

CUTS Centre for
Competition, Investment
& Economic Regulation
Discussion Paper

Institutional Independence in India



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Abstract

In India, several institutions have been mandated with institutional independence. Most of such institutions were established to perform the challenging task of maintaining a judicious balance between conflicting interests and overhauling the governance system, by enforcing accountability. The State has not been so successful in doing the same.

Independence comprises automatic funding of the institution in question, without having to depend on the whims of the ministers and their civil servants. Given its importance to the entire governance system, the process by which the concept of institutional independence has evolved in India needs to be examined.

Institutional Independence has an inverse relationship with external influences over the authorities. The lesser the influence, the higher will be the scope for functional autonomy. Institutions are necessary for the healthy functioning of political and economic democracy, but they come into conflict while exercising their independence to make social welfare meaningful. In India, the problem has been compounded, because the Parliament also wants to exercise some control over the way the institutions function.

In this paper, a comprehensive analysis of institutional independence in India has been done which would facilitate cross-disciplinary learning and identification of good and bad practices. The nature of the relationship which the Government should maintain with the institutions is highlighted in this paper.

Several instances of confrontations between the institutions and the Parliament have been cited over the jurisdiction as well as independence of action. Various obstacles in the way of the effective functioning of the independent institutions have been examined in this paper.

The paper suggests that institutional independence should not be mistaken as an objective in itself, it should rather be seen as an important requisite for achieving desired effectiveness, economy, and efficiency in the system.

Chapter 1

Introduction

Institutional efficacy demands functional independence. Functional independence for an institution implies achieving the desired degree of autonomy and maintaining an arm's length relationship from interest groups.

Independence comprises automatic funding of the institution in question, without having to depend on the whims of ministers and their civil servants

The line between independence and autonomy is a thin, but clearly recognisable, one. Independence, in the main, comprises automatic funding of the institution in question, without having to depend on the whims of ministers and their civil servants. It also means that the head of the institution, once appointed, has fixed tenure and can be removed only for incompetence and moral turpitude. Taken together, these two elements confer an unparalleled freedom of action on the institution. That some institutions chose to restrict their own freedom is not germane. There could be other minor variations, as well. But, these two are the most important ones. Autonomy, in contrast, usually has at least one of these elements, usually automatic funding, absent. Sometimes, even fixed tenure can be absent. Thus, while seeking to establish whether an institution is truly independent or merely autonomous, these are the first characteristics one should look for.

There is a *quid pro quo* that society demands from institutions that enjoy genuine independence. This means that those who head them should not accept employment after they relinquish their offices. Few realise it, but this is one of the most powerful drivers of independent action. If the incumbent has no personal axes to grind, such as a seat in the *Rajya Sabha* (the Upper House of Parliament), he would tend to be less accommodative of the constant 'requests' that emanate from the Government. This feature should be incorporated in the rules that govern all institutions. It will make a substantial difference to the way they function.

Institutions have emerged in the wake of the need to perform the balancing act between conflicting interests and, quite often, state-owned entities are such interest groups

In India, several institutions have been mandated with institutional independence. Such institutions have emerged in the wake of the need to perform the balancing act between conflicting interests and, quite often, state-owned entities are such interest groups. Most of such institutions were established to perform the challenging task of maintaining a judicious balance between conflicting interests and overhauling the governance system, by enforcing accountability. The State has not been so successful in doing the same. Therefore, these so-called independent institutions had to be established. However, in practice, often a gap exists between the expectations and the actual performance of these institutions. The reasons for this gap are several and lack of functional autonomy is one of them.

Institutional autonomy has been widely referred to and debated in the specific context of infrastructure sector regulatory authorities.

However, there are several other agencies that function outside the state domain. The contentious issue of (lack of) functional autonomy keeps surfacing in different forms and contexts. It would be worthwhile to look at the approaches being followed in India in this regard.

A comprehensive analysis of different kinds of institutions would facilitate cross-disciplinary learning and identification of good and bad practices

Given its importance to the entire governance system, the process by which the concept of institutional independence has evolved in India needs to be examined. Rather than just following a sector-specific approach, a comprehensive analysis of different kinds of institutions would facilitate cross-disciplinary learning and identification of good and bad practices. For instance, the relationship of the State with the Central Bureau of Investigation (CBI), the Reserve Bank of India (RBI) and the Election Commission can provide significant learning, while analysing institutional independence in India.

The central issue here is to define the nature of relationship that ideally the Government should maintain with such institutions. Notwithstanding the stated position of the Government of India (GoI) of imparting functional independence to such bodies, somehow it gets diluted when it comes to actual delegation.

In practice, it has been observed that loosening direct control over independent agencies is a difficult option for the Executive. Nevertheless, the perceived benefits of allowing these institutions to discharge their mandate with functional freedom are an attractive enough incentive to justify such a move. These benefits include improvement in effectiveness, efficiency, transparency and accountability in the system. All these factors are important, for both investors and economic management.

Institutional independence has an inverse relationship with external influences over the authorities. The lesser the influence, the greater will be the scope for functional autonomy. There could be a host of possible external influences, including those wielded by interest groups. However, the relationships these bodies maintain with the Government have always been at the centre stage of the debate. The Government can always discover ways and means to conveniently distort the nature and extent of functional autonomy of such institutions. Therefore, in practice, the extent of the vulnerability to Government influence actually determines the degree of independence for these institutions.

Institutional independence has an inverse relationship with external influences over the authorities. The lesser the influence, the greater will be the scope for functional autonomy

One of the most vexed issues to have dominated both political and economic discourses in the democratic world in the latter part of the last century is the question of institutional independence. The reason is that the issue consists of a paradox which country after country has tried to solve. Some have succeeded more than the others, but no one has succeeded wholly.

The paradox is that, while institutions are necessary for the healthy functioning of political and economic democracy, when they seek to exercise their independence to make social welfare meaningful, they come into conflict with the Executive, which, arguably, is the most powerful of the various institutions. This power, as we know, arises from the control that it exercises, directly or indirectly, over the power to appoint and remove heads of institutions and their boards.

In some countries, like India, the problem has been compounded, because the Parliament also wants to exercise some control, not merely over appointments but also over the way the institutions function. There are instances of confrontations between institutions and the Parliament, over jurisdiction as well as independence of action. Central to this conflict is the question of accountability.

Box 1: Ways to Make Institutional Independence Intact!

- A Panel should be constituted to recruit capable personnel for manning independent institutions. Such a Panel should be comprised of renowned and undisputed personalities with diverse expertise. One-third members of this Panel should be replaced every alternate year.
- The extension of the tenure should also be decided by the same Panel.
- Removal of Commissioners should be done on proven guilt in an impartial inquiry.
- What constitutes 'policy' should be debated and defined in an unambiguous manner.
- Independent institutions should be allowed to recruit their staff on contract basis. Such appointments should be made within the rules and regulations laid down by the Government.
- Independent institutions should be consulted prior to the Government formulating policies and mandated with entire regulatory functioning, rather than being just confined to advisory role.
- Wherever possible, these institutions should be encouraged to generate revenues on their own.

Chapter 2

The History and the Theory

The need for institutional independence worldwide has arisen from diverse factors, depending on the domain for which the institution is intended. In some countries, such as Britain, independence has evolved out of a particular set of historical circumstances. For example, by the end of the 16th century, when the reign of Elizabeth I ended, a large number of persons not belonging to the privileged, aristocratic, landed classes had become prosperous and were demanding a say in political and economic power. For instance, where the latter was concerned, they had begun to protest over the King's right to tax anything that he pleased. They wanted it subject to some scrutiny and, where necessary, abridgement. The first constitutional case involving the independence of the Judiciary was fought in 1618, in which the Chief Justice ruled that the King did not have such an absolute right. That judgement set the tone for what was to follow over the centuries.

The need for institutional independence worldwide has arisen from diverse factors, depending on the domain for which the institution is intended

The 17th century in Britain also saw the emergence of the struggle for independence of the Parliament. It claimed the sole right to pass legislation, which the King disputed. This is more clearly understood when we see that, by the 1630s, the Lower House of the British Parliament, the House of Commons, was dominated by the merchant class. They eventually rose up in arms against the King, Charles I. After a bloody civil war, the King was beheaded in 1649. This ensured the independence and supremacy of the Parliament for all times to come – including when, 38 years later, it even felt enabled to invite a foreign king, William of Orange, to come and rule Britain, because it did not agree with the religion of James II, who was a secret Catholic.

In the US, which had learnt its lessons from the events in its mother country, Britain, such independence was guaranteed in the Constitution. However, until recently, even there independence was interpreted to mean that the institution in question would not act against the wishes and agenda of the Government of the day. The story was much the same in most other countries.

This state of affairs was accepted for a long time. But, after the Second World War, there has been a sea change, largely because of the emergence of civil society groups. The pioneer, of course, was Ralph Nader, the American crusader for consumer rights. It is also important to note that the fact that such a movement emerged in the US, combined with the rapid enhancements in public awareness of its rights, gave the trend far more power and made it far more effective than if it had started somewhere else in the world. Thus, even in this matter, the US proved itself to be the trendsetter.

