**The Indian Fourth Branch: Developing a New Institutional Morality**

**Abstract**

*Contemporary discourse on democratic decline in India emphasises the need for stronger fourth branch institutions to safeguard Indian constitutional democracy. The difficulty, however, is the identification of features of the institutions that need to be strengthened in order to better equip the fourth branch to effectively respond to threats. The operation of fourth branch institutions is highly contingent on the leadership of the institution, and on the political context in which the institution operates. The most effective means to equip these institutions with the ability to successfully preserve constitutional democracy is, therefore, the creation of design features that are most conducive to the development of an institutional morality of integrity and accountability in the institution.*

1. **Introduction**

Over the last few decades, India and other countries have witnessed the proliferation of several institutions that do not fit the description of any of the traditional branches of governance[[1]](#footnote-1). These institutions, sometimes taken to be constitutive of a “fourth branch” of governance, include election management bodies, anti-corruption agencies, audit agencies, and other such institutions[[2]](#footnote-2). Because these agencies are intended to, and empowered to, respond to wrong or unlawful acts and omissions of other state actors, they have also been called the “integrity branch” or the “accountability branch”[[3]](#footnote-3).

Constitutional theory typically identified three branches of government. The idea of a tripartite system, tracing its origins to Montesquieu’s *De l'esprit des lois*, assigned a specific function of governance to each of the three branches[[4]](#footnote-4). The legislature was given to formulate and enact general rules, the executive was tasked with the implementation of the rules, and the judiciary was given to adjudicate disputes about the rules. The classical idea behind the tripartite structure was that each branch would supervise and regulate the actions of the other two branches. James Madison identified that each branch, with a distinct sphere of competence and independence from the other branches, would engage in the pursuit of its own interests, and in doing so, would curtail any excess or overreach on the part of the other two branches[[5]](#footnote-5).

Over time, however, it came to be acknowledged that an institutional design placing the power and responsibility of governance only in the hands of these three branches of governance might be untenable. It has been recognised both by legal scholars and by Constitution-framers[[6]](#footnote-6) around the world that stable and effective governance might require more than the tripartite structure of government. Bruce Ackerman formulated an “integrity branch” which, through its design features of a guaranteed minimum budget, high salaries and guaranteed career paths for its members, and protection from legislative reduction, would serve as “constitutional watchdogs” to root out high-level corruption[[7]](#footnote-7). The term “design features” is used throughout this paper to refer to the structural framework on which an institution is based, in terms of appointment processes, terms of service, and the degree of its formal or legal insulation from executive interference.

Mark Tushnet labels the new branch “Institutions Protecting Constitutional Democracy”, drawing from Chapter 9 of the South African Constitution[[8]](#footnote-8). Tarunabh Khaitan argues that these institutions might serve to guarantee norms in any constitutional context, and not just in constitutional democracies[[9]](#footnote-9). He, therefore, refers to these institutions as the “guarantor branch”. In this paper, however, I simply refer to these institutions as collectively constituting a “fourth branch”, on account of their separateness from, and equality in status to, the three classical branches.

Mark Tushnet identifies that the problem with the tripartite structure is primarily two-fold. *First*, he argues that the three branches are *structurally* insufficient in that they do not guarantee the stability or sustenance of a democracy in a system of political-party governance[[10]](#footnote-10). The system of checks and balances is disturbed where a single political party exercises control over the executive and the legislative branches. The *second* problem with the tripartite system is a *functional* limitation. Since political parties attempt to secure their own entrenchment through political platforms, there might be certain political domains where conflicts or convergences of interest occur. For instance, it makes little sense to entrust the investigation of high-level corruption to institutions that are under the control of the ruling dispensation. Certain institutions might, therefore, require some degree of *independence* from the three classical branches.

Given the problem of conflicts and convergence of interests, there might be an initial temptation to entrust the judiciary with all the functions that fall into political domains where such conflicts of convergences of interest occur. However, Courts are likely to frame issues in legally tractable terms, which might impair their ability to arrive at appropriate resolutions of constitutional conflicts[[11]](#footnote-11). In other words, there might be problems of *expertise* in a tripartite structure of governance, in that the classical branches might not be sufficiently equipped with the knowledge and skill to operate in certain political domains. *Expertise*, in this context, refers to a high degree of domain knowledge, experience, and skill, possessed by the institution[[12]](#footnote-12).

It therefore makes structural and functional sense to entrust institutions that are separate from, and independent of, the classical branches, with certain supervisory and regulatory functions. However, questions around what political domains require the creation of specialised institutions, the extentof independence that is to be accorded to these institutions, and the degreeof their regulatory or supervisory control over the three classical branches, continue to be debated. A high degree of independence is associated with problems of *accountability*, especially because the institutions in the fourth branch are unelected bodies.

This paper is an analysis of whether there is a need for “stronger” fourth branch institutions in India. Section II of this paper traces the operation of institutions in the Indian fourth branch in different political contexts. Section III of this paper locates the position of the fourth branch in ongoing discussion about democratic backsliding in India. It argues that the operation of fourth branch institutions is often characterised by a degree of relative autonomy from the design features on which they are based, and a high degree of contingency on the individuals forming the leadership of the institutions, and on the political context that the institution is given to navigate. Section IV of this paper argues that design features ought to be treated as particularly significant to securing the operational independence of institutions in the fourth branch, insofar as they facilitate the development of a certain kind of institutional morality. Different institutions might develop different kinds of ethics, which might enable each of them to curtail different kinds of threats to a democracy.

1. **The Indian Fourth branch**

Tarunabh Khaitan introduces two qualifying requirements for an institution to be classified as a fourth branch institution: (i) the norm that the institutions seek to guarantee is constitutionalised, and (ii) the institution itself has constitutional status[[13]](#footnote-13). He argues that for a norm or an institution to be constitutional, it requires a degree of insulation from change through ordinary legal and political processes. He notes that such insulation is necessary in order for the institution to be independent of the influence of the ruling dispensation. He shows that while some institutions in the Indian fourth branch are created by the Constitution, some others are established by statutes and have quasi-constitutional status[[14]](#footnote-14). While statutes *can* provide agencies with conditions that are conducive to independence, political actors have incentives to limit the independence of these institutions, which might impair their effectiveness[[15]](#footnote-15).

There is some disagreement over what institutions, if any, should be taken to be constitutive of the fourth branch. This section is largely a descriptive account of the operation of some institutions that are (or at least, ought to be) considered as part of the fourth branch, and describes their functioning in different political and institutional contexts. It primarily serves to illustrate that the variation in the operation of these institutions is significant in different contexts. It also attempts to show that, over the last few years, there has been a systemic effort by the political executive to incrementally undermine the structural and operational independence of the fourth branch.

1. The Election Commission

Arun Thiruvengadam identifies that the designers of the Indian Constitution were cognizant of the defects associated with parliamentary democracy, and they therefore sought to insert certain institutional safeguards to sustain democratic governance[[16]](#footnote-16). He argues that the Election Commission is particularly significant because it is given powers of oversight over the election process, which confers legitimacy to the ruling dispensation[[17]](#footnote-17). Articles 324 to 329 of the Indian Constitution, under Part XV, relate to the election process. The Election Commission of India (*hereinafter* “ECI”) is equipped with powers of ‘superintendence, direction, and control of the preparation of electoral rolls’ for elections to Parliament, state assemblies, presidency, and vice-presidency[[18]](#footnote-18). It is empowered to prepare a general electoral roll for every territorial constituency subject to qualifications of non-discrimination[[19]](#footnote-19). Article 326 provides that the conduct of the elections shall be founded on the principle of adult suffrage[[20]](#footnote-20). Articles 327 and 328 empower the Parliament and State Legislatures to legislate with respect to elections[[21]](#footnote-21). Article 329 bars judicial interference in electoral matters[[22]](#footnote-22).

The wide constitutional powers enjoyed by the ECI affords it significant flexibility in the exercise of its powers. Moreover, the independence of the ECI has been protected fiercely by the framers of the Constitution, as well as by courts[[23]](#footnote-23). Yet, for the first three decades of the Constitution, successive ruling governments expected the compliance of the ECI, which they were largely able to secure[[24]](#footnote-24). During Indira Gandhi’s tenure, institutions that were perceived to be a threat to the Prime Minister’s office were subdued[[25]](#footnote-25).

