority to provide reasons for rejection of applications, and whether the rejection of application led to damage to the applicant. This narrows the list of issues to be considered at the time of judicial enforcement of breaches, thereby reducing the costs and uncertainties of the judicial process followed. RTPS laws further reduce the uncertainties of judicial enforcement by establishing their own elaborate, and ubiquitously regulated structures of adjudication and enforcement. Further, the establishment of a trained grievance redressal system may help reduce some of the interpretive uncertainties and delays that would occur in a traditional court process.

RTPS laws of several states, such as the ones described above, aspire to achieved the policy outcomes of assured access to public services. For instance, by the digitising applications for Public Services, RTPS laws in Bihar attempt to enhance universal accessibility to Public Services. Similarly, legislating the details of the manner and timelines in which such applications are to be processed, RTPS laws seek to serve the objectives of universality, and efficiency in such provision. Finally, be reducing the uncertainties and costs involved with judicial enforcement, and by providing alternate means of adjudication, RTPS laws attempt to provide assured, enforceable, affordable, and universal access to Public Services.

EVALUATING THE TECHNIQUES USED TO REGULATE PUBLIC SERVICES

Evaluating ubiquitous RTPS laws

In this paper, I have asserted that RTPS legislation in India uses ubiquitous regulation as a regulatory technique for the provision of Public Services a substitute to the technique of market competition followed in Europe. As all regulatory techniques, the success of ubiquitous regulation in the provision of Public Services needs to be evaluated by through empirical study. Therefore, it is essential that the impact of RTPS laws in India be tested from time to time, to ensure that the state's policy is backed by relevant evidence. However, it may still be a little premature to conduct such a study of the impact of RTPS legislation. The technique of

ubiquitous regulation attempts to achieve specific outcomes by the homogenisation and standardisation of standards of acceptable behaviour. A transformation in the behaviour of persons (including officials) is a time-consuming process, and an evaluation immediately after the enactment of such regulation, is unlikely to produce helpful results. Therefore, RTPS laws must be allowed to operate for a few years, before they exhibit signs of achieving their stated outcomes.

When a comprehensive study of RTPS laws is undertaken, the research questions asked should match with the goals sought to be achieved by such legislation. In other words, the right questions to be asked in such a study of the working of RTPS laws, are those which seek information relating to whether the regulatory technique has worked.

Any such study would need to be primarily sociological in nature, to assess whether the passage of RTPS laws has, in practice, led to the internalisation of their rules. Since RTPS laws aspire to regulate the provision of Public Services by setting details of acceptable conduct and behaviour, any evaluation of their success must be behavioural in nature. Nascent studies conducted in Bihar and Madhya Pradesh indicate that while RTPS laws are yet to make an impact, there is evidence of the state bureaucracy being enthusiastic for its implementation. More than 98% of all RTPS applications in each of these states have been processed in a timely manner.²⁷ At the same time, emerging trends suggest that the enactment of RTPS laws in northern Indian states has led to an increase in a regeneration of faith in public authorities.²⁸ In Karnataka as well, there is some early evidence of RTPS legislation leading to attitudinal changes. These studies are significant indicators of RTPS laws' potential to bring about attitudinal and behavioural changes surrounding the provision of public services.

Another approach to the assessment of the regulatory technique adopted by RTPS laws in India may be evaluated is by studying the impact of digitisation on standardisation in the provision of services. States such as Bihar and Karnataka have attempted to transfer the process for applying for services online, thereby allowing for the processing of applications to be tracked and, in some cases, automated. The success of this strategy would require the efficient digitisation of application processes, and ensuring public accessibility in the use of digitised RTPS portals. Accordingly, the success of the RTPS technique must be evaluated in consideration of these factors.

Finally, it would be unwise to consider judicial trends in the enforcement of citizens' RTPS in such a survey, even though ubiquitous regulation under the RTPS act provides an alternative to judicial enforcement. The numbers of RTPS cases being brought to courts for adjudication are

²⁷Ibid 21.

²⁸Ibid 21.

influenced by a variety of factors such as public awareness, costs of litigation, early redressal by adjudicating authorities set up under RTPS laws, etc.