Delegated legislation is law made by ministers under powers given to them by the Parliamentary Acts to implement and administer the requirements of the Acts

Be that as it may, the overall consequence of what John Kenneth Galbraith, in another context, has called countervailing power, has been to force the political class and subsequently, albeit rather more reluctantly, the bureaucratic class, to accommodate public opinion. The empowerment of the people, through education and higher incomes, has also been accompanied by a pressure to allow full institutional independence. Independence has come to acquire a special political and economic significance. What is interesting is that, whether it was Britain in the 17th century or the US in the 20th, the context in which the term 'independent' is defined has remained virtually the same: not serving vested interests, regardless of whose – the government, the business, the politicians or all three acting in collusion.

But, prevention of collusion, even though it was the most important reason, because it was a political response to a mass movement, was not the only reason for devising independent institutions. Legislatures were overburdened and legislation on the nitty-gritty needed to be delegated. They also realised that they did not have the technical competence to deal with the details and it was not always possible for the core legislation to anticipate new situations, especially those arising from technological change. This led to the phenomenon of delegated legislation.

Delegated legislation (sometimes referred to as secondary legislation, or subordinate legislation), is law made by ministers under powers given to them by the Parliamentary Acts to implement and administer the requirements of the Acts. The legislation has equal effect in the Judiciary, although it can be challenged in the courts, on the grounds that specific pieces of delegated legislation are not properly based on the powers given by Acts. This is crucial.

This type of legislation usually tends to be more specific and encompasses the latest technical knowledge and creates more thorough and detailed legislation. It also deals with problems that arise with existing legislation, especially since it is not feasible to provide for every contingency that may arise in the future.

The increasing use of delegated legislation has led to the change that the Parliament is losing its importance

In the United Kingdom, from where we take our political principles and jurisprudence, delegated legislation is enacted through statutory instruments. These can take the form of ministerial regulations, orders in council and codes of practice. The amount and scope of delegated legislation has grown as a result of the increasing pressure on Parliamentary time. This, too, is crucial for understanding institutional independence.

At the most basic level, the increasing use of delegated legislation has led to the change that the Parliament is losing its importance. But, its proponents say that it is an efficient way of reducing the load on the Parliament, especially when a lot of delegated legislation is uncontroversial and relates to the nitty-gritty. But, what is controversial and what is not is not always easy to determine, as when, say, the pricing of quasi-public goods is involved. The point here is very simple: delegated legislation affects many people and, therefore, it needs to be overseen by the Parliament.

Box 2: Institutional Design for Utility Regulation in OECD Countries

A study of the utility regulation regimes in 23 Organisation for Economic Cooperation and Development (OECD) countries from Western and Central Europe, North America and the Asia-Pacific categorises the institutional approaches towards utility regulation under the following four heads:

- Exclusively managed by the Ministry;
- Ministry and an independent advisory body;
- Ministry and a ministerial agency; or
- Ministry and an independent regulatory agency.

Independent regulatory agencies have been established in ten countries. These entities are autonomous bodies, provided with specific powers and are governed by one or several commissioners, appointed for a definite and non-revocable period. The agencies in the US, the UK, Canada and Australia have a broad mandate to regulate industry and may act on almost all regulatory and competition policy issues. The agencies in Ireland and the Czech Republic are responsible for network and end-user tariff setting and network access issues, licensing and authorisations. The remaining agencies have more limited and specialised powers, mainly related to network and end-user tariff setting and network access issues. This is the case in France, Italy, Portugal and Denmark.

At the other end, the 'line ministry' is the only organisation directly involved in the management of regulation in Germany, Japan, New Zealand and Switzerland. In three of these countries – Germany, Japan and New Zealand – there is no ongoing regulation of networks.

Independent advisory agencies have been established in Belgium, Greece, Luxembourg and Spain. These agencies provide advise to the Ministry and are responsible for monitoring and arbitration, but have no definite regulatory powers. In accordance with their advisory role, the areas of activity of these organisations are broadly defined to include most regulatory issues. Governance and decision-making structures and independence safeguards are similar to those adopted by independent regulatory agencies.

In the remaining five countries, Finland, Hungary, the Netherlands, Norway and Sweden, management of day-to-day regulatory affairs is delegated to a ministerial agency formally subordinated to the line ministry and managed by a president or director, appointed for an indefinite, but revocable, period. Ministerial agencies specialise in regulating monopolies. Their main role is to manage network regulation, including tariffs and access conditions. These institutions operate on a separate budget, under an autonomous management, and may be subject to a differentiated legal framework, but are ultimately subordinate to the ministry.

In The Netherlands, competition law and regulation are also controlled by a single institution, namely the Ministry. In Australia, administration of competition law and most regulatory issues are the responsibility of a single independent agency at the federal and state levels.

Source: International Journal of Regulation and Governance, TERI, June 2003

Another important reason was the gradual evolution of the idea that monopolies and oligopolies, both economic and political, were bad for the overall social good and that free competition, defined as the freedom to enter a business or politics, operate in freedom and exit without let or hindrance, was what served the public interest best. This led to a demand from smaller businesses and smaller political groups that were seeking to grow for a fair and neutral referee who would ensure that they were not set upon by the larger incumbents in business and politics. The Election Commission of India is, by far, the best example of this in the world.

In sum, what we see, therefore, is the coming together of a variety of impetuses for either enhancing the independence of existing institutions or setting up new ones with in-built safeguards. It was this simultaneous pressure during the latter part of the 20th century that culminated in the idea of institutional independence, where independence is taken to mean, at one level, outside government control and, at another, not subject to pressure from vested interests. This has resulted in a positive political response and, although the degree has varied, in general, the trend is in favour of institutional independence. The problem today is how to get there with minimum dislocation.

The questions we need to ask in India arise from this overall context. It is necessary to ascertain if such pressure exists in requisite measure; whether the political response can be positive; if not why not; and what should be done about it in terms of creating the context that will result in a positive political response.

India has been trying to reconcile the pursuit of efficiency with equity. Where the economy is concerned, the management problem has been about promoting the interests of capital, while protecting the interests of labour or people

However, to answer these questions we need to understand the political economy of India, where the policy choice, made in the context of a large and diverse democracy, always requires that the Government determine the optimal trade-off between efficiency and equity. For the last 35 years, India has been trying to reconcile the pursuit of efficiency with equity. Where the economy is concerned, the management problem has been about promoting the interests of capital, while protecting the interests of labour or people. As a result of the liberalisation and globalisation, the problem has become even more complex. The political class, thanks to democracy, has not been able to ignore labour, even though it relies heavily on capital. But, it has also been compelled to realise that, unless it champions the cause of capital as well, it will not be able to deliver what the voters want. This is what has led to reform and this is what has contributed to their slowness.

Meanwhile, with the state expressing its inability – as indeed the private sector did 50 years ago – to undertake the new round of investments, attention has, naturally, turned to private finance. This hope has been bolstered by the experience of China and East Asia, who, between them, have seen almost US\$1,000bn of private capital inflows since 1986. But, this has a downside, which is neither adequately nor explicitly recognised. Nor, as mentioned earlier, is allowance made for the problems that arise in managing the transition from the politics of values to the imperatives of efficiency. This also causes disturbances in the system.

At its core, the governing imperative in a developing country democracy is that people cannot be excluded from consuming something because they cannot afford it. This holds true for everything, except the obvious luxuries. This is called populism and, whether we approve of it or not, it is a fact that requires to be accommodated, while managing the several transitions. The Indian paradox is that, while the so-called luxuries require relatively small investment, the public goods, which now include electricity and transport, require massive investments. This means that the eventual responsibility to arrange relative prices in a manner that is fair to all, consumers as well as producers, falls on the Government and the Parliament, because both are accountable to

the electorate in a manner that those charged with delegated legislation are not. And, as the interactions between central banks and governments the world over show, a great deal is predicated on the trust that exists between finance ministers and the governors of central banks.

The Judiciary, in particular, is concerned with justice, whereas the political establishment, including the Parliament and the Executive, to which some of the second-order institutions report, is concerned with equity

One final factor needs mentioning here, which we will discuss in detail in another chapter. This is the issue of the *hierarchy* of institutions. It is important to distinguish, in this context, between institutions that are created by the Constitution of the country and those that are created by the Parliament. The former are higher in the hierarchy and expect their authority to be respected by the latter. However, a fundamental problem can arise here, especially in democratic countries with large numbers of poor people: this is the conflict between equity and justice. On the face of it, the distinction between the two appears thin, but is, in fact, critical to the manner in which outcomes are determined.

The Judiciary, in particular, is concerned with justice, whereas the political establishment, including the Parliament and the Executive, to which some of the second-order institutions report, is concerned with equity. This can give rise to varying degrees of friction.

The co-operative and mutually deferential relationship between the first and the second-order institutions is a matter of concern. Each accuses the other of encroaching on its territory and matters get worse when the Executive or the government joins in. Therefore, each begins to scrutinise others more closely and this also creates difficulties, to the detriment of institutional independence.

Box 3: Institutional Independence: Some Touchstones

Selection and Removal: Attracting right people to man independent institutions is most crucial. Removal should only be possible if found guilty in an inquiry.

Financial Autonomy: Functional independence can effectively be delivered only when financial autonomy is ensured. In the absence of the latter, the so-called independent institutions will inevitably be subjugated to the will of the controller of the budget.

Staffing and Outsourcing: Empowering institutions to appoint sufficient and capable staff is also equally important. They should be allowed to appoint consultants through following transparent process.

