At arm's length from regulators

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The Tribunals Reforms Act, which came into force on August 25, recalibrates the institutional relationship between the Executive and tribunals. It retains the Centre's role in appointments and overall tribunal governance, while entrusting a National Tribunals Commission with the selection of chairpersons and members along with performance oversight.

The TRA provides for a five-year term for chairpersons and members, with eligibility for reappointment. It, however, enables the government to prescribe their qualifications, manner of selection, appointment, salaries and allowances, resignation, removal, and other conditions of service. Thus, the TRA makes an important institutional distinction: the government prescribes the framework; the NTC undertakes selection and performance oversight. This replaces the earlier approach of separate frameworks administered by respective ministries.

It creates a clearer separation between the government's role in institutional governance and sectoral interests of the ministries. It reflects a sound principle of public institutional design: where an institution must exercise independent judgement, an Executive department should not control its institutional governance. That principle has equal, if not greater, relevance to economic regulators.

The government provides services, owns assets, grants licences and authorisations, and participates in markets. Regulators make regulations; supervise markets; investigate, conduct and, in several cases, adjudicate violations; and impose sanctions. Their decisions can affect the government's economic interests. Regulators such as SEBI, TRAI, IRDAI, and the electricity regulators are, therefore, expected to operate with a degree of independence.

Ministerial influence can operate through several channels. The administrative ministry may substantially influence appointments, removal, tenure and service conditions. In some cases, regulations made by a regulator require prior government approval. In others, the regulator's human resources and service conditions are governed by rules made by the government. Most regulatory statutes bind regulators to directions issued by the government on policy and empower it to supersede regulatory boards. Each arrangement may have a historical justification. Taken together, however, they produce a fragmented oversight architecture.

The case for insulation is, if anything, stronger for regulators than for tribunals. A tribunal deals with a dispute occasionally; a regulator interacts with the government and the

regulated sector every day. Its relationship with the concerned ministry is continuous, not episodic. The possibility that an unpleasant interaction could affect a chairperson's appointment, tenure or service conditions is an avoidable institutional vulnerability.

The answer is not to make regulators unaccountable, nor to sever the legitimate relationship with the government. The government must continue to determine policy through legislation, provide democratic accountability and, where appropriate, oversee the broad regulatory architecture. What should change is who controls the institutional machinery through which independent regulation is delivered.

A National Regulatory Commission (NRC), modelled on the NTC, could undertake the selection of chairpersons and members of regulators through a transparent and consistent process and periodically review their performance. The government would continue to prescribe the common framework governing qualifications, manner of selection, appointment, salaries and allowances, resignation, removal, and other conditions of service. The key change would be that these matters would not be left to the varying preferences and practices of sectoral ministries. This would not merely protect regulators from government influence; it would also protect the government from allegations of favouritism, avoidable litigation and the recurring cycle of Executive-dominated arrangements being challenged and reconstructed.

The NRC could develop common standards and best practices for regulatory institutions, including standards relating to rule-making, enforcement, staffing and institutional support. It could also periodically assess regulatory performance against transparent parameters such as timeliness, quality and consistency of decisions, effectiveness of enforcement, regulatory burden, stakeholder service, and achievement of statutory objectives. Such assessments could be placed in the public domain and reported to Parliament. Independence would, thereby, be accompanied by measurable accountability.

The NRC could be administratively located within a ministry that has no direct stake in the sectors being regulated. Alternatively, the government could create a new department of regulatory affairs, within which both the NTC and NRC could be located. Its mandate should be strictly institutional: prescribing the common framework, supporting selection and appointment, tenure, removal, service conditions, institutional administration and performance assessment, without any role in substantive regulatory decisions. The objective would be a common institutional architecture without compromising the substantive autonomy of individual regulators.

Indeed, one may ask whether this reform should not have preceded tribunal reform. Regulators emerged earlier than regulatory tribunals, and their work is much more closely connected with the respective administrative ministries. If an arm's-length institutional arrangement is considered important for tribunals, it is difficult to justify a weaker

arrangement for the regulator, with the degree of independence varying from ministry to ministry.

There is, however, an important caveat. Simply transferring powers from a sectoral ministry to another ministry does not by itself guarantee independence. The institutional design must ensure that Executive control does not merely move one level upwards. Appointment and removal mechanisms, in particular, must contain adequate safeguards against Executive capture. The objective should be genuine institutional insulation, not a change of label.

The TRA, thus, provides a useful template for the next generation of regulatory reform. Its institutional lesson can be extended to economic regulators: the government should prescribe the common framework; an independent institutional body should undertake selection and performance oversight; and sectoral regulators should retain full responsibility for substantive regulatory decisions.

The objective is independence within the government's constitutional framework: policy with the elected government, regulation with independent regulators, adjudication with tribunals and institutional governance at arm's length from sectoral interests. That would take forward the institutional reform that the TRA has begun.

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(Views are personal)