THE ADMINISTRATIVE AND REGULATORY STATE

TV SOMANATHAN*

I. INTRODUCTION

As originally enacted, the Indian Constitution had the standard three-branches-of-government structure as its conceptual base, with a few institutions like the Election Commission forming marginal exceptions. The growth of the so-called 'regulatory State' challenges this conception. This chapter examines how constitutional law in India has dealt with the administrative and regulatory State as it has developed outside the traditional branches of government, and how judicial review is exercised over it.

While the 'administrative' State is self-explanatory, the term 'regulatory State' is often used to denote institutions operating at arm's length from the government, insulated from day-to-day political pressures and using technical expertise in reaching decisions.[1] However, viewed in terms of the economic functions performed, the 'regulatory' State does not necessarily mean *independent* regulators. Many aspects of financial, industrial, environmental, and labour regulation are implemented in India and elsewhere (including developed countries) through ministries and departments of the executive without an independent regulator. Indeed, independent regulators are not necessarily or always 'better' than traditional administrative structures. Thus, the 'administrative' State is much wider than the 'regulatory' State.

II. THE ADMINISTRATIVE STRUCTURE

Many functions and sectors now falling under 'independent' agencies outside the 'traditional' politically controlled executive branch remain executive/administrative functions in constitutional/legal terms and were earlier part of the traditional executive. The same functions in other sectors continue to be part of the 'traditional' administrative State. Therefore a brief overview of constitutional issues relating to the administrative State as it functions *within* the executive branch becomes necessary.

The Government of India ('the Union government' or the 'Central government') consists of ministries and departments. A ministry may consist of one or more departments. Ministries are headed by Cabinet Ministers, who may be assisted by Ministers of States, Deputy Ministers, and Parliamentary Secretaries, all of whom are part of the political executive and have to be Members of Parliament. Each department is headed by a Secretary (equivalent to 'Permanent Secretary' in many Commonwealth countries), who is typically a career civil servant, most often from the Indian Administrative Service. Coordination between ministries is the role of the Cabinet Secretary, who is the Secretary to the Union cabinet and head of the civil service, and his office (known as the Cabinet Secretariat). There is also a Prime Minister's Office (PMO) which assists the Prime Minister and

which has a combination of civil servants and political appointees. As of May 2014, the Government of India had fifty-one ministries and fifty-seven departments. There were twenty-eight Cabinet Ministers and forty-three Ministers of State.[2] The government can vary the number and sectoral jurisdiction of ministries and departments by executive order.

India has twenty-nine State Governments and seven Governments of Union Territories (one of them being the National Capital Territory of Delhi). State Governments have a similar structure of Cabinet Ministers, though it is less common for them to have Ministers of State, Deputy Ministers, or Parliamentary Secretaries. State Governments have multiple departments (not called ministries) and each department is typically headed by a Minister at the political level, with a Secretary who is normally a career civil servant (most often from the Indian Administrative Service). The structure and number of departments in the State Governments varies from State to State and is not necessarily aligned with the structure of ministries and departments at the central level. For example, in May 2014 the Government of Tamil Nadu had thirty-six departments, while the Government of West Bengal had sixty-one departments. Union Territories vary in size and structure, but typically have a similar structure to State Governments, albeit with fewer departments. The State-level equivalent of the Cabinet Secretary is the Chief Secretary, who is the Secretary to the State Cabinet and the head of the civil service. There is usually also a Chief Minister's Office, which may have both civil servants and political appointees, though typically far smaller in size than the PMO.

The Indian Administrative Service, the Indian Police Service, and the Indian Forest Service are 'All-India Services', most of whose members are recruited through rigorous competitive examinations by the independent Union Public Service Commission (a minority of them are promoted from State civil services). Members of these services work in both the Union and State Governments. The Union government and the State governments also have their own civil services. The Secretary is the administrative head of each department, who exercises supervision over all staff and financial resources.