Regulation Framing: To conduct their business independent bodies should be allowed to frame regulations within the broad policy directives issued by the government. Such regulations can be notified with having a prior approval from the government. This should replace the practice of government framing the regulations for these institutions.

Defining 'Policy Directives': The ambiguity should end. It should not be left to the sole discretion of the government to define what constitutes the policy directive. Gateways of 'policy directive' should be spelt out clearly in advance.

The fundamental principle that underlies the success of the idea of independent institutions is a co-operative and constructive relationship

The fundamental principle that underlies the success of the idea of independent institutions is a co-operative and constructive relationship. This, ultimately, depends upon meaningful communication and trust. The need for effective communication has become very acute, as societies and economies grapple with newer and increasing problems. If, to this, we add the constraints imposed by the general paucity of funds, it becomes even more important to restore the old, amicable relationship between the first and second-level institutions.

2.1 Subordinate or Delegated Legislation

Subordinate legislation is the legislation made by an authority subordinate to the sovereign authority, namely, the Legislature. According to Sir John Salmond, "Subordinate legislation is that which proceeds from any authority other than the sovereign power and is, therefore, dependent for its continued existence and validity on some superior or supreme authority".

Most of the enactments provide for the powers for making rules, regulations, by-laws or other statutory instruments which are exercised by specified subordinate authorities. Such legislation is to be made within the framework of the powers so delegated by the Legislature and is, therefore, known as delegated legislation.

The need and importance of subordinate legislation has been underlined by the Supreme Court in the Gwalior Rayon Mills Mfg. (Wing) Co. Ltd. V. Asstt. Commissioner of Sales Tax thus: "Most of the modern socio-economic legislations passed by the Legislature lay down the guiding principles and the legislative policy. The Legislatures because of limitation imposed upon by the time factor hardly go into matters of detail. Provision is, therefore, made for delegated legislation to obtain flexibility, elasticity, expedition and opportunity for experimentation. The practice of empowering the Executive to make subordinate legislation within a prescribed sphere has evolved out of practical necessity and pragmatic needs of a modern welfare State".

What a legislature can possibly do and actually does is that it lays down the policy and purpose of the legislation and leaves it to the Executive, experts and technocrats to provide for working details within the framework of the enactment by way of rules, regulations, bye-laws or other statutory instruments.

Delegated legislation is increasingly assuming an important role in the process of law-making, comprising an important component of legislation

That is why, delegated legislation is increasingly assuming an important role in the process of law-making, comprising an important component of legislation. Powers have also been conferred under various provisions of the Constitution of India on the different functionaries (*e.g.*, the President, the Government, *i.e.*, the Executive), to frame rules, regulations or schemes dealing with various aspects.

The 'Subordinateness' in subordinate legislation is not merely suggestive of the level of the authority making but also of the nature of the legislation itself. Delegated legislation under such delegated powers is ancillary and cannot, by its very nature, replace or modify the parent law, nor can it lay down details akin to substantive law. There are differences where pieces of subordinate legislation which tended to replace or modify the provisions of the basic law or attempted

to lay down new law by themselves had been struck down as *ultra vires*.

While in the context of increasing complexity of law-making, subordinate legislation has become an important constituent element of legislation, it is equally important to see how this process of legislation by the Executive under delegated powers, can be reconciled with the democratic principles or Parliamentary control. Legislation is an inherent and inalienable right of the Parliament and it has to be seen that this power is not usurped nor transgressed under the guise of what is called subordinate legislation.

Amongst the mechanisms evolved by the Legislature to exercise control over the delegated legislation, the most important is the constitution of the Committee on Subordinate Legislation. It is this Committee of the Legislature which examines if the powers conferred by the Constitution or delegated under an Act passed by the Legislature have been duly exercised and are within the conferment or delegation, and not beyond. It has to see that delegated legislation does not transgress into areas not prescribed for it, and also that it does not intrude into the sphere which is the sole concern of the Legislature itself.

To scrutinise and ensure whether powers to make rules, regulations, bye-laws, schemes or other statutory instruments conferred by the Constitution or delegated by the Parliament have been properly exercised within such conferment or delegation, a Committee, called the Committee on Subordinate Legislation, has been constituted under Rules 204-206 of the Rules of Procedure and Conduct of Business in *Rajya Sabha*.

A Committee, called the Committee on Subordinate Legislation, has been constituted to scrutinise and ensure whether powers to make rules, regulations, bye-laws, schemes or other statutory instruments conferred by the Constitution or delegated by the Parliament have been properly exercised

After each rule, regulation, bye-law, scheme or other statutory instrument (hereinafter referred to as the 'order'), framed in pursuance of the Constitution or the legislative functions delegated by the Parliament to a subordinate authority and which is required to be laid before the Parliament, is so laid before the Council, the Committee shall, in particular, consider:

- (1) whether the order is in accord with the provisions of the Constitution or the Act pursuant to which it is made;
- (2) whether the order contains matter which, in the opinion of the Committee, should more properly be dealt within an Act of Parliament;
- (3) whether the order contains imposition of taxation;
- (4) whether the order, directly or indirectly, bars the jurisdiction of the court;
- (5) whether the order gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power;
- (6) whether the order involves expenditure from the Consolidated Fund of India or the public revenues;
- (7) whether the order appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made;
- (8) whether there appears to have been unjustifiable delay in its publication or laying the order before the Parliament; and
- (9) whether, for any reason, the form or purport of the order calls for any elucidation.

The Chairperson, accordingly, issued a direction as follows:

- “(1) The Committee on Subordinate Legislation may examine all ‘orders’, whether laid before the Council or not, framed in pursuance of the provisions of the Constitution or a statute delegating power to a subordinate authority to make such orders;
- (2) The Committee may examine provisions of Bills which seek to:
 - (i) delegate powers to make ‘orders’, or
 - (ii) amend earlier Acts delegating such powers, with a view to see whether suitable provisions for the laying of the ‘orders’ before the Council have been made therein.
- (3) The Committee may examine any other matter relating to an ‘order’ or any question of subordinate legislation arising there from”.

The Committee has to satisfy itself whether the ‘order’ is intra vires of the Constitution or the respective Act of Parliament

The principal function of the Committee is to scrutinise various rules, regulations, bye-laws, schemes and other statutory instruments (briefly referred to as ‘orders’) framed in exercise of the powers conferred by the Constitution or delegated under the various Acts of Parliament to see whether the ‘order’ is in accord with the provisions of the Constitution or the Act, pursuant to which the same is made and to report to the *Rajya Sabha* in regard thereto.

The Committee has to satisfy itself whether the ‘order’ is *intra vires* of the Constitution or the respective Act of Parliament. In case, any order is found not to be in accord with the provisions of the Constitution or of the Act whereunder it is made, the Committee recommends that the respective rules and regulations be suitably amended.

The Committee also sees to it that the orders issued in exercise of the powers of delegated legislation do not take the place of an Act of Parliament nor do they seek to amend or add to the basic law.

Besides, the functions as enumerated in Rule 209, the Committee goes into matters, where the rules, regulations, bye-laws and other statutory instruments, as contemplated in the Constitution or envisaged in an Act of Parliament, have not been framed or the framing thereof has been inordinately delayed.

Chapter 3

Tier One Institutions

These are institutions created by the Constitution, as opposed to the Parliament, which is itself a creature of the Constitution. Some of these Constitutional institutions are on par with the Parliament, although the latter does not always accept this position, claiming, instead, a slightly higher position. This can bring it into conflict with the other institutions, most notably the Executive and the Judiciary. Here we shall not deal with the former, as most of the other institutions also come into conflict with it. Indeed, it is usually the Executive vs. the Rest, for the simple reason that the rest have been created to provide a check against the Executive.

3.1 The Judiciary

An independent Judiciary that can act as a check on the government requires individual judges and the Judiciary, as a whole, to be independent as well

Alexander Hamilton once wrote, “There is no liberty if the power of judging be not separated from the legislative and executive powers”. Although he was referring to the independence of the Judiciary, Hamilton’s insight applies to, generally, the notion of independence of all democratic institutions. Or, to slightly misquote the former US President, Woodrow Wilson, the struggle for constitutional government is a struggle for intelligent, independent and impartial institutions, which are not subject to domination by other parts of the government. The purpose is to diminish government arbitrariness.

An independent Judiciary that can act as a check on the government requires individual judges and the Judiciary, as a whole, to be independent as well. It is absolutely necessary to protect its sphere of authority from the influence of other government agencies. The words judicial independence comprises both individual as well as institutional aspects.

This requires that judges must be safe from government vengeance. Equally importantly, or some would say even more so, the method by which judges are selected must be such that it minimises the risk of corruption and outside influence.

In the US, protection comes from the fact that the positions and salaries of judges are kept beyond the reach of external forces, because the Constitution says judges hold office “during good behaviour”, which means for life, unless they are found guilty of serious misconduct. In India, in order to remove a judge from office, he or she has to be impeached by the Parliament. This has never happened to date. The US Constitution also ensures that their salaries cannot be reduced. Taken together, the effect is that judges do not fear to apply the law. In the end, though, the key lies in the process of selection. Considerations other than merit need to be ignored and avoided.