In 1990, the VP Singh government appointed T.N. Seshan as Chief Election Commissioner (*hereinafter* “CEC”)[[26]](#footnote-26), and the next few years were perhaps some of the most noteworthy in the history of the ECI. Although electoral codes were issued in several states in the 1960s, and model codes had been issued by the ECI in the late 1960s, little was done to operationalise and effectuate these rules[[27]](#footnote-27). T.N. Seshan, upon being appointed CEC, sought to enforce the Model Code, and to establish the ECI as an institution separate from, and independent of, the ruling dispensation. His tenure began at the start of the ‘coalition era’. He, therefore, perceived his office as affording him room to exercise significant power[[28]](#footnote-28). He attempted to control the elections schedules, conduct of elections, registration of parties, and other parts of the electoral process, to enforce the Model Code of Conduct and to regulate political parties[[29]](#footnote-29). To check his influence, Prime Minister Narasimha Rao appointed two additional Election Commissioners (*hereinafter* “ECs”)[[30]](#footnote-30). Such appointment was upheld as legal by a Constitutional Bench of the Supreme Court[[31]](#footnote-31). It was also held that the CEC could be overruled by the other two ECs, because the CEC is only the “first among equals”.

Michel Pal argues that the reputation of the ECI as an independent institution has fallen in recent years, in light of numerous credible allegations[[32]](#footnote-32). He notes that the ECI, to some extent, appears to have bent to the will of the ruling dispensation. He identifies that the ECI was most effective during the coalition era, and less so during dominant party governance under both the Congress, and the BJP. He situates the weak link in the institutional design of the ECI, specifically, in the appointment process. The potential for partisan appointments has always existed, and has occurred in the past. The Supreme Court, therefore, held in *Anoop Baranwal v Union of India*[[33]](#footnote-33)that selection of the CEC and appointment of the ECs would be made by a three-member body comprising of the Prime Minister, the leader of the opposition, and the Chief Justice of India. However, the Union Government subsequently passed a legislation[[34]](#footnote-34) to counter its effect, and to restore potential for partisan appointments by replacing the Chief Justice with a Union Cabinet Member, in the three-member body. Therefore, the institutional framework underlying the ECI, as it currently stands, compromises the structural (and likely, the operational) independence of the ECI.

1. Anti-Corruption Institutions: CAG, CVC, CBI, Lokpal, and ED

***The Comptroller and Auditor General***

The office of the Auditor General was developed by the colonial administration in response to criticisms of corruption[[35]](#footnote-35). The Constituent Assembly decided that to add ‘Comptroller’ would indicate that the scope of responsibility of the office would not be limited to auditing, but would include oversight of, and control over, government expenditure[[36]](#footnote-36). Dr Ambedkar identified the Comptroller and Auditor General (*hereinafter* ‘CAG’) as being the most important officer in the Constitution, and the duties of the office as being even more important than those of the judiciary. The Provisions under Chapter V of Part V of the Constitution relate to the office of the CAG. The Constitution sets a high bar for removal of the CAG[[37]](#footnote-37), provides that the salary and terms of employment shall not be varied to her disadvantage[[38]](#footnote-38), and places restrictions on post-service employment under the government[[39]](#footnote-39). These design features, along the lines of those sketched by Bruce Ackerman[[40]](#footnote-40), seek to guarantee and maintain the independence of the office of the CAG.

S.K. Das argues that despite Constitutional and statutory guarantees of independence, the CAG has had little influence on the conduct of the executive[[41]](#footnote-41). He attributes such ineffectiveness to a lack of cooperation by the executive, with the recommendations and reports of the CAG. The parliament displays an attitude of indifference towards the reports of the CAG, that led to a sense of resignation in the CAG[[42]](#footnote-42).

Most of the last incumbents in the office of the CAG have been from the civil service[[43]](#footnote-43). Further, many of the incumbents were on the verge of retirement from their previous positions, effectively rendering the position of CAG a post-service employment, and making them inclined to be grateful to the ruling dispensation.

It was discussed in the previous section how T.N. Seshan’s tenure was transformational to the role of the Election Commission. A similar figure in the office of the CAG was Vinod Rai[[44]](#footnote-44). In a 2010 report by the office of the CAG on the allotment of telecom licences, it was charged that $40 billion was lost by the government as a result of misallocation. The office of the CAG, under the leadership of Rai, recorded irregularities in several government activities over the course of Prime Minister Manmohan Singh’s second term[[45]](#footnote-45). The defeat of the United Progressive Alliance (UPA) government in 2014 was at least partly a result of the impact of the reports of the CAG on the reputation and image of the ruling dispensation[[46]](#footnote-46).

R. Sridharan argues that the CAG does not derive any independent mandate from the Constitution, but rather that it functions in accordance with prescriptions made by the Parliament[[47]](#footnote-47). He concludes that because the CAG serves to hold the executive accountable to the legislature, it should only be considered an extension of the legislature, and not an independent institution that is part of a separate branch. The difficulty with this argument is that in a system of political-party governance, conflicts and convergences of interest arise where a single party controls both the executive and the legislature. Amitabh Mukhopadhyay argues that in India, there is no real separation between the executive and the legislature, and that a separation only exists between the judiciary and the other branches[[48]](#footnote-48). The office of the CAG is unlikely to be able to hold the executive accountable to the legislature in a setting where the same dominant group controls both these branches. Tarunabh Khaitan shows that where a constitutional norm is non-self-enforcing, in that dominant parties are likely to have the ability and the will to frustrate or erase them, fourth branch institutions must act to guarantee the norms[[49]](#footnote-49).

The office of the CAG is therefore best perceived as operating outside the control of the three generalist branches. R. Sridharan also argues that the CAG ought not to position itself outside the tripartite framework by making appeals directly to the public, because public anger is an inadequate foundation for effort to improve governance. While that might be true, it nonetheless remains an important function of the office of the CAG to apprise the public of the nature and outcomes of government spending.

The ruling dispensation’s control over the office of the CAG in the Modi era is argued to have impacted its functioning[[50]](#footnote-50). There has been a seventy five percent fall in the number of reports issued by the CAG between 2015 and 2020. The current incumbent has been accused of being loyal to Modi and to the BJP government[[51]](#footnote-51). Officers who attempt to exercise autonomy are punished through transfers, and there is a sustained effort by the government to increase its stranglehold over the institution.

***The Central Vigilance Commission and the Central Bureau of Investigation***

The Central Vigilance Commission (*hereinafter* “CVC”) is a body constituted to investigate offences under the Prevention of Corruption Act, 1988[[52]](#footnote-52). The terms of service of the Central Vigilance Commissioner and of Vigilance Commissioners include restrictions on post-service employment, and the condition that salaries may not be varied to their disadvantage[[53]](#footnote-53). There is, therefore, an attempt to secure a degree of independence of the CVC through statutory protection.

The CVC is expected to carry it out its investigative functions through the Central Bureau of Investigation (*hereinafter* “CBI”) or the vigilance organisation in the departments[[54]](#footnote-54) The CVC has been described as an institution that does not rank well in the eyes of both the public and the Parliament[[55]](#footnote-55). Its ineffectiveness has been attributed to a variety of factors, including its lack of control over vigilance organisations and the CBI, poorly defined rules for the conduct of disciplinary proceedings, and faulty design[[56]](#footnote-56). Because the CVC can only conduct inquiry based on files, it can only investigate malfeasance where officials have been careless enough to leave paper trails. The CVC is vested only with advisory powers, in that it is not authorised to act in a manner inconsistent with directions issued by the government, or to issue directions regarding policy matters[[57]](#footnote-57).

Although it has been held by the Supreme Court that the CBI ought to report to the CVC about cases taken up and its progress[[58]](#footnote-58), since the CBI is established by the Delhi Special Police Establishment Act, it is for the Parliament to legislate on the matter. The Parliamentary Joint Committee has been reluctant to allow CVC superintendence of the CBI and prefers the retention of its control over the CBI[[59]](#footnote-59). There is, therefore, a conflict of interest, in that the retention of control over the CBI by the central government will likely preclude the investigation of high-level corruption in the government. Insofar as the CBI continues to take instructions from, and serves to further the interests of the government, it is unlikely that even securing CVC superintendence over the CBI will increase its independence or effective functioning.