Table 22.1 List of Central Regulatory Authorities

Authority	Enactment	Functional area	Ministry
Agricultural and Processed Food Products Export Development Authority	Agricultural and Processed Food Products Export Development Authority Act 1985	To undertake measures for the development and promotion of export of scheduled products.	Ministry of Commerce and Industry
Airports Authority of India	Airports Authority of India Act 1994	To determine the tariff for aeronautical services; to determine the amount of the development fees in respect of major airports; to monitor the set performance standards relating to quality, continuity, and reliability of service as may be specified by the Union government.	Ministry of Civil Aviation
Airports Economic Regulatory Authority of India	Airports Economic Regulatory Authority of India Act 2008	Design, development, operation, and maintenance of international and domestic airports and civil enclaves; construction, modification, and management of passenger terminals; development and management of cargo terminals at international and domestic airports.	Ministry of Civil Aviation
Atomic Energy Regulatory Board	Atomic Energy Act 1962	Safety policies, guidelines, and standards for construction of nuclear facilities; compliance of regulatory requirements through inspections and review.	Department of Atomic Energy
Central Drugs Standard Control Organisation*	Drugs and Cosmetics Act 1940	Approval of new drugs; clinical trials in the country; laying down the standards for drugs; control over the quality of imported drugs; coordination of the activities of State drug control organisations.	Ministry of Health and Family Welfare
Central Electricity Regulatory Commission*	Electricity Regulatory Commissions Act 1998	Regulation of the tariff of generating companies owned or controlled by the Union government; regulation of the tariff of generating companies, other than those owned or controlled by the Union government.	Ministry of Power
Central Pollution Control Board*	Water (Prevention and Control of Pollution) Act 1974	Prevention and control of water pollution and the maintaining or restoring of quality of water.	Ministry of Environment and Forests
Coal Regulatory Authority	Ministry of Coal Resolution: F No 13011/04/2007–CA II/ Vol.5/pt. III	Advise to the Union government on pricing of raw coal, standards of performance of norms, and on formulation of policies in the coal sector.	Ministry of Coal

Coastal Aquaculture Authority	Coastal Aquaculture Authority Act 2005	Regulation of the construction and operation of aquaculture farms within coastal areas.	Ministry of Agriculture
Competition Commission of India	Competition Act 2002	Prevention of practices having adverse effects on competition; promotion and competition in the market; protection of the interest of consumers and freedom of trade.	Ministry of Company Affairs
Director General of Civil Aviation	Aircraft Act 1934	Registration of civil aircraft; formulation of standards of airworthiness for civil aircraft; licensing of pilots and flight engineers; licensing of air traffic controllers; certification of aerodromes.	Ministry of Civil Aviation
Director General of Hydrocarbons	Government of India Resolution No 0-20013/2/ 92-ONG, D-III (1993)	Review exploration programmes of companies for adequacy; technical and financial evaluation and review of development plans of commercial discoveries; advice to Government on offering and award of acreages under the New Exploration Licensing Policy and coal bed methane rounds for exploration as well as matters relating to relinquishment of acreages; field surveillance of producing fields and blocks to monitor their performance.	Ministry of Petroleum and Natural Gas
Food Safety and Standards Authority of India*	Food Safety and Standards Act 2006	Regulation and monitoring of the manufacture, processing, distribution, sale, and import of food so as to ensure safe and wholesome food.	Ministry of Food Processing Industries
Forward Markets Commission	Forward Contracts (Regulation) Act 1952	Keeping forward markets under observation and taking such action in relation to them as it may consider necessary; also making recommendations generally with a view to improving the organisation and working of forward markets.	Ministry of Finance
Inland Waterways Authority of India	Inland Waterways Authority of India Act 1985	Development and regulation of inland waterways for shipping and navigation.	Ministry of Shipping
Insurance Regulatory and Development Authority	Insurance Regulatory and Development Authority Act 1999	Protection of the interests of policy holders in matters concerning assigning of policy, nomination by policy holders, insurable interest, settlement of insurance claim, etc; regulating investment of funds by insurance companies.	Ministry of Finance
National Disaster Management Authority*	Disaster Management Act 2005	Laying down of policies on disaster management; approval of the National Plan; laying down guidelines to be followed by the State authorities in drawing up the State Plan.	Ministry of Home Affairs
National Housing Bank	National Housing Bank Act 1987	Determining policy and issue directions to any housing financial institution.	Wholly owned subsidiary of the Reserve Bank of India (see below)
National Pharmaceutical Pricing Authority	Drugs (Prices Control) Order 1995	Implementing and enforcing the provisions of the Drugs (Prices Control) Order; dealing with all legal matters arising out of the decisions of the Authority; monitoring the availability of drugs, identify shortages, if any, and taking remedial steps.	Ministry of Chemicals and Fertilizers
Office of Controller of Certifying Authorities	Information Technology Act 2000	Exercising supervision over the activities of the certifying authorities and laying down the standards to be maintained by the certifying authorities.	Ministry of Communications and Information Technology
Pension Fund Regulatory and Development Authority	Pension Fund Regulatory and Development Authority Act 2013	Promoting old age income security by establishing, developing, and regulating pension funds; protecting the interests of subscribers to schemes of pension funds.	Ministry of Finance
Petroleum and Natural Gas Regulatory Board	Petroleum and Natural Gas Regulatory Board Act 2006	Protecting the interest of consumers by fostering fair trade and competition amongst the entities; registering entities to lay down the technical standards and specifications (including safety standards) in activities relating to petroleum, petroleum products, and natural gas.	Ministry of Petroleum and Natural Gas