Box 4: Institutional Independence: Summary of Principles

1. The principles of judicial independence from *Valente* may apply to administrative decision makers. These principles operationalise the reasonable apprehension of bias test from *CJL v. NEB* in the context of *institutional independence*; the test is separate and distinct from institutional impartiality in *Lippé*. Like other principles of PF, what will constitute a reasonable apprehension of a lack of independence will vary with the context. Courts have usually only held it to exist where the decision maker(s) is adjudicative (holding an oral hearing, determining rights or important interests, applying law or objective principles to facts): *Matsqui*.
2. Even where the *Valente* principles are properly applicable in the administrative setting, their application is flexible. Administrative decision makers are not typically held to the standard of judges: *Matsqui*.
3. The three indicia of independence from *Valente* are security of tenure, financial security and administrative control.
4. With respect to security of tenure, removal at pleasure or “without cause” is problematic. Fixed-term appointments, even comparatively short ones of one or two years or part-time ones, are not generally problematic: *Matsqui*, *Quebec Inc. (Regie case)*.
5. With respect to financial security, an absence of remuneration is typically problematic: *Matsqui*. Decision makers should generally be paid. But, again, it depends on the context. Where decision-makers do not depend on their post for their livelihood, then non-payment need not be a problem: *Katz*.
6. Administrative control has not been the ground on which a reasonable apprehension of a lack of independence usually rests or succeeds. Executive supervision over the affairs of adjudicative ADMs is common and expected; it fulfils the goal of public accountability: *Quebec Inc.*
7. What evidence should one look at in trying to ascertain how much security of tenure, financial security and administrative control exists? One should not only look to the written documents (statutes, regulations, bylaws, etc.) but also to the “operational reality” of the ADM: *Katz*, *CUPE 2003* (and dissent in *Matsqui*). It is not enough to only look at silent documents that have not spelled out independence requirements and so, while not mandating a situation that gives rise to a reasonable apprehension of a lack of independence, could conceivably allow or be permissive of such an apprehension. One must also look at how the ADM operates in practice to see whether any practices fill in the legislative gaps about independence.

Many countries, including in the Middle East, have adopted this approach to secure the independence of the Judiciary.

However, even these safeguards are fully applied, tensions sometimes results because the other side of the coin is judicial waywardness. The American Judiciary has been seized of the problem and, according to the former Chief Justice, Harlan Stone, “the only check upon our own exercise of power is our own self-restraint”. This is sought to be achieved through a code of conduct.

Adequate funding to the Judiciary, as a whole, is also important to guarantee independence. The Beirut Declaration recommends that “[t]he state shall guarantee an independent budget for the Judiciary, including all its branches and institutions. This budget shall be included as one item into the state budget and shall be determined upon the advise of the higher judicial councils within the judicial bodies”. The Cairo Declaration urges governments to “guarantee the financial independence of judiciaries”. Ensuring adequate and unconditional financing, in accordance with these Declarations’ recommendations, is a crucial step in insulating the Judiciary from improper influence.

Lastly, even when these imperatives are fulfilled, the interplay between the Executive and the Judiciary can often be troublesome, because the former tends to argue, as it has in India, that “judicial independence is not an end in itself, but a means to an end”. This is a dangerous doctrine and can lead, as it did in India, to the notion of a committed Judiciary – committed to the Government. Basically, judicial independence can result in rulings that are contrary to the interests of the government, which sometimes does things that are expedient, but not conducive, to preserving the rights and liberty. It is here that the Judiciary is required to step in and must act independently.

India’s legal system is based on the common law traditions of the United Kingdom. As such, India is basically a common law jurisdiction

3.1.1 Courts

India’s Judiciary has, in general, been highly independent. The Constitution encompasses a clear separation of powers. The Judiciary plays a central role within the Indian constitutional structure. India’s legal system is based on the common law traditions of the United Kingdom. As such, India is basically a common law jurisdiction.

Under the terms of List III, Schedule 7 of the Constitution, the Central and State Governments enjoy concurrent responsibility for the administration of justice, jurisdiction and powers of all courts (except the Supreme Court, over which the Central Government retains jurisdiction), criminal law and procedure and civil procedure. However, the organisation of the Supreme Court and the High Courts remains the exclusive jurisdiction of the Central Government, while the provisions regarding the officers and servants of the High Courts fall within the powers of the States.

The Central Government retains exclusive jurisdiction for offences against laws over which it alone has jurisdiction (List I of Schedule 7) and all matters involving the development or the use of the armed forces of the Union or the use of civil power. Similarly, States have exclusive competence with respect to offences against laws over which States have exclusive jurisdiction (List II of Schedule 7), police and public order.

The Attorney General is responsible for providing advise to the Government on all legal matters and the performance of all duties of legal character that may be assigned by the President

The Attorney General is responsible for providing advise to the Government on all legal matters and the performance of all duties of legal character that may be assigned by the President.

Chapter IV of Part V of the Constitution deals with the Union Judiciary. Article 124 concerns the establishment and constitution of the Supreme Court, which is the final court. It comprises of 26 justices, one of whom serves as the Chief Justice. Its decisions are binding on all the lower courts.

Article 131 gives the Supreme Court original jurisdiction to hear any dispute between the Government and the States or between States, “if and insofar as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends”. The Supreme Court has appellate jurisdiction on any judgement, decree or final order of a High Court, if the High Court certifies that a party can appeal under Article 134A.

Article 136 grants the Supreme Court a discretionary power to grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed by or made by a court or tribunal in the territory of India. The President can also request an advisory opinion from the Supreme Court, pursuant to Article 143, on a question of law or fact that has arisen or is likely to arise. Requests for an opinion under Article 143 must be heard by a panel of at least five judges.

All High Courts have jurisdictions conferred upon them by the Central or State Governments on subjects within their respective legislative competencies

All High Courts have jurisdictions conferred upon them by the Central or State Governments on subjects within their respective legislative competencies. High Courts also have original jurisdiction to issue writs and orders for the enforcement of the fundamental rights contained in Part II of the Constitution. State High Courts have a supervisory power over all subordinate courts and tribunals in areas where they exercise jurisdiction. There are currently 18 High Courts.

Chapter VI of Part VI of the Constitution relates to the creation of and jurisdiction over subordinate courts. The power to establish subordinate courts falls under the jurisdiction of both the Central and State Governments. Article 235 places the administrative control of all the district and other subordinate courts under the High Court of that State. Special tribunals and courts are under the judicial control of the High Courts and the Supreme Court.

3.1.2 Judges

Extensive constitutional provisions are intended to safeguard the independence of judges, including articles regarding the selection, conditions of tenure and removal of judges of both the Supreme Court and the High Courts. The overburdened court system and the lack of enforcement of court decisions in regions where there is armed conflict pose the greatest threats to judicial independence.

According to the Supreme Court of India, the Chief Justice has a pre-eminent position in the appointment process. He is responsible for the initiation of the process and no appointment can be made without the consent of the Chief Justice

Article 124(2) of the Constitution provides that “every judge of the Supreme Court shall be appointed by the President ... after consultation with such of the judges of the Supreme Court and of the High Courts in the State as the President may deem necessary...” In the case of appointments other than that of the Chief Justice, the Chief Justice is always to be consulted.

In accordance with Article 217, every judge of a High Court shall be appointed by the President, after consultation with the Chief Justice of India and the Governor of the State, and in the case of appointments other than the Chief Justice of a High Court, the Chief Justice of that court. The Supreme Court of India has ruled that the Chief Justice has a pre-eminent position in the appointment process. The Chief Justice is responsible for the initiation of the process and no appointment can be made without the consent of the Chief Justice. The Court has also set out, in detail, the procedures for the transfer of judges.

The Court has further determined that ‘consultation with the Chief Justice’ means consultation by the Chief Justice with the four senior-most judges of the Supreme Court concerning appointments. The individual opinion of the Chief Justice, therefore, was not sufficient to be considered as a consultation.

3.1.3 Conditions of Tenure

Articles 124 and 217 provide that the Supreme Court and High Court judges shall hold office until attaining the ages of 65 and 62 years, respectively. Articles 125 and 218, in conjunction with Part D of the Second Schedule, provide that judges of the Supreme Court and High Courts shall be paid a salary and entitlement to such privileges, allowances and rights as may be determined by law. The latter benefits may not be altered to their disadvantage after their appointment to office.

In July 2000, the Central Government advised the State and Union Territory Governments to undertake changes to improve the financial autonomy of the Judiciary. This initiative followed the comments made by the Chief Justice, as well as those of a three-judge committee set up by the Chief Justice to consider the issue, and recommendations made at the Chief Justices conference in December 1999.

3.1.4 Removal

Articles 124(4) and 217(1)(b) provide that the Supreme Court and High Court judges, respectively, cannot be removed from office except by an order of the President, confirmed in the same session, after an address by each house of the Parliament, supported by a majority of the total membership of that house and by a majority of not less than two-thirds of those voting and present.

A judge may only be removed on the grounds of proved misbehaviour or incapacity. Under the Judges (Inquiry) Act 1968, 100 members of the *Lok Sabha* (the Lower House of Parliament) or 50 members of the *Rajya Sabha* may request their respective Speaker or Chairperson of the House to consider material relating to accusations of misbehaviour or incapacity.

A Committee consisting of a Supreme Court judge, a Chief Justice of a High Court and an eminent jurist is formed to apprise the judge of the charges against him or her and to allow for the preparation of a defence. If the Committee concludes that misbehaviour or incapacity has been proved, it will report this finding to the Parliament for action. Members of the Judiciary of the subordinate courts may only be removed by the High Court, in its administrative capacity.

