

# A constitutional question

**S**INCE ITS ESTABLISHMENT in 1992, the Securities and Exchange Board of India (Sebi) has evolved into one of the most powerful financial regulators in India, exercising extensive quasi-legislative, executive, and quasi-judicial powers. This hybrid institutional design has been justified by the demands of investor protection, market integrity, and regulatory speed. The Securities Markets Code Bill, 2025 (SMC), now before Parliament, seeks to consolidate and extend this model. It, however, intensifies constitutional concerns about the limits of delegated legislation and the permissible concentration of regulatory power.

In a constitutional democracy, the primary responsibility for law-making rests with the legislature. This includes the articulation of policy, shaped through parliamentary deliberation and democratic accountability. Delegation to the executive is constitutionally permissible. But it is limited to filling in details and operationalising statutory policy, not determining its core content.

The line is especially firm when it comes to defining contraventions and prescribing punishment. These are core legislative functions: they delineate the boundaries of lawful conduct and directly affect liberty, property, and reputation, and must be determined by the legislature. When delegation extends to these matters, it risks crossing the line from permissible delegation into an abdication of core legislative responsibility. At its core, the issue is not regulatory power, but who defines its limits.

The history of securities regulation in India reflects this careful balance. When Sebi was first vested with the power to impose monetary penalties in the mid-1990s, the legislative framework retained primary control over the definition of wrongdoing, both criminal and civil, while permitting flexibility in enforcement. Contraventions were identified in the statute, adjudication was structured through rules framed by the central government, and appellate oversight lay with the Securities Appellate Tribunal.

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The SMC departs from this discipline by allowing the regulatory authority to play a more active role in shaping contraventions and penalties. Clause 92 permits the addition of contraventions beyond those specified in the statute, thereby enabling their scope to evolve. Practices once regarded as legitimate may later be reclassified as violations, and vice versa. This regulatory flexibility, however, carries a deeper cost—it makes the boundary between lawful and unlawful conduct contingent on executive determination rather than legislative choice.

These concerns are acute in the realm of criminal liability, which entails stigma, coercion, and deprivation of liberty. Given the severity of these offences, including imprisonment of up to 10 years and fines up to ₹10 crore, constitutional discipline demands that the core content of such offences be defined by the legislature. Clause 93, however, enables the executive to create additional criminal contraventions and prosecute their breaches. The foundation of criminal liability thus shifts from parliamentary enactment to administrative fiat, militating against basic principles of legality. Courts, bound to give effect to valid subordinate legislation, may thus uphold convictions based on norms that have not undergone legislative scrutiny.

This shift of critical policy choices away from elected representatives undermines democratic accountability and unsettles the constitutional balance between the legislature and the executive. It also departs from the assurance in the memo-

randum of delegated legislation accompanying the SMC that subordinate law-making would be confined to procedural and administrative matters; empowering the executive to define contraventions goes well beyond that limit.

While the SMC seeks, in part, to rationalise and decriminalise securities law, it retains criminal liability for a category of conduct described as “market abuse”. This appears to narrow criminal exposure and

improve the ease of doing business. Yet it carries an inherent tension: even as Parliament signals restraint, it delegates to the regulator the authority to expand the scope of criminalisation. The result is not calibrated decriminalisation, but an open-ended architecture of criminal liability.

The SMC compounds these concerns by restructuring the adjudicatory framework. It empowers Sebi to prescribe, through regulations, the manner of conducting adjudication proceedings. This departs from the existing model, where such procedures are governed by the central government-framed rules. This shift collapses the distinction between rulemaking and enforcement: the same authority would define the norms, initiate proceedings, and design the process for their adjudication.

Under the proposed regime, Sebi would thus shape both substantive enforcement standards and the procedures governing adjudication, while also controlling the appointment of adjudicating officers. This concentration of functions may enhance regulatory efficiency, but it blurs the lines between norm creation, enforce-

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ment, and adjudication, lines that are central to preserving institutional balance.

The concern is not of institutional expertise or integrity. It is structural—such concentration can undermine the validity of enforcement itself. The consequences of failing to maintain institutional separation are real. In *Deloitte Haskins v. Union of India* (2025), Delhi High Court quashed multiple show-cause notices and final orders of the National Financial Reporting Authority on the ground that it failed to segregate audit quality review from disciplinary functions. The lesson is clear: structural safeguards aren’t formalities; they are conditions of valid enforcement.

None of this suggests that securities regulation should be weakened or that regulatory agility is undesirable. Modern financial markets demand swift, expert-driven, and adaptive intervention. But constitutional design requires that such agility be anchored in accountability. When delegation extends into domains that shape the boundaries of liability and the processes of adjudication, it begins to resemble not flexibility, but institutional substitution.

The SMC thus raises a deeper constitutional question: How far can regulatory consolidation go before it begins to erode the foundational distinction between legislature and executive? Modern markets demand a strong regulator, but that strength must rest on a clearly defined legislative foundation. The legitimacy of regulation rests not only on expertise and efficiency, but also on its grounding in democratically accountable law-making.

The SMC presents a constitutional inflection point for securities regulation. It offers an opportunity to modernise and streamline the law, but also carries a risk of unsettling first principles. When the power to define offences, expand criminal liability, and design adjudicatory processes migrates to the regulator, the issue ceases to be one of regulatory efficiency and becomes one of constitutional design. Without careful recalibration, the result may not be better regulation, but a gradual erosion of the constitutional boundaries that sustain the rule of law.