Reserve Bank of India	Reserve Bank of India Act 1934	Regulating the issue of banknotes and the keeping of reserves with a view to securing monetary stability in India and generally to operate the currency and credit system of the country to its advantage.	Ministry of Finance
Securities and Exchange Board of India	Securities and Exchange Board of India Act 1992	Protecting the interests of investors in securities; promoting the development of, and regulating, the securities market.	Ministry of Finance
Tariff Authority for Major Ports	The Major Port Trusts Act 1963	Regulating all tariffs, both vessel related and cargo related, and rates for lease of properties in respect of Major Port Trusts and the private operators located therein.	Ministry of Shipping
Telecom Regulatory Authority of India	The Telecom Regulatory Authority of India Act 1997	Making measures to facilitate competition and promote efficiency in the operation of telecommunication services.	Ministry of Communications and Information Technology

* In these cases there are also separate State-level regulators.

Table 22.2 List of Regulatory Tribunals

Tribunal/Authority	Enactment	Functional area
Appellate Tribunal for Electricity	Electricity Act 2003	Appeals against the orders of the adjudicating officer or the Appropriate Commission (Central or State) under the Act.
Appellate Tribunal for Foreign Exchange	Foreign Exchange Management Act 1999	Appeals specified under the Foreign Exchange Management Act.
Authority for Advance Rulings	Income Tax Act 1961	To allow non-residents and certain categories of residents to ascertain their income tax liability in advance.
Board for Industrial and Financial Reconstruction	Sick Industrial Companies (Special Provisions) Act 1985.	Timely detection of sick and potentially sick industrial companies, speedy determination and enforcement of preventive, remedial, and other measures.
Company Law Board	Companies Act 1956	To carry out functions specified in the Companies Act 1956.
Copyright Board	Copyright Act 1957	To hear certain disputes under the Copyright Act.
Customs Excise and Service Tax Appellate Tribunal	Customs Act 1962	Appeals specified under the Customs Act 1962, Central Excise Act 1994, and the Finance Act 1994.
Cyber Appellate Tribunal	Information Technology Act 2000	Appeals against orders made by the Controller or by an Adjudicating Officer appointed under the Information Technology Act 2000.
Debt Recovery Appellate Tribunals	Recovery of Debts Due to Banks and Financial Institutions Act 1993	To entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.
Film Certification Appellate Tribunal	Cinematograph Act 1952	Appeals filed under Section 5C of the Act by any applicant for a Certificate in respect of a film who is aggrieved by an order of the Central Board of Film Certification (CBFC).
Income Tax Appellate Tribunals	Income Tax Act 1961	Appeals against orders passed by authorities under the Income Tax Act.
Intellectual Property Appellate Board	Trademarks Act 1999	Appeals from the order or decision of the Registrar and all cases pertaining to rectification of Register; appeals from the Geographical Indication of Goods Act 1999 and the Patents Act 1970.

