

What matters in regulatory governance

TALENT HUNT. Prioritising domain expertise, long tenure and competitive compensation are the key metrics for appointing members in regulatory bodies



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PK MALHOTRA
MS SAHOO

In its May 2010 judgment, a Constitution Bench of the apex court examined the legal provisions governing the expertise of the National Company Law Tribunal and the National Company Law Appellate Tribunal. It observed that the assumption that company law matters required specialised skills that judges lacked was erroneous.

Equally erroneous, it noted, was the assumption that members of the civil services possessed expertise in company law to qualify as technical members. The court lamented that the three-year term, coupled with a retirement age of 65 years, appeared tailor-made for individuals who had retired or were nearing retirement, encouraging these tribunals to serve as post-retirement havens.

Since then, the provisions governing tribunal membership have undergone several revisions, but concerns about expertise remain.

In a November 2024 judgment, a full Bench of the Supreme Court again observed in respect of the same tribunals: "The Members often lack the domain knowledge required to appreciate the nuanced complexities involved... Filling such vacancies with experts having adequate domain knowledge in the field must be prioritized."

SYSTEMIC CHALLENGE

This reflects a systemic challenge across regulatory bodies and tribunals. Critics argue that individuals no longer suitable to continue in the bureaucracy or judiciary are placed in these roles, perpetuating the perception of regulatory bodies and tribunals as sinecures for those nearing retirement.

The business reforms of the 1990s brought two significant changes to the governance edifice to address the challenges of a market economy: the reliance on regulations as the primary instruments for market governance and the establishment of regulators and regulatory tribunals to implement and

oversee these regulations. Regulators were tasked with drafting, implementing, and enforcing regulations, while tribunals reviewed regulatory actions to ensure fairness and equity in their application.

These institutions were created to address key market demands, such as the need for faster responses and specialised expertise, areas where traditional state machinery often fell short. In essence, they assumed roles previously performed by the government: regulators took over executive responsibilities, while tribunals assumed certain judicial functions. Their powers and how they exercise such powers were tailored to align with the dynamic needs of the market.

However, the recruitment process for full-time members of these bodies has consistently resulted in the selection of individuals from government backgrounds, typically those who are recently retired or approaching retirement.

Reportedly, a former finance minister explained how competing institutional interests, rather than public interest, shaped the recruitment process, citing the example of the Competition Act, 2002.

Initially, the Act envisioned the Competition Commission of India (CCI) with adjudicatory functions. However, it was unclear whether the CCI would function as a judicial or regulatory body, a distinction that would determine the eligibility criteria, appointment processes, and terms of its members.

If the CCI were considered a judicial body, retired judges would likely fill its positions. Conversely, if it were deemed a regulatory body, retired bureaucrats would likely occupy the roles. This ambiguity led to a tussle between the judiciary and the bureaucracy, each viewing the CCI as a potential post-retirement avenue.

The impasse delayed the

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implementation of the law for over five years. Ultimately, the issue was resolved by splitting the CCI into two entities: the CCI as a regulatory body and the Competition Appellate Tribunal as a judicial body. This solution provided post-retirement opportunities for both judges and bureaucrats but raised concerns that individuals might compromise their pre-retirement roles to enhance their prospects for these positions.

Enhancing the expertise of regulatory bodies and tribunals to address the complexities of modern markets and perform effectively under pressure requires modifications to the recruitment process.

KEY SUGGESTIONS

First, prioritise domain expertise. The selection process must emphasise technical and specialised knowledge, irrespective of candidates' institutional affiliations. Selection committees should include a majority of distinguished experts from the relevant field to identify individuals with deep domain expertise.

Second, expertise over institutional strengths. While members of the bureaucracy and judiciary bring significant institutional strengths, such as policy expertise, administrative acumen, process discipline, and legal interpretation, they may lack domain knowledge. Conversely, professionals from the relevant fields bring deep subject-matter expertise but may lack institutional strengths. There are always exceptions who may have both institutional strengths and professional expertise.

In addition to onboarding such exceptional individuals, the system should prioritise individuals with deep domain expertise and equip them with institutional strengths, rather than the other way around. In any case, selected candidates must undergo a comprehensive orientation programme covering the markets and institutions they will engage with, emphasising both their responsibilities and the actions they must avoid.

Third, secure, long tenure. Members of the bureaucracy or judiciary typically serve until superannuation, with significant protections against their removal from office and restrictions on post-retirement employment. This motivates a highly successful advocate

to quit practice to join the higher judiciary. A secure, long career promotes independence and shields them from the fear, favour, or undue influence of the government of the day while allowing them to develop expertise at a relatively young age.

In contrast, professionals appointed for short, renewable terms face uncertainties that can compromise their ability to act impartially or develop deep understanding of market complexities. To address this, appointments to regulatory bodies and tribunals should provide secure, non-renewable terms until retirement, akin to practices seen in the past with the Income Tax Appellate Tribunal. This would incentivise appointees to focus on expertise and independence rather than post-term prospects.

Fourth, competitive compensation. Attracting top talent requires competitive, uniform compensation, irrespective of candidates' backgrounds, whether from the judiciary, bureaucracy, or the open market. Compensation should align with market rates and decoupled from standard government pay scales, as already seen with some regulators. For individuals transitioning from government roles, full salary without pension deductions should be ensured. This approach across all regulatory bodies and tribunals would encourage promising individuals to transition from the judiciary or bureaucracy at an appropriate stage in their careers to serve these institutions.

To build sustained expertise, regulators and regulatory tribunals should attract professionals at younger ages for dedicated careers. Regardless of the age at which they join, appointees should serve until the standard retirement age applicable to government services. An individual deemed unfit for government service at a certain age should likewise be considered unfit for regulatory or tribunal roles, unless such roles are explicitly classified as less demanding and requiring lower levels of expertise. This would ensure a steady infusion of expertise and independence, equipping these institutions to meet the demands of modern governance effectively.

Sahoo is Founder, Dr. Sahoo Regulatory Chambers, and former Chairperson, Insolvency and Bankruptcy Board of India; Malhotra is former Law Secretary to the Government of India.