3.2 Comptroller and Auditor General (CAG)

The CAG was established in pre-independence era and, subsequently, adapted to the Indian Constitution, under Articles 148 to 151. In 1971, there were amendments to streamline its functioning.

The legal basis for the auditorial functions of the CAG of India is provided by the Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971. Although India has a federal set up, the Constitution provides for a unitary audit by the CAG of India, who conducts audit of the accounts of both the Union and the State Governments.

The CAG has a dual role: (a) as an agency to function on behalf of the Legislature to ensure that the Executive complies with various laws passed by the former in letter and spirit; and (b) on behalf of the Executive to ensure compliance by subordinate authorities with the rules and orders issued by the Legislature.

The CAG is neither a part of the Legislature nor the Executive, but is an officer created by the Constitution to ensure that diverse authorities act in accordance with the Constitution, with regard to all financial matters

The CAG is neither a part of the Legislature nor the Executive, but is an officer created by the Constitution to ensure that diverse authorities act in accordance with the Constitution, with regard to all financial matters. In addition, the CAG also plays a fiduciary role in federal financial relations, under Article 279 of the Constitution.

Financial autonomy is the strong point that appears to have contributed considerably towards the functional independence of the institution, which can be suitably emulated in other cases

There are several provisions enshrined in the Constitution to safeguard the CAG's functional independence. He is appointed by the President of India and can be removed from office only on grounds of proven misbehaviour or incapacity, after an address by both Houses of Parliament, supported by a two-third majority. His salary and conditions of service cannot be varied to his disadvantage after appointment. He shall not be eligible for further office under the Government of India or of any State after retirement.

The administrative expenses of the office are charged to the Consolidated Fund of India and are not subject to voting by the Parliament. Financial autonomy is the strong point that appears to have contributed considerably towards the functional independence of the institution, which can be suitably emulated in other cases.

3.2.1 Jurisdiction

The CAG has a very wide jurisdiction, encompassing virtually every organisation that receives funding from the Government and is run by it.

3.2.2 Powers

Under the Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971, he is empowered to make rules for carrying out the provisions relating to the maintenance of accounts and to access any information required for that purpose, as also for the purpose of auditing.

The issue of institutional autonomy cropped up with seriousness during the proactive approach adopted by one Chief Election Commissioner, who exercised the functional autonomy that the Constitution has provided to the institution

The CAG also brings out a large number of reports relating to the Union and the State Governments. These reports incorporate important audit findings and performance reviews of systems, projects and programmes and comprehensive appraisals of public enterprises and other bodies and authorities. He also reports on Acts that infringe upon the economic interests of the State, like mass embezzlement of State assets, serious losses and wastes. These reports are laid before the Parliament and State Legislatures concerned, every year. He can share his audit reports with the public and the media only after laying them in the Parliament and the State Legislatures. Some of these reports are selected by the Public Accounts Committee of the Parliament and State Legislatures for detailed discussions and recommendations. The CAG assists the Public Accounts Committee by vetting the Action Taken Notes on these selected Reports.

3.3 Election Commission (EC)

The EC was set up as a Constitutional Body in the year 1950. Subsequently, a notification was issued under the Representation of People's Act, 1951. Until the late 1980s, it was widely perceived as a body indirectly controlled by the Government. However, the issue of institutional autonomy cropped up with seriousness during the proactive approach adopted by one Chief Election Commissioner, who

exercised the functional autonomy that the Constitution has provided to the institution.

The Constitution clearly foresaw and anticipated the complexities of the electoral process in India, where parties and candidates, with varying ideologies, representing different interests and trying to meet conflicting aspirations – ethnic, social, regional and linguistic – compete with one another in widely divergent conditions and try to gain, regain or wrest power at the national as well as the State level. It is crucial, therefore, that the independence of the electoral process and the avoidance of any interference whatsoever by the Executive in the elections to the legislative institutions should be regarded as inviolable.

Speaking on the powers and functions of the Election Commission, Dr. B.R. Ambedkar observed in the Constituent Assembly that “...in the interests of purity and freedom of elections to the legislative bodies, it was of the utmost importance that they should be free from any kind of interference from the Executive of the day”.

The Parliament and the Election Commission works in harmony. While the Election Commission conducts elections which result in the formation of the Parliament, it is the Parliament which lays down the laws which govern the conduct of such elections by the Election Commission

Interestingly, initially, there was a proposal for creating an Election Commission only for elections to the Parliament and for setting up of separate Election Commissions for elections to the State Legislatures. However, subsequently, after long discussion, it was decided that there should be one Election Commission only for the “orderly conduct of elections”, the main task that the Commission is charged with.

Ambedkar said, “the whole of the election machinery should be in the hands of a Central Election Commission, which alone would be entitled to issue directives to returning officers, polling officers and others engaged in the preparation and revision of electoral rolls, so that no injustice may be done to any citizen in India, who, under the Constitution, is entitled to be brought on the electoral rolls”.

The Parliament and the Election Commission have to necessarily work in harmony. While the Election Commission conducts elections which result in the formation of the Parliament, it is the Parliament which lays down the laws which govern the conduct of such elections by the Election Commission.

The Commission and the Secretariats of the Parliament work together in conducting the elections to the Offices of the President and the Vice-President of India. The Parliament has also enacted the requisite basic legal framework for elections, by legislating the Representation of the People Acts, 1950 and 1951, and the Presidential and Vice-Presidential Election Act of 1952.

But altogether, most importantly, the Parliament has seen to it that the Commission functions in an independent manner, insulated from interference by the Government of the day. This has been done by enacting the Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991, giving an assured tenure to the Chief Election Commissioner and Election Commissioners and placing them on par with the Judges of the Supreme Court in the matter of their salaries, allowances and perks. These measures have contributed substantially to strengthening the electoral system and the Commission. The Commission has been

seeking to introduce electoral reforms, in consultation with the other organs of the Government.

3.4 Union Public Service Commission (UPSC)

UPSC is the new *avatar* of the erstwhile Federal Public Service Commission, established under the Government of India Act 1935. The purpose was to give a secure and autonomous status to the Commission to ensure unbiased recruitment for Civil Services and protecting service interests. The Commission has been accorded a constitutional status, under article 315, as an autonomous entity.

The role of the UPSC is to 'advise' the Government on recruitment methods to various services, suitability of officers for appointment on promotion as well as transfer-on-deputation, quantum of penalties in disciplinary cases against employees of the Government of India, etc. It possesses the authority in matters related to recruitment. In the matter of selection and deputation of officers, prior consultation with the Commission is mandatory.

The role of the UPSC is to 'advise' the Government on recruitment methods to various services, suitability of officers for appointment on promotion as well as transfer-on-deputation, quantum of penalties in disciplinary cases against employees of the Government of India

A convention has been established by the Government that in several matters, such as quasi-judicial cases, selection of candidates, appointment of candidates on higher initial pay, etc., the recommendations made by the Government shall be accepted by the Commission, except in exceptional circumstances.

Establishing such a convention, via informal understandings, it can be said it contributes to diluting the institutional autonomy. However, it is for the Commissioners to set fresh conventions which are more appropriate and in line with the spirit of the law.

What emerges from the above narration is the fact that the Tier One Institutions, that is, those created by the Constitution, are independent. That sometimes they may not have exercised their powers in the manner they are expected to has been an aberration caused mainly by the appointment of the wrong sort of persons to head these institutions. This didn't used to happen until the 1970s. For nearly two decades, it became the norm to appoint persons who were regarded as being 'friendly' by the Government to these positions.

For the last 15 or so, however, this trend has been reversed. This has happened largely because of the diminution in the size of the majority of governments in the Parliament and the corresponding growth of the strength of the opposition.

Overall, the consequence has been to strengthen the constitutional institutions and increase the independence with which they function.

This, however, cannot be said of the Tier Two Institutions, that is, those that have been created by the Parliament. This is where the real problem lies and it is to these we turn now.

Chapter 4

Tier Two Institutions

Tier Two institutions have been created by the Parliament, rather than by the Constitution

Tier Two institutions, as we noted in the previous section, are those that have been created by the Parliament, rather than by the Constitution. This difference is crucial in determining the degree of independence they enjoy. Overall, institutions created by the Constitutions are fully independent and, if constraints exist, they are self-imposed. The same, however, cannot be said of the institutions created by the Parliament, which suffer from a number of externally imposed constraints. Broadly, these relate to the appointments and removal from office, on the one hand, and funding, on the other. Both eventually have the same effect: an abridgement in the degree of the freedom the institution is allowed.

In the following discussion, we first look at non-economic institutions and then at the economic ones (market regulators).

In recent time, the emergence of so-called independent regulatory regime in various infrastructure services has positioned the institutional autonomy at the centre stage of the debate on institutional autonomy. The core objective for setting up these institutions outside the Government's control was to redefine and demarcate regulatory functions from that of policy-making. However, it appears, the Government is yet to articulate its vision and objectivity cogently for optimising the degree of independence to be delegated to these institutions.

In the specific context of the infrastructure sector, traditionally, the Government was performing multiple roles, of policy maker, regulator, as well as that of service provider, in a monopolistic environment. Therefore, the question of institutional independence did not arise until these sectors were restructured and faced competition.