Assessing the Potential of Market Competition in Public Services in India

It is essential for any regulatory technique to be evaluated periodically to ensure its effectiveness and impact. If it is found that a given regulatory technique is unable to achieve the regulatory outcomes sought by it, the government must re-evaluate its choice of regulatory outcome, and consider other outcomes. In this paper, I have suggested some criteria for the evaluation of the regulatory technique adopted by RTPS laws. If at a later event, it is found that RTPS laws are unable to meet their sought outcomes, the government must consider an alternative method.

At that stage, the government would need to consider whether market competition would be an effective regulatory substitute to ubiquitous regulation. The European example has demonstrated that a competitive approach can lead to the realisation of most stated goals of Indian RTPS legislation. While market based approaches have led to the efficient provision of public services in the European context, caution must be exercised while imitating European techniques in India. Since laws are, by nature, contextual, it is necessary for any legal transplant to be adjusted to match the realities of the context into which they are transplanted.²⁹ Therefore, it is essential for the government to conduct macro and micro levels to study the way the European policy of competition can be adopted while privatising the provision of Public Services in India. Privatisation of electricity and water supply in various parts of the country can provide case studies, based on which, such contextualisation can be planned.

Any study to plan the contextualised implementation of the European regulatory technique of privatisation in the provision of Public Services in India will be a time and resource consuming project. However, the provision of Public Services is an urgent and immediate need and is tied to the most fundamental obligations of the state. Therefore, it would be politically unwise for the State to wait for an evaluation of the success of RTPS legislation to be completed, to find out whether such a feasibility study is warranted. As a result, it is advisable that such a feasibility study be conducted alongside the implementation of the RTPS model in India. This would enable legislators to determine the regulatory technique for the future governance of Public Services, on the basis of extensive evidence.

CONCLUSION

In this paper, I have examined two contrasting approaches to the regulation of Public Services in India and Europe. While the European approach is that of adopting market competition in the

²⁹Nuno Garoupa and Anthony Ogus, *A Strategic Interpretation of Legal Transplants*, (2006) 35 *Journal of Legal Studies* 339.

provision of SGEIs, in the absence of exceptional circumstances, the Indian approach is that of retaining a state monopoly over the provision of Public Services, to which, very few exceptions are carved out. The adoption of these two contrasting approaches in the European and Indian contexts may be justified in light of different regulatory goals sought to be achieved in each context. European law strives to achieve the objectives of quality, safety and affordability, equal treatment, universal access, and user rights in the provision of SGEIs. On the other hand, the Indian regulatory objectives in the regulation of Public Services are less coherently stated. In this paper, I have demonstrated that Indian law aspires to ensure universal access, timely provision, efficiency, and affordability in the provision of Public Services. Despite an overlap, there are some distinctions in the goals pursued in each jurisdiction. Ensuring quality, safety, and equality in the provision of public services are not substantive goals of Indian law. On the other hand, Indian law remains preoccupied with ensuring the timely processing of applications for Public Services, and the efficient adjudication of disputes. In light of these distinctions, European and Indian regulators have adopted different regulatory techniques to achieve their respective roles. While a deregulatory approach has been adopted in the EU, Indian regulators have chosen to subject the provision of Public Services to a network of detailed regulation, to govern every aspect of the processing of an application for a Public Service. By creating extant legal regulations to govern such provision, Indian law attempts to homogenise and standardise the conduct of public authorities, in the provision of Public Services. Since the RTPS model attempts to standardise conduct, it may take a considerable number of years before the impact of the model may accurately be evaluated. In this paper, I have suggested parameters based on which the RTPS may be evaluated. At the same time, I recommend the conduct of a comprehensive study of the feasibility of adopting the European method of market competition in the Indian context, to study whether and in which ways such a model can lead to the achievement of Indian regulatory goals. Such an assessment would help Indian legislators make an evidence-based policy choice between ubiquitous regulation and market competition. Alternatively, Indian regulators can consider employing a judicious mixture of both techniques of regulation to achieve their sought outcomes.