National Company Law Tribunal and National Company Law Appellate Tribunal [not yet operational; provisions are under challenge in Supreme Court]	Companies Act 2013	To carry out the functions of the Company Law Board and the Board for Industrial and Financial Reconstruction.
National Green Tribunal	National Green Tribunal Act 2010	To effectively and expeditiously dispose of cases relating to environmental protection and conservation of forests and other natural resources.
Securities Appellate Tribunal	Securities and Exchange Board of India Act 1992	Appeals against orders passed by the Securities and Exchange Board of India or by an adjudicating officer under the Act.
Competition Appellate Tribunal	Competition Act 2002	Appeals against any direction, decision, or order passed by the Competition Commission of India.
Telecom Disputes Settlement and Appellate Tribunal	Telecom Regulatory Authority of India Act 1997	To adjudicate disputes between licensor and licensee, between service providers, between a service provider and a group of consumers, and to hear appeals against any decision or order of the Telecom Regulatory Authority of India.

III. The Regulatory Structure

In recent years, several new regulatory institutions have been created. The degree of independence of these institutions varies. Some of them are part of the traditional executive, some are outside but subject to a high degree of executive control, and some are independent of direct executive control. Table 22.1 presents a list of major regulatory bodies that are either explicitly called 'regulatory' or, though not so called, in fact exercise regulatory functions.

While many of the regulatory bodies listed in Table 22.1 are outside the traditional executive, there are now a number of tribunals that perform judicial functions outside the traditional judiciary. Several of these are specifically linked to the regulatory bodies listed in Table 22.1, while some hear disputes relating to other administrative matters. Some of these handle both judicial and quasi-judicial functions. Table 22.2 is a list of the main tribunals which deal with disputes arising from the decisions of regulatory bodies and administrative agencies.

IV. The Constitution and the Administrative and Regulatory State

The constitutional position of the administrative and regulatory State draws partly from the Constitution itself (as amended), but even more from judicial decisions, especially in the past twenty years, when judicial decisions have been far-reaching and in some cases have gone to the extent of moving beyond even express provisions of the Constitution.

Articles 53 and 154 provide that executive authority can be exercised by officers subordinate to the President (in the case of the Union) and the Governor (in the case of States).[3] These Articles also allow Parliament/State legislatures to confer functions on authorities other than the President/Governor, and are thus the basic source allowing the creation of independent regulatory agencies. Articles 77/166 provide that the President/Governor shall 'make rules for the more convenient transaction of business' and for allocation of work among Ministers. The rules framed

under this Article are called the 'Business Rules' or 'Rules of Business'. These rules provide for the allocation of the work of government between different ministries and departments and they also enable delegation of authority from the Council of Ministers (cabinet) to individual Ministers and to officers subordinate to those Ministers. They specify which kinds of decisions need to come before the cabinet and the procedure in the event of interdepartmental disagreement. Therefore, while all executive action is taken in the name of the President/Governor, actual authority to take those decisions may vest in lower levels of the executive. Under Articles 73 and 162 the executive power of the Union and State Governments, respectively, are coextensive with their legislative powers. Article 248 allocates legislative power on all residuary matters (ie, subjects not listed in the State or Concurrent List) to Parliament, and hence executive power thereon belongs to the Union government.

The Constitution does not explicitly mention or require 'separation of powers'. This is particularly true of the separation between the executive and legislature, given that it is a parliamentary form of government. On the contrary, it has chapters on the 'Legislative Powers of the President/Governor', which confer the power to promulgate ordinances on the executive. It also implicitly allows the executive to exercise, to a limited extent, judicial powers insofar as the (subordinate) judicial services are part of the public services of the State; the separation of the subordinate judiciary is a 'Directive Principle of State Policy', and thus non-justiciable. However, the separation of powers between the judiciary and executive has been held by the Supreme Court to be part of the (unamendable) 'basic structure' of the Constitution.