***Lokpal***

The Lokpal is an institution which is intended to inquire into allegations of corruption against public functionaries[[60]](#footnote-60). The Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, submitted its report on the Lokpal and Lokayuktas and other related Law (Amendment) Bill 2014[[61]](#footnote-61). It sought to integrate the CBI (insofar as its anti-corruption functions were concerned) and the CVC, with the Lokpal. The Lokpal, exercising control over the other two institutions, would conduct inquiry, investigation, and prosecution through them. While such design might render the CVC redundant[[62]](#footnote-62), redundancy is an integral feature of the design of fourth branch institutions. When redundancy is incorporated into the design of the system, there is a greater likelihood that an institution will act to guarantee democracy even where other institutions fail to do so[[63]](#footnote-63).

One limitation in this design, as argued by the CBI, is that corruption cases and other cases investigated by it are often connected[[64]](#footnote-64). Further, Amitabh Mukhopadhyay identifies that the case for the Lokpal is founded on a fundamental lacuna in the design of financial accountability in India[[65]](#footnote-65). The interaction of members of the Public Accounts Committee with Members of Parliament outside committee meetings creates significant potential for the negotiation of issues of financial accountability. Several shortcomings have been identified with the functioning of the Lokpal, in terms of its inability to fully utilise its budgeted funds, for its lack of transparency, and for its insufficient capacity to substantively battle corruption and maladministration[[66]](#footnote-66). The Modi-led BJP government has also been accused of unreasonably delaying the appointment of a Lokpal for most of its existence[[67]](#footnote-67).

***The Enforcement Directorate***

The Enforcement Directorate (*hereinafter* “ED”) is an economic intelligence agency in India. It is tasked with the investigation of offences under The Prevention of Money Laundering Act, 2002, and of violations of foreign exchange laws[[68]](#footnote-68). In the second term of the Modi government, the ruling dispensation has been accused of weaponizing the ED to target its political opponents[[69]](#footnote-69). The number of cases registered by the ED has increased five-fold since 2014-15. In 2021, the government passed laws that provided for annual extensions of the tenure of the director of the ED[[70]](#footnote-70). These amendments were challenged before the Supreme Court which, by its ruling in 2023, upheld the validity of the amendments[[71]](#footnote-71). Gautam Bhatia shows that through the introduction of a policy of annual extensions, the independence of the ED is significantly impacted, because the government exercises control over the tenure of the ED Director[[72]](#footnote-72). He assails the judgment of the Supreme Court for its non-recognition of the institutional independence of the ED. Such non-recognition poses significant problems of conflict of interest. An institution under executive control cannot be expected to conduct impartial investigation, as shown by the track record of the ED over the last few years. An investigation reveals that ninety five percent of the cases registered by the ED since the BJP was voted into power in 2014 were against leaders of opposition parties[[73]](#footnote-73). Therefore, although the ED is conceptualised as an institution belonging to the fourth branch, it has come under executive control, and has been appropriated by the ruling dispensation for the pursuit of its political objectives.

1. Other Institutions

Tarunabh Khaitan includes institutions such as central banks, attorney generals, knowledge institutions[[74]](#footnote-74), and human rights commissions, as part of the fourth branch[[75]](#footnote-75). Mark Tushnet illustrates a problem in the characterisation of human rights commissions as fourth branch institutions. He argues that where courts have developed a model such India’s public interest litigation, some work that a human rights commission might do is performed by the judiciary. Moreover, a human rights commission that is subject to government control is unlikely to lack the capacity or the will to perform the functions that an independent commission might perform[[76]](#footnote-76).

The case for the independence of central banks is similar to that of election-management bodies or anti-corruption agencies[[77]](#footnote-77). Dr Y.V. Reddy, former governor of the Reserve Bank of India (*hereinafter* “RBI”), argues that central banks perform certain functions such as debt management as an agent of the government, and certain other functions such as the execution of the monetary policy as an autonomous institution[[78]](#footnote-78). He states that these functions could be in conflict because of the differential degrees of autonomy exercised in their performance.

Before 1997, the independence of the RBI was limited by virtue of government access to central bank credits to finance its spending[[79]](#footnote-79). Although the RBI continues to have little formal independence, it has been argued to have exercised significant operational independence, especially in the period after the 1991 economic reforms[[80]](#footnote-80). While the current ruling dispensation has been accused, on several occasions, of attempting to interfere in the functioning of the RBI[[81]](#footnote-81), the institution appears to have resisted some of these efforts, and had not become entirely compliant[[82]](#footnote-82). The appointment of the current RBI governor, however, is argued to have rendered the institution pliant[[83]](#footnote-83)

Some Constitutions include independent prosecutors whose offices are tasked with the investigation of impropriety in public administration[[84]](#footnote-84). However, the Indian constitutional law officer, the attorney-general, is tasked by the Constitution with providing advice on legal matters, to the government[[85]](#footnote-85). The attorney-general of India appears for the Union Government in the Supreme Court of India, and is not envisioned as an office that maintains a check on executive authority.

The current ruling dispensation has also been argued to have compromised the independence of several important knowledge institutions. Tarunabh Khaitan shows that the government has effectively downgraded the status of the Central Information Commission from an independent quasi-constitutional institution to a department of a government ministry[[86]](#footnote-86). Similarly, he shows that the government has hindered the functioning of the National Statistics Commission[[87]](#footnote-87).

1. Conclusion

This section does not claim to make an exhaustive analysis of all fourth branch institutions in India. Rather, it traces the operation of several important institutions in the fourth branch to illustrate their performance in different political contexts. A trend that arises from such analysis is that these institutions operate particularly well where there is no single dominant party. For instance, T.N. Seshan saw himself as having room to flex his authority over a government which was not ruled by an absolute majority. Similarly, Vinod Rai exercised autonomy in the scam-riddled second term of the UPA, where the influence of the ruling dispensation was waning. In the context of a dominant party with a weak opposition, the executive is likely to be able to exercise greater influence over fourth branch institutions. What is also significant is that none of the institutions appear to exercise consistent levels of independence and autonomy. Moreover, the variation in the degree of independence and autonomy exercised is not a function of the design features that the institutions are based on. For example, despite little formal independence, the RBI has exercised significant operational independence at various points of its existence[[88]](#footnote-88). Institutions such as the CAG and the ECI, despite possessing greater formal independence from the executive, have experienced phases of low operational independence and compliance with the ruling dispensation at several periods in independent India.

Over the last decade, under the rule of the dominant BJP government, the ECI and the CAG have been accused of bending to the will of the ruling dispensation. Institutions such as the CBI and the ED have been shown to have fallen under government control. The government has been accused of attempting to exercise influence over the RBI, and of deliberately rendering anti-corruption institutions toothless. This trend raises an important question about fourth branch institutions. Can these institutions operate well when they are needed the most: when there are threats to constitutional democracy? This is a theme that will assume central significance in the next section of this paper.

1. **A “Stronger” Fourth branch**

Although this paper discusses the relevance of fourth branch institutions in relation to ongoing discussion about threats to Indian constitutional democracy, it is important not to perceive the argument as restricted to a particular political context or dynamic. While it may certainly be argued that a specific political context requires stronger action by fourth branch institutions, the question of whether India needs a stronger fourth branch must not be reduced to a question of whether there is in fact democratic backsliding in the country. To begin an inquiry into whether stronger fourth branch institutions are necessary, one need only establish that there is *potential* for executive aggrandizement and democratic decline in a polity, and it would not be correct to state that an argument for a stronger fourth branch is *only* warranted if it is established that there is in fact democratic decline. This is because, as argued earlier, it makes general structural and functional sense to include fourth branch institutions as features of any constitutional democracy.

There is a fundamental antinomy in the operation of fourth branch institutions. Irrespective of the degree of independence guaranteed to the institutions by their design features, the powerful influence of the current ruling dispensation appears to have compromised their independence and autonomy. Mark Tushnet identifies that fourth branch institutions tend to operate most effectively in political contexts that least require them[[89]](#footnote-89). Where there is a dominant party and leader, the ruling dispensation tends to have the ability to secure the compliance of fourth branch institutions[[90]](#footnote-90), reducing independence to a question of political will[[91]](#footnote-91).

