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Unsettled designs: India's regulators & tribunals

Voiding a few provisions of the 2021 Act may not secure the right institutional framework

The Supreme Court's judgment of November 19, striking down key provisions of the Tribunal Reforms Act, 2021, is the latest episode in a long-running cycle. For three decades, the Court has repeatedly held that certain institutional arrangements violate constitutional requirements. The legislature has responded, often with marginally altered provisions, only for the Court to find the changes inadequate and invalidate them again.

The cycle seems unending. Judicial primacy lasts only until the next legislative intervention, and legislative primacy endures only until the next judicial reckoning, each time set in motion and defended by the executive. The locus of "victory" may alternate between Parliament and the Court, but the consistent loser is the country, both in reform momentum and institutional credibility.

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At the heart of this churn lies a deeper question: How should regulators and tribunals be staffed and structured? India's history offers telling examples. In the early 2000s, the Competition Commission of India became the site of a tug-of-war between the judiciary and the bureaucracy, each seeing it as a post-retirement destination. The eventual bifurcation, creating the Competition Appellate Tribunal separate from the regulator, reflected negotiated turf rather than functional design. The cost was a lost decade in building competition jurisprudence and enforcement capacity. This episode illustrates a larger pattern: Instead of designing institutions around capability, independence, and purpose, they are too often designed around turf.

Regulators and tribunals were conceived to function differently from traditional ministries and courts. Yet, in practice, the executive tends to treat regulators as administrative extensions, and the judiciary often views tribunals as subordinate courts. Appointing retired bureaucrats and judges reinforces these instincts. By habit, training, and network, they replicate bureaucratic or judicial reflexes, producing institutions that mirror familiar systems rather than innovating for their specialised mandates.

This institutional mimicry manifests in several ways. Many tribunals, for instance, have ventured into striking down subordinate legislation, though constitutional questions of vires lie with the High Courts and the Supreme Court. Even the Adjudicating Authority under the Insolvency and Bankruptcy Code issues orders from "_ Tribunal, _ Bench (Court-_)," signalling a drift back to conventional court culture. Such patterns reveal how deeply inherited institutional behaviours shape outcomes.

The legal foundations for regulators and regulatory tribunals are now largely settled, and statutes have transferred specific functions from the executive and judiciary to these bodies on the premise that distinct processes, expertise, and modified arrangements for independence would improve outcomes. However, their institutional design, recruitment architecture, and inter-institutional balance remain inadequately conceived.

Consider regulatory independence. As far back as 1995, it was settled that regulators may frame regulations without prior government approval, subject to post-facto legislative oversight. Yet many regulations still require prior approval, reflecting a continued reluctance to cede space. This persistent oscillation suggests an incomplete understanding of the rationale for establishing regulators and tribunals, and an ongoing attempt, on both executive and judicial fronts, to shape these bodies in their own institutional image.

One major design flaw is ad hoc organisational arrangements that lack the continuity, long-term architecture, and characteristics of the bureaucracy or the judiciary. Members of the higher judiciary and senior bureaucracy enjoy long, protected tenures that enable expertise, stability, and institutional memory. By contrast, tribunal members typically serve short terms of three to five years, often post-retirement, which is insufficient to build or retain capacity. Regulators fare somewhat better because of dedicated professional secretariats. The ongoing debate over tribunal tenure, reduced to choosing between four and five years, misses the point entirely.

Sustained institutional expertise in regulators and regulatory tribunals requires recruiting mid-career professionals and offering tenures linked to a fixed retirement age, regardless of age of entry. Questions of ethics, performance, and accountability should be addressed through transparent governance frameworks, not through artificially short terms. Appointments must prioritise individuals, whether from the Bench, bureaucracy, academia, professions, or industry, who can advance institutional purpose, not those who merely extend familiar chains of command. This would enable a steady infusion of specialised capability and foster genuine institutional independence.

With nearly three decades of experience behind us, India now has sufficient data to conduct a rigorous, evidence-based study of how its regulators and tribunals function in practice. Such a study should go beyond anecdotal impressions and systematically map mandates, workloads, decision-making processes, timelines, organisational capacities, and user experience. Such an evidence-based assessment can reveal what works, what does not, and why certain institutions consistently outperform others, and which structural features contribute to such outcomes. Insights from such evidence should then guide a comprehensive redesign, not piecemeal legislative fixes. A mature regulatory state requires a coherent institutional architecture built on tested principles, not reactive amendments.

Thereafter, a common design template may be developed, akin to the constitutional principles that guide the executive and the judiciary, to articulate overarching principles that guide the establishment and operation of regulators and tribunals, irrespective of their sectoral domain. It should address foundational elements that any regulator or regulatory tribunal must embody: Clear functions and powers; robust governance and management structures; calibrated mechanisms of independence and accountability; fixed-retirement-based tenures; transparent recruitment and removal processes; standardised conflict-of-interest and ethics rules; and institutionalised professional secretariats. These principles must then be adapted to the purpose and context of each body, rather than imposed as replicas of ministries or courts.

Only by grounding institutional design in capability, independence, and evidence, not in inheritance or hierarchy, can India build a genuinely independent regulatory state. Such an architecture is indispensable if the country is to move beyond the cycles of judicial invalidation, legislative patchwork, and institutional drift that have characterised these domains for too long.

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