Institutions created by the Constitutions are fully independent and self-imposed whereas the institutions created by the Parliament, suffer from a number of externally imposed constraints

With the opening up of the economy in the late 80s and the early 90s, permitting the private sector to participate in infrastructure services, the role of the Government came under close public scrutiny. Subsequently, the Government realised the need for separating the policy-making function from day-to-day regulation. Hence, it gradually established sectoral regulatory authorities, over the years. However, developing a workable framework with these institutions still remains to be understood by the Government functionaries. The absence of adequate functional independence has been reported to hamper the efficacy of some of the sectoral regulatory bodies.

A cursory survey of different laws enacted to set up these regulatory bodies reveals a variance and lack of consistency in the Government's approach. There also appears a clear attempt to keep, direct or indirect, control over the functional independence across the board. Following

Box 5: A Tricky Issue

The distinction between Tier One and Tier Two Institutions has created a peculiar problem. Whereas the Tier One Institutions are clearly accountable to the Constitution, it is not clear to whom the Tier Two Institutions are accountable – to the Parliament as they have been created by it, to the administrative ministries which supervise them or to the consumer and producers, in whose interests they are supposed to act. This confusion has created very awkward implications for accountability, in as much as the Parliament is essentially a political body, the Ministry is a creature of the Executive and consumers and producers have interests that diverge not only from each other but also from those of the Parliament and the Executive.

The problem becomes even more acute when the institution is regulating goods that have acquired a 'public goods' characteristic, that is, those goods and services that are consumed by the poor as essential commodities. If there is a large public sector incumbent in the industry, like say in telecoms or railways or even airlines, the product acquires a 'public good' aspect, even if it is not an essential commodity (e.g., travel or phoning), in the sense that the term is normally understood. Basically, price regulation becomes politically sensitive, as politicians prefer prices that tend to zero, regardless of the cost to the taxpayer and efficiency. MPs are then able to say that it is all very well for the regulator to raise prices, but it is they who have to answer to the public, when the elections come round. Therefore, MPs have been demanding a supervisory role over the Tier Two Institutions with a power to veto. The irony, of course, is that, where genuinely essential commodities are concerned, like food, clothing, housing, health and education, politicians show little or no interest.

The Executive, on the other hand, has different priorities and objectives and needs to take care of costs and efficiency as well. Therefore, it has been resisting the demands by MPs that the Tier Two regulators should be placed under the supervision of the Parliament, even if it is via a sub-committee. So far, Indian producers and consumers have not entered this tussle, largely because they are unaware of the implications. However, in other countries, public opinion plays an important role in the way in which regulators are supervised and conduct themselves.

It is not clear how this issue is going to be resolved. Who supervises supervisors is one of the oldest problems of governance, dating back to Aristotle's times. It has not been solved fully and the most we can hope for is an approximation to the ideal which consists of everyone acting for the largest benefit of the largest number. In short, it requires an understanding by all parties of the long-term social interests, rather than merely a single-minded pursuit of narrow, short-term gains.

analyses of some specific institutions has been carried out to identify the extent of functional autonomy they have been entrusted with. The discussion covers a range of institutions to demonstrate varied degree of functional independence these institutions are provided with and the source of their mandate as well.

4.1 Central Vigilance Commission (CVC)

This was established as an apex vigilance institution in 1964 and placed outside the control of any executive authority. A high-level Committee, under the Chairpersonship of the Prime Minister, selects the CVC and the President issues the formal appointment.

Its mandate includes monitoring all vigilance activities under the Union Government. Its jurisdiction covers the following:

1. Members of All India Services serving in connection with the affairs of the Union and Group A officers of the Central Government;

2. Board-level appointees and other senior officers up to two grades below the Board-level in the Public Sector Undertakings (PSUs) of the Central Government;
3. Officers of the rank of Scale V and above in the Public Sector Banks;
4. Officers of the rank of Assistant Manager and above in the Insurance Sector (covered by the LIC and GIC and four non-life insurance companies in the Public sector); and
5. Officers drawing basic pay of Rs. 8700/- per month and above in autonomous bodies/local authorities or societies owned or controlled by the Central Government.

The powers and the functions of the CVC include:

1. Exercising superintendence over the functioning of the Delhi Special Police Establishment (DSPE), with respect to investigations under the Prevention of Corruption Act, 1988, or offence under the CRPC for certain categories of public servants and to give directions to the DSPE for the purpose of discharging this responsibility;
2. Reviewing the progress of investigations conducted by the DSPE into offences alleged to have been committed under the PC Act;
3. Undertaking an inquiry or causing an inquiry or investigation to be made into any transaction in which a public servant working in any organisation, to which the executive control of the Government of India extends, is suspected of acting or alleged to have acted for an improper purpose or in a corrupt manner;
4. Tendering independent and impartial advice to the disciplinary and other authorities in disciplinary cases, involving vigilance angle at different stages, i.e., investigation, inquiry, appeal, review etc.;
5. Exercising a general check and supervision over vigilance and anti-corruption work in Ministries or Departments of the Government of India and other organisations to which the executive power of the Union extends;
6. Chairing the Committee for selection of the Director (CBI), Director (Enforcement Directorate) and officers of the level of an SP and above in the DSPE; and
7. Undertaking or causing an inquiry into complaints received under the Public Interest Disclosure and Protection of Informer and recommend appropriate action.

The CVC is empowered to enquire or cause inquiries to be conducted into offences alleged to have been committed under the Prevention of Corruption Act, 1988, by 'certain categories' of public servants

The CVC is not an investigating agency. However, it can either get the investigation done by the CBI or the Departmental Chief Vigilance Officers. It is empowered to enquire or cause inquiries to be conducted into offences alleged to have been committed under the Prevention of Corruption Act, 1988, by 'certain categories' of public servants.

Prior to the Supreme Court issuing a judgement on the matter, the CVC had a mere 'advisory' role in case of group 'A' and some other categories of Government officials, as the Government would specify in the Gazette from time to time. This differentiation remains unexplained.

The CVC has been made a multi-member Commission, having a 'statutory status' with effect from August 25, 1998. Arising out of the case of Vineet Narain vs. Union of India, the Supreme Court had directed the Central Government to confer statutory status upon the CVC, which was hitherto an advisory body, and make it responsible for effective supervision of the functioning of the CBI.

It has thus now required a reasonable degree of independence. However, it still has to depend on the police agencies, which are controlled by the Government. In that sense, it lacks teeth. The expenses of the CVC are charged to the Consolidated Fund of India.

4.2 Economic Regulators

4.2.1 The National Highway Authority of India (NHAI)

The NHAI can be better termed as the Government's arm that was created for the specific purpose of developing, maintaining and managing the national highways

Established through the NHAI Act, 1988, this was possibly the first specialised institution that was provided with some degree of functional autonomy. Though enacted in the year 1988, the Authority could not become operational before 1995, until the Government appointed a full-time Chairperson and other Members. Though the NHAI cannot be termed as independent institution, however, it was the beginning of the Government's move towards delegating specialised tasks to such bodies.

The related line ministry appoints the members of the Authority and many of them are government officials. Appeals against the decisions of the NHAI can be filed before the Judiciary.

It is interesting to note that the Ministry took seven years to operationalise the NHAI. This explains the mindset and the level of resistance within the system, against delegating executive powers. The NHAI has been instrumental in facilitating private investment in highways, by offering a range of contractual agreements, including annuity projects, build-own-operate transfer (BOOT) and build-own transfer (BOT). The annual budget of the Authority has to be approved by the related ministry.

The NHAI can be better termed as the Government's arm that was created for the specific purpose of developing, maintaining and managing the national highways. Though the Authority is not mandated to function as independent of the Government, however, creating a specialised statutory body outside the ministry was a significant move.

4.2.2 The Airports Authority of India (AAI)

The AAI was set up in 1994, which is another outfit within the government domain that performs a complex task of service delivery (it is supposed to earn profits for the government) and as a regulatory agency. The AAI has been given almost unlimited powers with regard to security-related issues at major airports.

The selection and the appointment of the members and the staff and the conditions of their services are subject to Government direction and discretion. Workers are also to be represented in the board of the Authority.

The AAI is mandated to function as an arm of the Government. The AAI generates revenues for the Government and its annual budget has to be approved by the line ministry

Competing airlines, including the state-owned Indian and Air India, use common airports that are regulated by another state-controlled agency, the AAI. The AAI is mandated to function as an arm of the Government. The AAI generates revenues for the Government and its annual budget has to be approved by the line ministry. A tribunal has been set up as appellate authority.

In sum, these institutions can easily be graduated to the status of independent sectoral regulators, with necessary amendments in legislation, provided the Government has the will to do so.

Within Tier Two, some other sectoral regulatory bodies have been set up with far more independence. These were in sectors such as telecom, ports and electricity.

4.2.3 The Tariff Authority for Major Ports (TAMP)

The TAMP, as an independent authority, regulates all tariffs, both vessel and cargo-related, for leasing of properties in respect of Major Port Trusts and private operators located therein

The TAMP was constituted in 1997, as an independent authority, to regulate all tariffs, both vessel and cargo-related, for leasing of properties in respect of Major Port Trusts and private operators located therein. Instead of introducing a separate legislation, the Major Port Trust Act, 1963, was amended by the Port Laws (Amendment) Act, 1997, to constitute the TAMP.

The TAMP is empowered to notify the rates and conditionalities governing the application of the rates as well. However, it has no jurisdiction over the 'safety' and 'conservancy' aspects of port management. Appeals against the orders of the TAMP can be filed before the Judiciary.