1. Democratic Decline and the Fourth Branch

Tarunabh Khaitan argues that the decade of BJP’s governance is not characterised by a full-frontal attack on constitutional democracy such as that during Prime Minister Indira Gandhi’s tenure, but rather by a systemic effort to incrementally undermine the independence of other institutions in its exercise of executive aggrandisement[[92]](#footnote-92). He identifies that the ruling dispensation has made efforts to finance its campaign, and to influence a demographic change, in order to secure an electoral advantage. He also shows that the government has made sustained efforts to weaken the opposition, the judiciary, and fourth branch institutions. Manoj Mate argues that the BJP government has undermined the constitutional ethos by successfully injecting religion into politics and eroding the core constitutional value of secularism[[93]](#footnote-93). It has also been argued that an incremental decay in constitutional democracy has been caused by declining trends of deliberation in parliament[[94]](#footnote-94).

Tarunabh Khaitan argues that because the judiciary cannot effectively protect democracy alone, it is important to establish mechanisms to preserve the independence of fourth branch institutions[[95]](#footnote-95). He proposes an Independent Institutional Bill as the means to accomplish and preserve the autonomy and independence of these institutions. Such a bill, he argues, should pursue objectives of multi-partisan appointments, operational independence and impartiality, and accountability to the legislature rather than to the executive[[96]](#footnote-96). He argues that appointments must be made by multi-partisan legislative committees, which he terms Independent Institutions Committees (*hereinafter* “IICs”). These Committees, he argues, ought to be designed such that nominees from the largest opposition parties can defeat nominations of the ruling party when united, enabling compromise between the ruling party and at least one key opposition party. He also sketches some design features along the lines of those formulated by Ackerman[[97]](#footnote-97), such as appointment for fixed terms, guaranteed career paths, statutorily protected salaries, and other such measures to secure insulation.

Paul Tucker identifies that some independent institutions may be given multiple distinct missions, subject to certain qualifications[[98]](#footnote-98). For example, central banks may be entrusted with both the monetary policy and with the supervision of the banking system[[99]](#footnote-99). Mark Tushnet suggests that to enable an institution to exercise jurisdiction over more separate criteria secures greater independence for the institution[[100]](#footnote-100), because it can undertake a greater range of actions to balance its various missions under the given circumstances[[101]](#footnote-101).

Institutions in the fourth branch, while separate from the political executive, nonetheless make deeply political decisions[[102]](#footnote-102). It may therefore be made a necessary requirement that candidates to lead the institutions must meet certain qualifying requirements of experience or expertise in politics and in the field that the institution operates in. Tarunabh Khaitan argues that the number of leaders of a fourth branch institution depends on the range of actions that the institution undertakes[[103]](#footnote-103). According to him, an institution that undertakes a greater range of activities might require that different kinds of expertise be pooled, thus warranting multi-member leadership. However, expertise might not be the only relevant consideration in deciding the numerical strength of the leadership of fourth branch institutions. For example, multi-member institutions might prevent impulsive enforcement by an individual[[104]](#footnote-104), resist corruption better than individual leaders[[105]](#footnote-105), ensure greater neutrality by balancing opinions[[106]](#footnote-106), ensure better representation of different communities[[107]](#footnote-107), and so on. Therefore, multi-member commissions might, as a matter of general institutional design, ensure greater independence and neutrality of fourth branch institutions.

1. Relative Autonomy and Contingency of the Fourth Branch

The operation of institutions in the fourth branch is characterised by (i) a degree of relative autonomy from the design features on which the institutions are based, and (ii) a high degree of contingency on the political context in which they operate, and on the leadership of the institution. Most fourth branch institutions are led by an individual, who exercises significant control over the operation of the institution. For instance, individuals such as T.N. Seshan or Vinod Rai exercised a degree of independence and autonomy in their positions as CEC or CAG not only by virtue of the guarantees afforded to them by the design features on which their institutions were based, but also by their personal integrity and a commitment to combat corruption and to ensure checks on the conduct of the executive[[108]](#footnote-108).

Design features, therefore, cannot be taken as determinative of the nature of the institution that they create. The actual operation of the institution is highly contingent on the individuals in-charge of the institution, and the party-political context in which the institution operates. Therefore, even if design features secure the structural independence of an institution, the institution might be rendered pliant if its leader favours the ruling dispensation, or if the ruling dispensation is sufficiently dominant to be able to undermine its functioning.

Consider, for example, judicial appointments in India. In *Supreme Court Advocates on Record Association v Union of India*[[109]](#footnote-109), popularly known as the ‘second judges case’, a nine-judge bench of the Indian Supreme Court overruled a previous seven-judge bench decision[[110]](#footnote-110) (the ‘first judges case’) and held that appointments to the Supreme Court would be made by the Chief Justice of India in consultation with the two senior-most judges of the Supreme Court and the seniormost judge whose opinion would likely be significant in determining the appropriateness of the candidate, whether because the judge came from the same high court as the candidate, or ‘otherwise’[[111]](#footnote-111). Similarly, appointments to the high courts would be made by the Chief Justice of India in consultation with a colleague in the Supreme Court who is ‘likely to be conversant with the affairs of the concerned high court, with the chief justice of the concerned high court, with the governor of the concerned state. The Chief Justice of India was given the discretion to consult with senior judges of the high court if she believed their opinions likely to be significant[[112]](#footnote-112).

A few years later, another nine-judge bench was constituted to respond to a presidential reference containing nine questions to the Supreme Court[[113]](#footnote-113), in what is now called the ‘third judges case’. The bench being of the same strength as that in the second judges case, did not have the authority to overrule that decision. Rather, it made modifications to the decision in the second judges case[[114]](#footnote-114). It increased the number of judges the Chief Justice of India was required to consult, to four of the seniormost judges in the Supreme Court. This body consisting of the Chief Justice and the four seniormost judges was named the “collegium”. In the ‘fourth judges case’ in 2014[[115]](#footnote-115), the Supreme Court heard petitions challenging a law[[116]](#footnote-116) which provided a greater role to the executive in making appointments to the judiciary. The majority opinion in the case revived the collegium system and struck down the new law as violating the basic structure principle of separation of powers, and, therefore, as being unconstitutional.

The judiciary has, therefore, vigorously safeguarded its own structural independence in several judgements. Although appointments to the judiciary are made by the collegium, and the judiciary cannot be held accountable by either the executive or the legislature, the judiciary is still argued not to possess substantive independence and autonomy. In a seminar on judicial appointments and the collegium system, Mohan Gopal argued that there is a sharp increase in the number of judges who turn to religious Hindu texts as sources of legal authority[[117]](#footnote-117). He argued that executive interference with the operational independence of the judiciary can happen in several ways. In the same seminar, Aditya Sondhi argued that interference with judicial independence can take on different avatars, despite formal separation from the executive[[118]](#footnote-118).

Therefore, although the design features afford the judiciary absolute separation from the executive, such separation is not a guarantee of operational independence. Executive interference in the operational independence of other institutions can occur in different ways, such as through the manipulation of institutional design and use of informal organizational factors. In exploring anti-corruption efforts in Finland and New Zealand, for example, Robert Rotenberg, shows that institutional design is not critical to anti-corruption efforts[[119]](#footnote-119). He argues that norm development plays a more significant role in reducing corrupt behaviour[[120]](#footnote-120). This is a theme that will be discussed in greater length in the next section of the paper.

1. Conclusion

It has been argued that the Supreme Court has, over several cases, failed to recognise and protect the independence of various fourth branch institutions[[121]](#footnote-121). The court has held an imagination of the ECI as having only limited independence, failed to recognise the absolute separateness of the CBI and the ED from the executive, limited the autonomy of the CAG, and failed to recognise the necessity of the independent appraisal of economic policy decisions by the RBI[[122]](#footnote-122). To maintain a check on the power of the executive, the judiciary must recognise the substantive independence of fourth branch institutions from executive control. Judicial imagination must extend the protection under the basic structure feature of separation of powers[[123]](#footnote-123) to include institutions in the fourth branch. Rigorous judicial protection of fourth branch institutions from executive domination is, therefore, necessary for the preservation of the independence of the fourth branch.