Executive power is the residue of all powers that are not legislative or judicial (and thus inclusive of quasi-judicial powers). Mukherjea CJ stated in *Ram Jawaya Kapur v State of Punjab* that:

> It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive function connotes the residue of governmental functions that remain after legislative and judicial functions are taken away.[4]

It is sometimes argued that the power of regulatory bodies to make rules (ie, the power of delegated legislation) is not found in the Constitution and thus is a grey area and, further, that these regulatory bodies are 'mini-States' combining executive, quasi-judicial, and quasi-legislative (ie, subordinate legislation) powers.[5] However, delegated legislation by the President or Governor is not specified anywhere in the Constitution as a 'legislative' function. Therefore the function of delegated legislation is encompassed within the 'residual' functions, which are *executive functions*. For that reason, Articles 53 and 154 would cover the function of delegated legislation and allow the delegation of that (executive) function by the legislature to authorities other than the President/Governor, such as independent regulators.

Under Articles 75(3)/164(2), Ministers of the Union/State government are collectively responsible to Parliament/State legislatures for actions of the executive. The effect of Article 75(3)/164(2) read with Articles 77(2)/166(3) is that individual Ministers are personally accountable to Parliament/State legislatures for actions taken within their areas of responsibility, whether those actions were taken by them or by their subordinates. The conduct of ministries and departments is often the subject of comment and criticism in Parliament/State legislatures. The Supreme Court has stated that:

> The Cabinet is responsible to the Legislature for every action in any of the ministries … Similarly an individual Minister is responsible to the Legislature for every action taken or omitted to be taken in his ministry.[6]

This leaves the question of the degree of parliamentary accountability of Ministers for actions taken by organisations *outside* the traditional executive. The constitutional requirement of ministerial responsibility has been the basis for the control of the administrative ministry over public sector

corporations and undertakings. It has also been the source of a provision (in the special Acts creating regulatory authorities, public corporations, and boards—including the Reserve Bank—and in the articles of association of 'Government companies'),[7] enabling the government to issue directions to such organisations. The principle is that since the Minister (and thus the ministry) remains accountable to the legislature, a commensurate degree of authority is necessary. No doubt, Ministers and officers in ministries are perceived to have often used this authority (without necessarily invoking the formal power to issue directions) to exercise direct control over public undertakings to the detriment of efficiency and public good.

The question of the extent of ministerial accountability for the actions of public undertakings and independent regulators has not yet been tested in court and remains ambiguous. The laws creating some of the new 'independent' regulatory bodies do not incorporate provisions for issuing directions,[8] though some of them do.[9] The ministry cannot, in many cases, supersede the management of these institutions. It would appear that the Minister cannot have the same degree of parliamentary accountability for the actions of these bodies. Thus the creation of 'independent' regulators does reduce the extent of democratic (parliamentary) accountability. However, parliamentary accountability is not totally absent to the extent that the budgetary appropriations for these bodies do need to be proposed by the ministry and voted by Parliament. This is unlike the funding for courts, which is charged expenditure that does not need to be voted. It has been suggested that there should be a Standing Committee of Parliament on Independent Regulators.[10]

A case that has had a major influence on institutional design involved the Competition Commission of India. As originally legislated, the selection of the Chairman was to be done by the executive. The procedure was challenged on the grounds that some of the adjudicatory functions of the Commission were judicial functions and the appointment of the head of a judicial forum must necessarily be done through the Chief Justice of India or his nominee. The original Act had wording explicitly stating the proceedings were judicial.[11] Thus the Commission was clearly intended to perform judicial functions. A three-judge bench of the Supreme Court did not go into the substantive issues in detail but did state that 'it might be appropriate' to remove those functions that were of an 'adjudicatory' nature and entrust them to a separate tribunal.[12] This decision, albeit from a small bench and not a binding order, appears to have had a lot of influence on the design of regulatory bodies. The subsequent amendment, the Competition (Amendment) Act 2007, removed any reference to the proceedings being judicial, modified several substantive and procedural provisions, and created an appellate tribunal headed by a judge; this has become almost a template for regulatory design.