The related ministry appoints the regulators and approves the annual budget of the authority, yet the TAMP is empowered to decide salaries and allowance and to appoint staff, which is not the case with many other sectoral regulators. However, the Government has retained the power to issue policy directives and supersede the TAMP and even modify/cancel the orders issued by the Authority. The related line ministry approves the budget of the Authority.

4.2.4 The Telecom Regulatory Authority of India (TRAI)

The TRAI Act 1997, despite its serious constraints, was a major move towards the evolution of the concept of economic regulation in India. However, following a major controversy that ended up with Government sacking all but one member of the Authority, the TRAI Act was amended in the year 2000.

Specific provisions have been made under the amended Act that facilitates appointment of retired bureaucrat as Members of the Authority. Part-time Members can also be appointed, which has not been observed in any other comparable legislation. Reappointment is also allowed. The provision of Appellant Tribunal was introduced, along with more stringent control by the Government.

The TRAI's role is mostly to 'recommend' to the Government, without any binding, even in matters such as deciding on the number of licences in a Circle

In addition to the usual grounds, the TRAI Chairperson/Members can now be removed on account of being prejudicial to public interest, after being given reasonable opportunity to be heard. However, the members of the Appellant Tribunal can be removed only in case of proven guilt by a Supreme Court inquiry.

The TRAI's role is mostly to 'recommend' to the Government, without any binding, even in matters such as deciding on the number of licences in a Circle. The appointment of the staff is subject to government approval and salaries and other emoluments of the staff are also in the domain of the Government.

Box 6: The TRAI Fiasco

In 1999, the tussle over turf issue between the Government and the Telecom Regulatory Authority reached such a level that the Government responded to scrapping the entire TRAI Act, 1997. This became necessary since the Act protected the Members of the Authority, as their removal was subject to proven guilt in a judicial probe. The Government got rid of the then Chairperson/Members of TRAI by repealing the entire Act. Only one member of the erstwhile TRAI was reappointed.

In September 1999, the TRAI said that the pricing of cellular phone calls should shift to a 'Calling Party Pays' (CPP) regime, which means that calls from fixed phones to mobile ones would be charged slightly more than the prevailing rates and mobile subscribers would simultaneously stop paying for incoming calls. This is the standard practice in most countries worldwide. A war broke out. The government-owned Department of Telecommunications (DoT) was the biggest service provider, followed by the *Mahanagar Telecom Nigam Ltd* (MTNL). The MTNL argued that higher call rates were anti-people and proceeded to challenge TRAI's jurisdiction on the ground of jurisdiction. The court found TRAI's powers were severely limited and insufficient to ask for a shift in pricing regimes. It could make such recommendations to the Government, which would then decide what was to be done.

Unlike US's Federal Communications Commission, which doles out operating licences, monitors monopoly powers and auctions wireless bandwidth, the TRAI could do nothing but set caps in a given pricing structure and determine how various operators would share revenues. It also had no say when disputes broke out between operators.

To drive the point home, the Government decided to rewrite the TRAI law, sack existing heads and members to create a pliant, well-behaved TRAI. At that time, independent economic regulation was at a nascent stage in India. Subsequently, this experience is perceived to have made the Government extra conscious, while delegating functional independence.

The 'after effect' can be observed in several laws passed subsequently. In the amended TRAI Act, 2000, the Government has kept its over-riding power not just to issue 'policy directives' but has gone to the extent of empowering itself with powers of superseding the Authority in certain situations. Furthermore, under the new law, the Government can terminate the tenure of the Members and Chairperson, with just a perfunctory right to be heard.

In its new *avatar*, the TRAI can determine terms of interconnect between operators, but it has lost the power to settle disputes between operators. A new entity called the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) was created for that. This one incident appears to have left a lasting impact on the overall approach of the Government towards such institutions, having spill over effect.

The Government is still the policy maker and seller of telecom operating licences. It also owns all the equity in India's biggest telecom company, called the *Bharat Sanchar Nigam Ltd* (BSNL). The TRAI is supposed to regulate the BSNL, however, both of them report to the DoT.

The Act provides for crediting all the receipts, fees, interest and government grants to the 'TRAI General Fund'. However, this has not happened in practice. Currently, the amount is being deposited in the Consolidated Fund of India, as government revenue, and, in turn, the Government allocates funds to the Authority. Such provisions work as effective deterrents against the Authority adopting innovative approaches. Recently, the Authority had suggested to the Government to allow imposing of a levy of 0.05 percent on the revenues of market players in telephone as well as cable TV markets. However, the Government had turned the proposal down.

Reducing the regulatory function to that of 'advisory' role can only be detrimental to the objective of setting up of an independent institution and it discourages the Authority from being innovative and imaginative. The Government needs to restrain itself from encroaching upon the regulator's turf. Once the broad policy framework is in place, execution and regulation should be left to the designated authorities.

4.3 The Electricity Regulatory Commissions (ERCs)

The ERCs are quasi-judicial authorities, having legislative, judicial and executive responsibilities

The ERCs are quasi-judicial authorities. They have legislative, judicial and executive responsibilities. Though the Electricity Act 2003 provides for the selection of the Chairperson/Member of the Commissions to be made by a Committee, in practice, the objectivity in selection is lacking. Prior to the Electricity Act 2003, on several occasions, questions have been raised on the selection criterion for manning these institutions. For instance, the Central Electricity Regulatory Commission (CERC) remained headless for more than a year, after the retirement of the first Chairperson in 2001, until the then Power Secretary in the Government retired and joined as the Chairperson.

The removal of Commissioners is possible on usual grounds, is as the case with several other Authorities. However, it is subject to proven guilt, after proper inquiry. The Bodies are almost entirely dependent on the Government for budgetary allocation and selection and appointments of their staffs. Allowing the Commission to generate its revenues, by imposing cess and levies, could be a better approach to strengthen the functional independence.

On several counts, the provisions made under the Electricity Act 2003, with regard to demarcating the respective domains for state policy and regulatory functioning, are not clear. The Commission has been given an advisory role, while the Government formulates the National Electricity Policy/Plan and Tariff Policy as well.

The Appellate Tribunal has also been set up and the Chairperson of the Tribunal has to be appointed in consultation with the Chief Justice of India. However, the extension of the term is left to the will and pleasure of the Government. Such attempts on part of the Executive might prove detrimental to the independence of the institution.

The Government's authority of issuing 'policy directives' to the regulators is one grey area, as it has been left to the Government to define arbitrarily what constitutes 'policy'?

The Government's authority of issuing 'policy directives' to the regulators is one grey area, as it has been left to the Government to define arbitrarily what constitutes 'policy'? The possible overlap between policy directions and regulatory functions can potentially be a source of controversy and might hamper functional independence.

The line ministry approves the budget of electricity regulators, though the legislation provides for setting up of a Fund with the regulator, which has not been done as yet.

4.4 The Competition Commission of India (CCI)

The CCI is another addition to the list of functionally independent institutions in India. It has been given the mandate to promote and sustain competition in the market. The Government is to appoint the Chairperson and the Members of the Commission. It is also provided

that a judge of High Court can be appointed as the Chairperson or member. However, the Government appointed a retiring bureaucrat as the Chairperson, which was challenged in the Supreme Court. The matter is still under consideration of the Supreme Court.

It is for the Government to appoint major staff for the Commission and to specify the places where the Benches of the Commission shall be sitting. Even the transfer of Members from one Bench to another located in different cities is subject to prior government approval.

The CCI is another addition to the list of functionally independent institutions in India, which has been given the mandate to promote and sustain competition in the market

Though removal of Commissioners is possible in case of proven guilt in an inquiry conducted by the Supreme Court, however, the Government has been vested with the power to supersede the Commission and in such case the Chairperson/Member shall be deemed terminated and a fresh set of commissioners shall be appointed.

In addition to that, the Government can exempt from application of the Act in certain situations and can also issue policy directives to the Commission. Again, defining the 'policy' has been left to the Government. Even matters such as setting rules for promoting competition advocacy, creating awareness and imparting training, etc., are held by the Government.

A Competition Fund is to be created to meet out the expenses of the agency. Recently, amendments are being made in the legislation that intends to divide the executive and judicial functions between the CCI and the Appellate Tribunal, respectively.

4.5 The Securities and Exchange Board of India (SEBI)

The SEBI was established via the SEBI Act, 1992, to protect the interests of investors in securities and promote development and regulation of the securities market and matters connected therewith, or incidental thereto.

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The Chairperson/Members of the SEBI are to be appointed by the Government, with one Member to be nominated by the RBI. In addition, two Members are nominated from amongst government officials. The Government has to appoint five other Members, out of which at least three have to be whole-time Members. These five Members of the SEBI can only serve at the pleasure of the Executive, as the law empowers the Government to terminate their services just by serving a 3-months notice or paying the salary for the same period. The Members also have the right to relinquish the office at anytime prior to expiry of their term, by giving a similar notice to the Government.

Such provisions for easy exit have not been observed in any of the comparable institutions and appear detrimental to the functional independence of the institution. In this situation, the Members would always be vulnerable to externalities, as they can continue only at the wish and pleasure of the Executive.

The Board has been provided with the powers to prohibit fraudulent and unfair trade practices relating to the securities market and in such cases the SEBI is empowered to impose a penalty of Rs 25 crore

or three times the amount of profits made out of such practices, whichever is higher.