Therefore, while an Independent Institutions Bill introducing terms of employment, and mechanisms of appointment and accountability, is usually[[124]](#footnote-124) a necessary condition for the preservation of the independence of the fourth branch, it might not be a sufficient condition for such preservation. Constitutional, quasi-constitutional, and legislative protections offer some degree of structuralindependence to fourth branch institutions. Despite legal guarantees of independence, the operationalindependence of fourth branch institutions might be undermined by the political dynamic, or by the individuals in charge of the institution. While design features are, in a sense, *facilitative* of operational independence, they are not *determinative* of such independence.

A proactive judiciary may be necessary to preserve the structural independence of fourth branch institutions, but it might not be able to effectively identify and address informal organizational factors that threaten or undermine the operational independence of these institutions[[125]](#footnote-125). The Independent Institutions Bill, therefore, remains only one of several efforts that ought to be made to secure the independence and accountability of fourth branch institutions. Further, while a proactive judiciary and sound institutional design may offer some degree of protection to fourth branch institutions against executive aggrandizement, the operational independence of the fourth branch remains highly contingent on the individuals in charge of the institutions. The next section of this paper explores how each fourth branch institution might develop internal guarantees to preserve its operational independence.

1. **Institutional Morality**

It has been argued that the public can, at times, act as a guarantor of constitutional democracy. However, it is unclear whether institutions which can reliably foster a civic virtue in the citizenry, can be developed. This section explores whether a civic virtue can be infused in the citizenry, and whether a similar kind of morality can be developed within fourth branch institutions.

1. The Public as a Guarantor of Democracy

Yaniv Roznai argues that where the citizenry act collectively as an ad hoc massive in response to threats to liberal democracy, they constitute a fourth branch institution[[126]](#footnote-126). He shows that the judicial “reforms” in Israel that sought to weaken the judiciary, and strengthen the executive, were met with massive public protests. He argues that the protection of democracy cannot be entrusted only with the courts, but it must also occur in the streets.

Robert Rotenberg illustrates that stringent rules and effective implementation were not determining variables in the anti-corruption efforts of Nordic countries[[127]](#footnote-127). Rather, it was a culture of trust and order that was infused in society, producing and reproducing an aversion to corrupt practices. Finnish democracy, for example, maintained sufficiently transparent and accountable public institutions which enabled substantive public participation in governance. Similarly, New Zealand’s experience with corruption illustrates that direct and conscious efforts to reduce corrupt practices might be less effective than the development of norms and a culture of aversion to corruption[[128]](#footnote-128).

The difficulty, however, is the identification of institutions that can effectively develop a civic virtue in the citizenry[[129]](#footnote-129). Mark Tushnet, for example, argues that the development of civic virtue would require highly localised institutions that regularly engage with the citizenry[[130]](#footnote-130). Attempts of such ‘radical decentralization’ appear to have been unsuccessful in infusing civic virtue in the citizenry, as in the case of the Indian panchayat system[[131]](#footnote-131). Arun Thiruvengadam argues that in while there have been some positives, panchayats in many cases are merely an *addition* to the existing administrative system, rather than a *substitute* to it[[132]](#footnote-132). Panchayats, in many cases, act as agents of the central government to promote and sponsor its schemes at the local levels.

1. Changing Institutional Culture

M.S. Gill, the immediate successor to T.N. Seshan as CEC, commented that the directives issued by Seshan would not have a lasting effect on the strength of the ECI[[133]](#footnote-133). He argued that the effective strengthening of the Commission would require structural enhancements to the Commission. This comment was made in the context of Seshan’s displays of autonomy while engaging in egotism and self-promotion[[134]](#footnote-134). Alistair MacMillian argues that Gill himself was susceptible to the influence and reputation that were associated with the Commission after Seshan’s tenure[[135]](#footnote-135). Yet, his claim that a lasting contribution to the strength of the institution requires a committed and sustained effort to changing the institutional structure, warrants deeper inquiry.

As argued in the previous section, the independence and autonomy exercised by individuals such as T.N. Seshan and Vinod Rai were not only functions of the structural independence offered to them by the design features of their constitutional offices, but also of their personal values, beliefs, and commitment. However, T.N. Seshan and his successor were susceptible to the power and reputation that their positions came to be associated with[[136]](#footnote-136), and there was little done to develop an institutional culture of aversion to executive interference in the electoral process, and to rid elections of corruption[[137]](#footnote-137). Upon Vinod Rai’s retirement, the executive appointed leaders who maintained much lower profiles[[138]](#footnote-138), and did not pursue the preservation of a culture of integrity and autonomy.

While radical decentralisation may be difficult because of challenges in identifying and operationalising institutions that operate effectively at extremely localised levels, it may be attempted to infuse a desirable culture of commitment and integrity in fourth branch institutions. As argued, even some leaders of fourth branch institutions who exercised autonomy and independence failed to ensure sustained efforts to effect changes to the structure and culture of the institutions that they led. While design features are guarantees of formal independence from executive control, sustained operational independence and autonomy requires proactive effort by the individuals in charge of the institutions.

Design features are significant because they facilitate the development and preservation of the kind of institutional morality that the leaders of the institution must strive to develop. For example, a design principle which disallows partisan appointments might increase the probability of that the leader who is appointed is impartial. Similarly, design features fixing salaries, prohibiting post-service employment, and so on, decreases the possibility that the leader of the institution favours the ruling dispensation. However, the actual development of the right kind of institutional morality is a function of the actions and efforts of individual leaders of the institutions, and not of the design features.

Elliot Blumer argues that members of fourth branch institutions must act impartially and set aside personal preferences[[139]](#footnote-139). He argues that the members must accord primacy to the interests of the polity over that of any political party, ideology, community, family, or person. While multi-member commissions may be more neutral than individual leaders of institutions, they are not guarantees of neutrality or independence. The responsibility for creating a political culture of accountability and independence therefore lies largely on the members of each fourth branch institution. If, for example, the efforts of even just a few leaders to effect substantive changes to the culture of the institution might successfully create an expectation from the institution as being independent as responsible[[140]](#footnote-140). Public expectations for performance of institutions and individuals tend to have an impact on the conduct of the institutions and individuals[[141]](#footnote-141). Therefore, subsequent leaders of the institution might be inclined to live up to the expectation that comes to be associated with the institution, increasing the likelihood that the culture is preserved. Design features of the institution are facilitative of the preservation of the culture in that the possibility for the executive to influence leaders of the fourth branch institution is greatly reduced.

1. **Conclusion**

Dr B.R. Ambedkar argued, in his concluding remarks to the constituent assembly, stated that the character of governance is determined more by the quality of the political leadership, than by the quality of the Constitution[[142]](#footnote-142). This paper argues that the same is true of fourth branch institutions. It locates the significance of design features in that sound design is likely to be more conducive to the development of an institutional morality, that can empower the fourth branch to preserve constitutional democracy in India.

While this paper has addressed questions of independence and autonomy of the fourth branch in significant detail, it has not addressed questions of accountability, that are naturally associated with greater independence and strengthened capabilities of the branch. Institutions in the fourth-branch are unelected bodies. Structural and operational accountability ought to be integral features of these institutions. The growing power of an institution must necessarily be accompanied by transparency and accountability[[143]](#footnote-143). However, finding a combination of appropriate degrees of independence and accountability in an institution is a difficult task[[144]](#footnote-144). It may be noted that while there may be challenges of accountability associated with fourth branch institutions, such challenges do not undermine the structural and functional logic of the fourth branch[[145]](#footnote-145).

In the context of the ECI, Mohsin Alam Bhat shows that rather than through rules backed by sanction, the ECI regulates the conduct of political parties by exercising control over the electoral process.[[146]](#footnote-146) In other words, the ECI regulates elections through architectural regulation, by “structuring, steering, and framing the electoral process”[[147]](#footnote-147). The challenges of institutional accountability in regard to the ECI therefore arise more out of the nature of the ECI than from the extent of its functions. In another work[[148]](#footnote-148), he recognises operational accountability as being distinct from structural accountability. While structural accountability relates to institutional design, operational accountability relates to relationships between institutions on the basis of oversight, transparency, and reason-giving[[149]](#footnote-149), relying on institutional practices and legal norms.

