Regulatory Independence: Misunderstood & muddled

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Synopsis

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Even after a few decades of experimenting with ���independent��� regulators, the debate on regulatory independence is far from over. It has rather engulfed the independence of ���neo-governments���, the institutions created by government for governance (customer protection, development and regulation) of markets on its behalf. This has made the umbilical cord between the government and the neo-government hazy.

To some, independence is a misnomer. It certainly does not mean independence from the laws of the land. Nor does it mean independence from standard checks and balances evolved over time for the exercise of powers. As much as one may wish, a public agency has to discharge its responsibilities within the frame of the law and be accountable for its performance.

In a democratic mode of governance no agency is independent. If one is independent, it cannot be a part of any system that is an amalgam of a set of complementary parts. A system delivers best only if all its parts have harmonious co-existence and no part seeks independence of others. In fact, dependence on one another is a strength, rather than weakness. Besides, vigilance by others keeps one always on toes and prevents its failure.

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Independence is not free of cost: it has to be earned. In a system, only those who can shoulder accountability deserve to be inde-pendent. Hence accountability and independence go hand in hand and the mechanism to ensure this need to be provided together. A related issue would be credibility. Whether an organisation created can legitimately achieve the credibility overnight to claim real independence even if statute provides for it? Even central banking independence the world over has been earned over decades.

The protagonists of the regulatory mode of governance believe that neo-governments need to be independent to enable them to discharge their responsibilities professionally. They seek functional independence in respect of regulatory activities to facilitate objective decisions without being encumbered by socio-political legacy constraints.

Efficiency and speed of decision making are the watch words which no political decision making process could dispense. Indepen-dence in this functional sense means adequate powers, enough resources and capacity to carry on regulatory activities.

The neo-governments discharge non-regulatory functions as well where perhaps the degree of independence sought is different. Here, the neo-governments are just one of the players (governments may have multiple arms performing these tasks) while in the regulatory space they are the umpires.

The umpires must be independent ��� but armed with the knowledge; including the knowledge that their independence is restricted to the game on the field. Non-regulatory activities are not the exclusive prerogative of the neo-governments. For example, the development initiatives generally emanate from market participants, the neo-governments ensure that these are orderly.

Similarly, customer protection initiative by any body is welcome. Discharging the responsibilities of the neo-governments requires legislative, executive and judicial measures ��� a reason why their powers, including the self-image, sometimes get magnified. But given the exalted position of legislature and judiciary in the Indian Constitution, independence is not sought in respect of legislative and judicial activities.

It is considered normal if the regulations / orders of neo-governments are modified / set aside by the legislature / judiciary. Thus, independence of neo-governments essentially boils down to independence from the executive branch of the State.

The Constitution assigns a particular subject to the government. The business allocation rules assign it to an executive unit. However, the legislature, by a statute, has assigned regulation, development and customer protection matters related to the subject to a neo-government, without actually curtailing the responsibilities of the executive.

The said statute, however, empowers the executive to constitute the neo-government and supersede it if it is failing to discharge its duties to its satisfaction. It also empowers the executive to give direction on policy matters to neo-government. The executive places the activity reports ��� annual report, the annual accounts, regulations, etc. ��� of neo-governments before the legislature for scrutiny.

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facto an agency mode of governance. Further, the executive is accountable to people through legislature on all matters relating to the subject. In exercise of these responsibilities, the executive engages in constant interaction with the neo-government. The interaction, if not properly calibrated, is construed as interference.

Let us look at regulatory domain of a neo-government. Under the statutes, a neo-government makes subordinate legislation dealing with market related matters. It issues various kinds of directions in the interest of market and / or customers. It determines and initiates enforcement action appropriate in the circumstances. It has powers to raise resources to support its regulatory functions.

Its staff enjoys immunity from suit, prosecution or other legal proceedings in respect of actions taken by them in good faith. Once appointed, the chairman and members of the neo-government cannot be removed, except under extreme circumstances. These statutory provisions promote independence of neo-governments and hardly leave any scope for the executive to interfere in the regulatory arena. Viewed in this context, every neo-government in India is independent.

There are a few agencies within govern-ment who need independence for their effectiveness. These include the Election Commission, Comptroller and Auditor General of India and Union Public Service Commission. All of them respond to Parliament through the executive. They are subject to legislative and judicial scrutiny. They do not enjoy any higher level of independence than the neo-governments do.

They are rather worse off in certain respects. For example, none of them has an independent source of finance. Even the Supreme Court, which is independent in every sense, does not have its own source of funding.

There are general regulators and special regulators. While one deals with a particular market, another may deal with one aspect of every market. For example, the Competition Commission of India deals with competition issues in all markets while Sebi deals with all aspects of securities market. Both these regulators may wish to have independence to determine competitive structure of securities markets. Does such determination by one amount to interference in the domain of the other?

There are comparable bodies in other countries. A case in point is the Securities and Exchange Commission in the

often as required. The fees levied by it are turned over to general treasury. The Congress approves its budget as well as important rules proposed by it. It is required to hold its proceedings in public.

Its programmes and expenditure are studied by the govern-ment accountability office. It seeks administrative sanctions from an administrative law judge. It refers the matter to the justice department for launching prosecution before the district criminal court. Viewed in this context, the neo-governments in India appear comparatively more independent.

Governance through neo-governments is still evolving. The Constitution of India does not explicitly recognise neo-governments as recognised mechanism for delivery of governance. When governance through panchayats was considered necessary, the Constitution was amended to explicitly recognise them and specify their responsibilities, including their autonomy and accountability arrangements.

Given the clouds generated by the debate it may be appropriate that a clear Constitutional provision be made to explicitly recognise neo-governments and provide for an appropriate autonomy-accountability framework for them. While deciding their space in the constitutional scheme, it would be ideal to define the autonomy arrange-ments of the neo-governments to the three organs of the State ��� legislature, judiciary and executive.

This is necessary to remove both conceptual ambiguity and the cobweb on the practical aspects of independence.

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