The SEBI has the powers of a civil court for the purpose of summoning, asking for production and investigating documents and so on. It can appoint an investigating agency in the matter, if it finds it appropriate, and can cease or desist any person from committing or causing violations of rules. It has the powers to impose penalties of Rs one lakh per day, going up to Rs one crore, in case of continuing violation of its directives by any person.

The SEBI has the powers of a civil court for the purpose of summoning, asking for production and investigating documents

A SEBI Fund has been constituted, which comprises of grants, fee, charges received under this Act and all sums received by the Board from sources decided by the Government. The Fund is to be applied to meet the administrative expenses to perform the functions authorised by the Act.

The Government can issue written 'policy directives' of binding nature to the Board, without prejudice to the foregoing provisions of the Act. In such a case, the SEBI is to be given an opportunity to express its views before any such direction is given, as far as practicable. The Government may supersede the Board in specific circumstances, such as in public interest.

Following the amendment made to the SEBI Act in the year 1995, the Board is now empowered to frame rules and regulations to carry out the purposes of the Act, without seeking prior approval of the Government. Such a move needs to be followed in other institutions as well.

The Securities Appellate Tribunal (SAT) is the appellate authority against SEBI's orders. The Presiding Officer of this two-member body will be a sitting/retired judge of the Supreme Court or a Chief Justice of a High Court and every proceeding before the SAT is deemed to be a judicial one. Appeals against the decision of the SAT can only be filed before the Supreme Court.

It may be concluded that, though the SEBI has been provided with reasonable functional autonomy in its operations, the procedures for appointment as well as removal of the Chairperson/Member are the weakest link. Expecting the SEBI to perform proactively under the Damocles sword of termination by the Executive will not be realistic.

4.6 The Reserve Bank of India (RBI)

The RBI is the oldest regulatory institution in the economic sphere and has worked out an amicable modus vivendi with the Government. Sometimes, there are differences of opinion on monetary matters, but these are over technicalities, rather than substance.

The RBI is the oldest regulatory institution in the economic sphere and has worked out an amicable modus vivendi with the Government

The Government appoints the Governor and Deputy Governors. During 1951-82, the RBI had as many as 11 Governors. Of these, seven were appointed for a regular term. Their initial term varied from one to five years. One served for 7 and 1/2 years and one for just one year. Two relinquished office before completing their term of 5 years. Four were

appointed as stopgap governors. The shortest term was 42 days. In two cases, they came from the Finance Ministry.

The issue of central bank's independence is a widely debated one, internationally. It is not yet fully settled, nor will it ever be. The reason is the divergence of objectives between central banks and the governments.

Central banks are charged with maintaining monetary and financial stability and curbing inflation, even if that means taking measures that reduce the rate of growth in the short run. Governments, as political entities, tend to pull in the opposite direction, through fiscal expansionism. This creates conflicts on an ongoing basis. The only country that has made its central bank completely independent is New Zealand, which has given a legal mandate to it to keep the inflation at two percent, or less. However, the experiment was soon given up.

The RBI has had its differences of opinion with the Government, but, by and large, it now acts as a subordinate office of the Finance Ministry, in as much as, in the final analysis, it "accommodates" the Government's needs

The RBI has had its differences of opinion with the Government, but, by and large, it now acts as a subordinate office of the Finance Ministry, in as much as, in the final analysis, it "accommodates" the Government's needs. However, since 1997, it has been able to limit these wishes, as it was in that year it signed an Memorandum of Understanding (MoU) with the Government that there would be a limit to the size of the ad hoc treasury bills that the Government could issue. Until then, there was no such limit. With regard to financial independence, the RBI faces no issue.

It must be said, however, that amongst such Tier Two Institutions, the RBI has the closest working relationship with the Government. It also does not come into conflict with investors, as that aspect has been left to the SEBI. This has left the RBI to deal with the banks, which it has been able to do without coming into conflict with the Government, because depositors are a nationally important political constituency.

Chapter 5

Conclusion

Transparency, with regard to the role of the Government in searching, selecting, appointing, remuneration, extension, removal and re-employment procedures varies across the institutions. In general, the political executives thus far have treated the issue as a matter of pure political patronage. Many of the mentioned institutions are not perceived as independent from the government departments. Insufficient functional autonomy could be one of the reasons for that.

There are different ways the Government exercises the control over independent institutions

There are different ways the Government exercises the control over independent institutions. For instance, most of the institutions covered under this study depend upon the concerned ministries for their budgetary allocations. Allowing an institution to become financially self-sufficient (or less vulnerable) is an essential pre-condition for functional autonomy.

Powers related to sanctioning and appointing the staff is another equally important matter. It is difficult to justify the power of ministries doing this job on behalf of an independent authority, which is the case with most agencies at present.

Similarly, in many cases, independent authorities have to obtain Government approval before appointing consultants or procuring professional inputs from outside. Hence, virtually it is for the ministry to decide in such matters, which is an encroachment on the independence.

Arguably, the Government has the sovereign authority to express its policy and convey the same to the respective authority in a transparent manner. All laws examined here empower the Government to issue 'policy directives'. However, what constitutes 'policy' has been left vague and subject to interpretation, in a highly arbitrary manner. Better clarity is needed in this regard. Unless independent institutions are fully empowered, the expectations would not be met.

An independent authority law should clearly demarcate the respective domains of their functional responsibilities with the state policy

An independent authority law should clearly demarcate the respective domains of their functional responsibilities with the state policy. The possibility of government interference in the functional domain of the authority, in the name of policy directives, needs to be eliminated. Even when issuing so-called 'policy directives', the law should make it mandatory for the Government to consult the authority concerned and it be given an opportunity to express views, prior to issuing such directives.

The presence of a strong leader could tilt the balance in favour of the institution. Experience suggests that such champions have redefined

the mandate of the institution, by pushing the limits and making a real difference. Such individual activism subsequently results into setting higher benchmarks for successors.

Institutional independence should not be mistaken as an objective in itself. It should rather be seen as an important pre-requisite for achieving desired effectiveness, economy, and efficiency in the system

Though the presence of champions might help in making the institutional independence widely felt, necessary backing from the legislation is a priori condition for that. However, the presence of champions cannot replace institutionalised autonomy. As long as the provisions such as reappointment of commissioners are left to the pleasure of the Government, emergence of such champions is less likely to happen.

In fact, functional autonomy is a precondition for effective performance and the absence of that would only create perceptions of the Government driving from the back seat. It needs to be realised that, other factors remaining constant, a high degree of proportional relationship exists between the degree of institution's autonomy and its credibility amongst the people.

Institutional independence should not be mistaken as an objective in itself. It should rather be seen as an important pre-requisite for achieving desired effectiveness, economy, and efficiency in the system. One must carefully understand the difference between imparting functional independence and absence of accountability, as one is not related to the other.

Most of the authorities surveyed are either subject to judicial scrutiny or their decisions can be challenged before appellate tribunals and they have to submit annual accounts and report before the respective Legislatures. However, practically, this does not effectively serve the purpose, as there has been hardly any meaningful discussion by the legislative bodies. Desired accountability amongst these independent institutions could be attained through activism on part of the civil society organisations, as well as pressure from informed public. This would work as an effective deterrent against a possible 'institutional capture', which varies with the degree of institutional independence.

Desired accountability amongst the independent institutions could be attained through activism on part of the civil society organisations, as well as pressure from informed public.

The degree of independence might require varying approaches, depending upon the nature and mandate of an institution. For instance, the job of an electricity regulator cannot be compared with that of the RBI. Therefore, the degree of independence and the relationship with the Government, in particular, is bound to differ on a case-to-case basis. However, there needs to be a defined autonomy an institution must have in order to function effectively and deliver its mandate.

The lack of consistency in the Government's approach, with regard to institutional autonomy, is evident. While the Tier One Institutions such, as the NHRC and EC have been provided with reasonable functional autonomy, the Tier Two Institutions, which comprise of regulators, are kept under indirect clutches of the Government, by not imparting to them financial autonomy. Executives are tempted to retain executing powers to the maximum possible extent which reflects in terms of variations in functional autonomy.

Chapter 6

Recommendations

The Parliament should consider establishing a permanent National Commission on Institutions, to comprise representatives from all three branches of the Government, as well as other stakeholders, representatives of litigants and other groups with an interest in the federal courts. The Commission would develop, on an ongoing basis, recommendations concerning practices, procedure and administration and evaluate legislative proposals.

The Commission should encourage heads of institutions to meet informally with each other and with MPs for improving inter-branch communication and understanding.

Institutions should be liberated from their ministerial masters and funding should be provided on an autonomous basis by the Planning Commission.

The Government and the Parliament should resist stripping the institutions of their jurisdiction to hear and decide any issue.

The Parliament should provide for judicial review of questions in cases involving administrative and regulatory actions and ordinarily to provide for judicial review of enforcement and coercive actions of the Government in administrative and regulatory actions.

The Parliament should resist efforts to intrude into the remedial processes of the institutions for the purposes of restricting the ability of litigants to obtain their rights.

Salaries should be market-related and subject to periodic and automatic cost-of-living adjustments.

A Special Conduct and Disability Act should be legislated for holding heads of institutions/judges accountable for misconduct that does not rise to the level of an impeachable offence.

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