Michael Pal argues that accountability may be ensured by expanding the system of checks and balances that forms the logic underpinning the tripartite structure, to the fourth branch[[150]](#footnote-150). For example, the Constitution of Ghana makes the central bank accountable to the Auditor General, who is, in turn, accountable to the Parliament[[151]](#footnote-151). The scope of powers of independent anti-corruption agencies may, therefore, include investigation of financial impropriety in other institutions in the fourth branch. Similarly, threats to institutional arrangements may be addressed by proactive judicial review[[152]](#footnote-152).

However, there are limits to the ability of institutions and courts to hold fourth branch institutions accountable[[153]](#footnote-153). Another important means to facilitate accountability is by making fourth branch institutions answerable to the legislature or to the IIC[[154]](#footnote-154). Reports submitted to the parliament by the fourth branch institutions may be scrutinised and questioned by the parliament or the IIC in hearing held at regular intervals[[155]](#footnote-155). Robust exercise of judicial review has been identified as an important means to ensure the operational accountability of the branch[[156]](#footnote-156). It was earlier argued that the exercise of judicial review to curtail political interference in the operation of fourth branch institutions can help preserve the independence of the branch. Mohsin Alam Bhat argues, in the context of the ECI, that while the Supreme Court has generally demanded high levels of accountability and transparency from the political executive, it has perceived the ECI as an ally in electoral reform[[157]](#footnote-157). As a result, the Court has been inattentive to ensuring the accountability of the ECI. He attributes the expanding powers of the ECI to the attitude of the Supreme Court towards the institution. Courts are sufficiently equipped to demand accountability of fourth branch institutions[[158]](#footnote-158). Therefore, an attentive judiciary which exercises its powers to curtail the excesses of the fourth branch can facilitate greater legitimacy, transparency, and accountability, in the operation of fourth branch institutions.

Therefore, while there may be reasonable concerns around the accountability of the fourth branch, expanding the system of checks and balances, making fourth branch institutions accountable to the legislature (but not to the executive), and robust exercise of judicial review, can help preserve the accountability of the branch, without impacting its independence.

1. Tarunabh Khaitan, ‘Guarantor Institutions’ (2021) 16 Asian Journal of Comparative Law 40, 41. [↑](#footnote-ref-1)
2. Ibid. [↑](#footnote-ref-2)
3. AJ Brown, ‘The Fourth, Integrity Branch of Government: Resolving a Contested Idea’ (2018) Paper Delivered at World Congress of Political Science in Brisbane, Australia, 19. [↑](#footnote-ref-3)
4. Mark Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (CUP 2021) 8. [↑](#footnote-ref-4)
5. Ibid 11. [↑](#footnote-ref-5)
6. The Constitution of India 1950, Articles 324-329; The Constitution of the Republic of South Africa 1996, Chapter 9; etc. [↑](#footnote-ref-6)
7. Bruce Ackerman, ‘The New Separation of Powers’ (2000) 113 Harvard Law Review 633, 694. [↑](#footnote-ref-7)
8. Mark Tushnet, ‘Institutions Protecting Constitutional Democracy: Some Conceptual and Methodological Preliminaries’ (2020) 70 UTLJ 95, 96. [↑](#footnote-ref-8)
9. Khaitan (n 1) 51. [↑](#footnote-ref-9)
10. Tushnet (n 4) 3. [↑](#footnote-ref-10)
11. Ibid 25. [↑](#footnote-ref-11)
12. Tarunabh Khaitan, ‘Guarantor (or the so-called ‘Fourth Branch’) Institutions’ in Jeff King and Richard Bellamy eds, *Cambridge Handbook of Constitutional Theory* (CUP 2023 Forthcoming) 7. [↑](#footnote-ref-12)
13. Khaitan, (n 1) 44. [↑](#footnote-ref-13)
14. Tarunabh Khaitan, ‘Executive Aggrandisement and Party–State Fusion in India’ in Swati Jhaveri, Tarunabh Khaitan, and Dinesha Samaratne (eds.) *Constitutional Resilience in South Asia* (Hart Publishing 2023) 153. [↑](#footnote-ref-14)
15. Tushnet (n 4) 44. [↑](#footnote-ref-15)
16. Arun Thiruvengadam, *The Constitution of India: A Contextual Analysis* (Hart Publishing 2017) 140. [↑](#footnote-ref-16)
17. Ibid 148. [↑](#footnote-ref-17)
18. The Constitution of India 1950, Article 324. [↑](#footnote-ref-18)
19. Ibid, Article 325. [↑](#footnote-ref-19)
20. Ibid, Article 326. [↑](#footnote-ref-20)
21. Ibid, Article 327, Article 328. [↑](#footnote-ref-21)
22. Ibid, Article 329. [↑](#footnote-ref-22)
23. E Sridharan and Milan Vaishnav, ‘Election Commission of India’ in Devesh Kapur, Pratap Bhanu Mehta, and Milan Vaishnav (eds.) *Rethinking Public Institutions in India* (OUP 2017). [↑](#footnote-ref-23)
24. Ibid. [↑](#footnote-ref-24)
25. Thiruvengadam (n 16) 154. [↑](#footnote-ref-25)
26. Ibid. [↑](#footnote-ref-26)
27. David Gilmartin: ‘One day’s sultan: T.N. Seshan and Indian democracy’ (2009) 43(2) Contributions to Indian Sociology 247, 251. [↑](#footnote-ref-27)
28. Thiruvengadam (n 16) 155. [↑](#footnote-ref-28)
29. E Sridharan and Milan Vaishnav (n 23). [↑](#footnote-ref-29)
30. Ibid. [↑](#footnote-ref-30)
31. *T.N. Seshan, Chief Election Commissioner of India v Union of India* (1995) 4 SCC 611. [↑](#footnote-ref-31)
32. Michael Pal, ‘The South Asian Fourth Branch: Designing Election Commissions for Constitutional Resilience’ in Swati Jhaveri, Tarunabh Khaitan, and Dinesha Samararatne (eds.) *Constitutional Resilience in South Asia* (Hart Publishing 2023) 283. [↑](#footnote-ref-32)
33. (2023) 6 SCC 161 [↑](#footnote-ref-33)
34. Chief Election Commissioner and other Election Commissioners (Appointment, Conditions of Office and Terms of Office) Bill, 2023 [↑](#footnote-ref-34)
35. Thiruvengadam (n 16) 141. [↑](#footnote-ref-35)
36. Ibid 142. [↑](#footnote-ref-36)
37. The Constitution of India 1950, Article 148 (1). [↑](#footnote-ref-37)
38. Ibid, Article 148 (3). [↑](#footnote-ref-38)
39. Ibid, Article 148 (4). [↑](#footnote-ref-39)
40. Ackerman (n 7) 694. [↑](#footnote-ref-40)
41. S.K. Das, ‘Institutions of Internal Accountability’ in Devesh Kapur and Pratap Bhanu Mehta (eds.) *Public Institutions in India: Performance and Design* (First Published 2005, OUP 2017) 132. [↑](#footnote-ref-41)
42. R. Sridharan, ‘Institutions of Internal Accountability’ in Devesh Kapur, Pratap Bhanu Mehta, and Milan Vaishnav (eds.) *Rethinking Public Institutions in India* (OUP 2017). [↑](#footnote-ref-42)
43. Thiruvengadam (n 16) 145. [↑](#footnote-ref-43)
44. Tushnet (n 4) 158. [↑](#footnote-ref-44)
45. Thiruvengadam (n 16) 146. [↑](#footnote-ref-45)
46. Ibid 147. [↑](#footnote-ref-46)
47. R. Sridharan (n 42). [↑](#footnote-ref-47)
48. Amitabh Mukhopadhyay, ‘Foregrounding Financial Accountability in Governance’ in Devesh Kapur, Pratap Bhanu Mehta, and Milan Vaishnav (eds.) *Rethinking Public Institutions in India* (OUP 2017). [↑](#footnote-ref-48)
49. Khaitan (n 1) 53. [↑](#footnote-ref-49)
50. Aakar Patel, ‘Transparency in the Modi Era? CAG’s Working Shows It Remains Opaque’ (17 October 2023, The Wire) <https://thewire.in/government/transparency-in-modi-era-cags-working-shows-it-remains-opaque> Accessed 21 April 2024. [↑](#footnote-ref-50)
51. Ibid. [↑](#footnote-ref-51)
52. The Central Vigilance Commission Act 2003. [↑](#footnote-ref-52)
53. Ibid, section 5 (6); section 5 (7). [↑](#footnote-ref-53)
54. Das (n 41) 137. [↑](#footnote-ref-54)
55. R. Sridharan (n 42). [↑](#footnote-ref-55)
56. Ibid. [↑](#footnote-ref-56)
57. The Central Vigilance Commission Act 2003, s 8 (1) (h). [↑](#footnote-ref-57)
58. *Vineet Narain v Union of India* AIR 1998 SC 889. [↑](#footnote-ref-58)
59. Das (n 41) 141. [↑](#footnote-ref-59)
60. The Lokpal and Lokayuktas Act, 2013. [↑](#footnote-ref-60)
61. Prianka Rao, ‘Standing Committee Report Summary’ (4 Jan 2016, PRS India) <https://prsindia.org/files/bills\_acts/bills\_parliament/2014/SCR%20Summary%20Lokpal%20and%20other%20laws%20Bill%202014.pdf> Accessed 19 April 2014. [↑](#footnote-ref-61)
62. R. Sridharan (n 42). [↑](#footnote-ref-62)
63. Tushnet (n 4). [↑](#footnote-ref-63)
64. Ibid. [↑](#footnote-ref-64)
65. Mukhopadhyay (n 48). [↑](#footnote-ref-65)
66. Moushumi Das Gupta, ‘3 years since Launch, Lokpal is a non-starter. Complaints dry up, questions rise over intent’ (11 January 2022, The Print) <https://theprint.in/india/3-years-since-launch-lokpal-is-a-non-starter-complaints-dry-up-questions-rise-over-intent/795110/> Accessed 19 April 2024. [↑](#footnote-ref-66)
67. Tarunabh Khaitan, ‘Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India’ (2020) 14 (1) Law & Ethics of Human Rights 49, 77. [↑](#footnote-ref-67)
68. Directorate of Enforcement, ‘What we do’ <https://enforcementdirectorate.gov.in/> Accessed 20 April 2024. [↑](#footnote-ref-68)
69. The Wire Staff, ‘ED Action Has Increased Dramatically Under Modi Govt, Parliament Reply Reveals’ (26 June 2022) <https://thewire.in/government/ed-action-has-increased-dramatically-under-modi-govt-parliament-reply-reveals> Accessed 20 April 2024. [↑](#footnote-ref-69)
70. Central Vigilance Commission (Amendment) Act 2021; Fundamental (Amendment) Rules 2021. [↑](#footnote-ref-70)
71. *Dr. Jaya Thakur v Union of India* (2023) 10 SCC 276. [↑](#footnote-ref-71)
72. Gautam Bhatia, ‘The Limits of Institutional Independence: The Supreme Court’s ED Director Judgment’ (17 July 2023, Constitutional Law and Philosophy) <https://indconlawphil.wordpress.com/2023/07/17/the-limits-of-institutional-independence-the-supreme-courts-ed-director-judgment/> Accessed 20 April 2024. [↑](#footnote-ref-72)
73. The Wire Analysis, ‘Does the All-Powerful Enforcement Directorate Have a Director?’ (22 March 2024) <https://thewire.in/government/does-the-all-powerful-enforcement-directorate-have-a-director> Accessed 20 April 2024. [↑](#footnote-ref-73)
74. Vicki Jackson defines knowledge institutions as ongoing entities whose primary purpose is the pursuit of production or dissemination of knowledge through disciplinary norms; See Vicki C. Jackson, ‘Knowledge Institutions in Constitutional Democracies: Preliminary Reflections’ (2021) 7 CJCCL 156, 166. [↑](#footnote-ref-74)
75. Tarunabh Khaitan, ‘A Fourth Branch of the State? On Constitutional Guarantors in the UK’ (30 March 2023, UKCLA) <https://ukconstitutionallaw.org/2023/03/30/ tarun-khaitan-a-fourthbranch-of-the-state-on-constitutional-guarantors-in-the-uk/> Accessed 19 April 2024. [↑](#footnote-ref-75)
76. Tushnet (n 4) 36. [↑](#footnote-ref-76)
77. Ibid 5. [↑](#footnote-ref-77)
78. Y.V. Reddy, ‘Autonomy of the Central Bank: Changing Contours in India’ (The Second Foundation Day Lecture at IIM Indore, Indore, 3 October 2001) <https://www.bis.org/review/r011010b.pdf> Accessed 20 April 2024. [↑](#footnote-ref-78)
79. Errol D’Souza, ‘Reserve Bank of India: The Way Forward’ in Devesh Kapur, Pratap Bhanu Mehta, and Milan Vaishnav (eds.) *Rethinking Public Institutions in India* (OUP 2017). [↑](#footnote-ref-79)
80. Ibid; Anand Chandravarkar, ‘Towards an Independent Federal Reserve Bank of India: A Political Economy Agenda for Reconstitution’ (2005) 40 *Economic and Political Weekly* 3837. [↑](#footnote-ref-80)
81. PTI, ‘Viral Acharya had Warned of Economic Fires if Central Banks’ Independence Was Compromised’ (24 June 2019, The Wire) <https://thewire.in/banking/viral-acharya-rbi-deputy-governor-resignation> Accessed 20 April 2024; Prashant Reddy, ‘Demonetisation: When exactly did the RBI take the decision to issue new Rs 2,000 bank note? (15 Jan 2017) <https://scroll.in/article/826658/demonetisation-when-exactly-did-the-rbi-take-the-decision-to-issue-new-rs-2000-bank-note> Accessed 20 April 2024. [↑](#footnote-ref-81)
82. Vivek Kaul, ‘Why the Modi government should stay away from the RBI’ (31 October 2018, Newslaundry) <https://www.newslaundry.com/2018/10/31/the-modi-government-should-stay-away-from-the-rbi> Accessed 20 April 2024. [↑](#footnote-ref-82)
83. Khaitan (n 67) 84. [↑](#footnote-ref-83)
84. The Constitution of the Republic of South Africa 1996, Chapter 9; The Constitution of Colombia 1991, Article 249. [↑](#footnote-ref-84)
85. The Constitution of India 1950, Article 76 (2). [↑](#footnote-ref-85)
86. Khaitan (n 67) 81. [↑](#footnote-ref-86)
87. Ibid 82. [↑](#footnote-ref-87)
88. For example, Tarunabh Khaitan shows that even the current BJP government has had disagreements with RBI governors appointed by itself; See Khaitan (n 67) 83. [↑](#footnote-ref-88)
89. Tushnet (n 4) 173. [↑](#footnote-ref-89)
90. Ibid 65. [↑](#footnote-ref-90)
91. Lance Ang and Jiangyu Wang, ‘Judicial Independence in Dominant Party States: Singapore’s Possibilities for China’(2019) 14 (2) Asian Journal of Comparative Law [↑](#footnote-ref-91)
92. Khaitan (n 67) [↑](#footnote-ref-92)
93. Manoj Mate, ‘Constitutional Erosion and the Challenge to Secular Democracy in India’ in Mark A. Graber, Sanford Levinson, Mark Tushnet (eds.) *Constitutional Democracy in Crisis* (OUP 2018) 377. [↑](#footnote-ref-93)
94. Anmol Jain, ‘Democratic Decay in India: Weaponising the Constitution to Curb Parliamentary Deliberation’ (2022) 34 (1) NLSIR 247. [↑](#footnote-ref-94)
95. Tarunabh Khaitan. ‘The Importance of Fourth Branch Institutions to Constitutional Democracy (7 April 2019, Constitutional Law and Philosophy) <https://indconlawphil.wordpress.com/2019/04/07/the-importance-of-fourth branch-institutions-to-constitutional-democracy-guest-post/> Accessed 22 April 2024. [↑](#footnote-ref-95)
96. Tarunabh Khaitan, ‘An Independent Institutions Bill remains a long-unrealised constitutional aspiration (16 March 2019, Indian Express) <https://indianexpress.com/article/opinion/columns/independent-institutions-bill-opposition-holding-up-fourth branch-5629032/> Accessed 22 April 2024. [↑](#footnote-ref-96)
97. Ackerman (n 7). [↑](#footnote-ref-97)
98. Paul Tucker, *Unelected Power: The Quest for Legitimacy in Central Banking and the Regulatory State*’ (Princeton University Press 2018) 123. [↑](#footnote-ref-98)
99. Ibid 121. [↑](#footnote-ref-99)
100. Tushnet (n 4) 55. [↑](#footnote-ref-100)
101. Ibid 64. [↑](#footnote-ref-101)
102. Mark Tushnet, ‘Institutions Supporting Constitutional Democracy: Some Thoughts About Anti-Corruption (And Other) Agencies (2019) *Singapore Journal of Legal Studies* 440, 454. [↑](#footnote-ref-102)
103. Khaitan (n 12) 9. [↑](#footnote-ref-103)
104. Tushnet (n 102) 454. [↑](#footnote-ref-104)
105. Elliot Bulmer, ‘Independent Regulatory and Oversight (Fourth-Branch) Institutions (2019) *International Institute for Democracy and Electoral Assistance* 3. [↑](#footnote-ref-105)
106. Ibid. [↑](#footnote-ref-106)
107. Ibid. [↑](#footnote-ref-107)
108. Tushnet (n 4) 142; Arun Thiruvengadam (n 16) 146, 155. [↑](#footnote-ref-108)
109. AIR 1994 SC 268. [↑](#footnote-ref-109)
110. *S.P. Gupta v President of India* AIR 1982 SC 149. [↑](#footnote-ref-110)
111. Abhinav Chandrachud, *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India* (OUP 2014) 123. [↑](#footnote-ref-111)
112. Ibid. [↑](#footnote-ref-112)
113. *In re: Presidential Reference* AIR 1999 SC 1. [↑](#footnote-ref-113)
114. Chandrachud (n 111) 138. [↑](#footnote-ref-114)
115. *Supreme Court Advocates-on-record Association v Union of India* (2016) 5 SCC 1. [↑](#footnote-ref-115)
116. The Constitution (Ninety-Ninth Amendment) Act, 2014; National Judicial Appointments Commission Act, 2014. [↑](#footnote-ref-116)
117. Padmakshi Sharma, ‘Theocratic Judges Who Find Source of Law in Religion than Constitution have Sharply Increased: Dr Mohan Gopal’ (18 February 2023, Livelaw) <https://www.livelaw.in/top-stories/theocratic-judges-who-find-source-of-law-in-religion-than-constitution-have-sharply-increased-dr-mohan-gopal-221925> Accessed 24 April 2024. [↑](#footnote-ref-117)
118. Padmakshi Sharma, ‘Lawyers Losing Independence to Speak About Law A Serious Issue’: Aditya Sondhi Raises Concerns About Bar Becoming Pliant (18 February 2023, Livelaw) <https://www.livelaw.in/top-stories/aditya-sondhi-bar-pliant-independence-of-judiciary-supreme-court-221910> Accessed 24 April 2024. [↑](#footnote-ref-118)
119. Robert I. Rotberg, *The Corruption Cure: How Citizens & Leaders can Combat Graft*’ (Princeton University Press 2017) 210. [↑](#footnote-ref-119)
120. Ibid 211. [↑](#footnote-ref-120)
121. Kartik Kalra, ‘Conceptualizing the Fourth Branch as Co-Equal- On the Supreme Court’s Enforcement Directorate Judgement(s)’ (29 July 2023, Constitutional Law and Philosophy) <https://indconlawphil.wordpress.com/2023/07/29/guest-post-conceptualizing-the-fourth branch-as-co-equal-on-the-supreme-courts-enforcement-directorate-judgements/> Accessed 23 April 2024. [↑](#footnote-ref-121)
122. Ibid. [↑](#footnote-ref-122)
123. See Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine*’ (OUP 2009) 131- 137 for an overview of the features of the basic structure identified by the Indian judiciary. [↑](#footnote-ref-123)
124. This is usually true because weak design features would allow the executive to interfere in the functioning of the institution. However, this is not always true, as shown in the case of the RBI in the previous section, or as in the cases described in Rotenberg (n 119). [↑](#footnote-ref-124)
125. See Paul L. Posner and Asif Shahan, ‘Audit Institutions’ in Mark Bovens, Robert E. Goodin, and Thomas Schillemans (eds.) *The Oxford Handbook of Public Accountability* (OUP 2014) for an overview of informal organizational factors that influence the actual operation of audit institutions. [↑](#footnote-ref-125)
126. Yaniv Roznai, ‘We the Fourth Branch? The People as an Institution Protecting Democracy’ in Vicki Jackson & Madhav Khosla (eds.) *Comparative Constitutional Law: Redefining the Field* (OUP 2024). [↑](#footnote-ref-126)
127. Rotenberg (n 119). [↑](#footnote-ref-127)
128. Ibid 211. [↑](#footnote-ref-128)
129. Tushnet (n 4) 9. [↑](#footnote-ref-129)
130. Ibid 177. [↑](#footnote-ref-130)
131. Ibid 178. [↑](#footnote-ref-131)
132. Thiruvengadam (n 16) 98. [↑](#footnote-ref-132)
133. Alistair McMillan, ‘Election Commission’ in Nirja Gopal Jayal and Pratap Bhanu Mehta (eds.) Oxford Companion to Politics in India (OUP 2010) 112. [↑](#footnote-ref-133)
134. Ibid. [↑](#footnote-ref-134)
135. Ibid. [↑](#footnote-ref-135)
136. Thiruvengadam (n 16) [↑](#footnote-ref-136)
137. MacMillan (n 133). [↑](#footnote-ref-137)
138. Thiruvengadam (n 16) 147. [↑](#footnote-ref-138)
139. Bulmer (n 105). [↑](#footnote-ref-139)
140. Seshan and Rai, as argued earlier, created a reputation of integrity and independence for their institutions in only one term. [↑](#footnote-ref-140)
141. See Joel D. Barkan, Ladipo Ademolekun, and Yongmei Zhou, ‘Emerging Legislatures: Institutions of Horizontal Accountability’ in Brian Levy and Sahr Kpundeh (eds.) *Building State Capacity in Africa: New Approaches, Emerging Lessons* (2004, The International Bank for Reconstruction and Development) 222 for an overview of the kind of impact that public expectations can have on the performance of institutions. [↑](#footnote-ref-141)
142. Dr. B.R. Ambedkar, ‘Concluding remarks in the Constituent Assembly on Constitution’ (25 November 1949) <https://prasarbharati.gov.in/whatsnew/whatsnew\_653363.pdf> Accessed 29 November 2024. [↑](#footnote-ref-142)
143. M Mohsin Alam Bhat, ‘Between Trust and Democracy: The Election Commission of India and the Question of Constitutional Accountability’ in Swati Jhaveri, Tarunabh Khaitan, and Dinesha Samararatne (eds.) *Constitutional Resilience in South Asia* (Hart Publishing 2023) 304. [↑](#footnote-ref-143)
144. Mark Tushnet, ‘Institutions Protecting Democracy: A Preliminary Inquiry’ (2018) 12 Law & Ethics of Human Rights 181. [↑](#footnote-ref-144)
145. Brown (n 3). [↑](#footnote-ref-145)
146. M Mohsin Alam Bhat, ‘Governing Democracy Outside the Law: India’s Election Commission and the Challenge of Accountability” (2021) 16 Asian Journal of Comparative Law 85. [↑](#footnote-ref-146)
147. Ibid 87. [↑](#footnote-ref-147)
148. Bhat (n 143) 303. [↑](#footnote-ref-148)
149. Ibid. [↑](#footnote-ref-149)
150. Tushnet (n 4) 37. [↑](#footnote-ref-150)
151. Khaitan (n 12). [↑](#footnote-ref-151)
152. Bhat (n 143) 320. [↑](#footnote-ref-152)
153. Khaitan (n 12) 21. [↑](#footnote-ref-153)
154. Ibid. [↑](#footnote-ref-154)
155. Khaitan (n 98). [↑](#footnote-ref-155)
156. Bhat (n 143) 329. [↑](#footnote-ref-156)
157. Ibid 306 [↑](#footnote-ref-157)
158. Ibid 329. [↑](#footnote-ref-158)