The various judgments of the Supreme Court contain a number of inconsistencies, but the following are the key principles that appear to govern the constitutionality and legality of regulatory bodies:

1. To the extent that regulation comprises executive functions, Parliament and the State legislatures may (in their respective areas of legislative competence) create independent regulators. All administrative decisions, and thus all decisions of regulators, are subject to judicial review in the High Courts and Supreme Court through their writ jurisdiction provided for in the Constitution. Parliament also has the power to create tribunals under its residuary powers.
2. If a regulatory body or tribunal (set up outside the traditional executive or traditional judiciary, respectively) involves performance of judicial functions, it cannot be constituted entirely of, or headed by, non-judges. In hearing matters having a judicial aspect, the bench must

include a judicial member.
3. Whether a function is judicial is determined by the specific circumstances, wording, and substance of the legislation.
4. It should be noted that the reference above is to *judicial* and not to quasi-judicial functions. Many quasi-judicial functions are in fact performed by the executive; not all adjudicatory functions are judicial and not all tribunals are judicial tribunals. No clear tests have been laid down as to the borderline between quasi-judicial and judicial, but a function previously discharged by a High Court will almost certainly be considered judicial.
5. Even if a statute explicitly provides for an appeal from the orders of a regulator to a tribunal and then to the Supreme Court, the High Courts will assert (and the Supreme Court will almost certainly uphold) their writ jurisdiction as being part of the basic structure of the Constitution. Thus review of decisions of a tribunal (effectively, an appellate jurisdiction, though not termed as such) by High Courts will always remain available to aggrieved parties, even if the tribunal itself is headed by High Court/Supreme Court-level judges.

V. THE REGULATORY STATE: A CONCEPTUAL OVERVIEW

Before considering some of the issues that arise from the emerging constitutional jurisprudence on the regulatory State, it is useful to briefly look at the conceptual underpinnings of, and justification for, the regulatory State.

The economic arrangements of modern times often require a more complex approach than the State was traditionally capable of. In particular, good decisions on many modern regulatory issues may require a degree of scientific, technical, or economic expertise that may not be found in the generalist civil servants and generalist judges who typify the traditional executive and judiciary, respectively. The case for the involvement of sectoral experts in regulation is thus self-evident. Of course, sectoral expertise can be brought into the administration by employing or consulting experts without necessarily changing institutional structure—in a sense, this objective can be achieved by 'modernising' the administrative State. By itself, the need for expertise does not explain the creation of the regulatory State.

The primary rationale for *independent* regulators in India was and still is the prevalent opinion that some kinds of economic decisions need to be insulated from the political process.[13] This is based on the notion—particularly among economists—that 'economic' decisions should be made 'rationally' without being 'distorted' by political considerations. Indeed, the initial push for independent regulators came in India through transplantation of Anglo-American models by lending agencies like the World Bank and then was replicated through 'copying'.[14] In theory, such unelected bodies would play a major role in achieving economic efficiency objectives, with the political process then stepping in through separate income redistribution to tackle any normative inequities in the outcomes.[15] There is ample evidence in many sectors that even though optimal (or, at least, more efficient) solutions are known, those solutions are not implemented for political reasons.[16]

An additional impetus for the creation of regulatory bodies has been the higher degree of *operational flexibility* they have in personnel and other routine managerial matters *vis-à-vis* ministries; thus independent regulators may internally be more efficient than ministerial regulators.[17]

However, improving the overall level of economic welfare does not automatically improve the

welfare of all participants and a solution that makes some people better off often makes others worse off. Questions of distribution of gains and losses essentially *are* political. Resolving them may require negotiation and persuasion and the trading of gains and losses, rather than legalistic adjudication or scientific determination. Thus it is not really possible to 'exclude' politics, as many economists and technocrats might wish to. As Dubash puts it, much of the clamour for independent regulation has been 'based on the somewhat questionable premise that it is feasible to create an apolitical regulatory sphere simply by legislating one'.[18] A consequence of the push towards independent regulation is not only that the political aspect is, so to speak, brushed under the carpet, but also that it is implicitly regarded as illegitimate. On the other hand, it should be noted that regulatory bodies are often required to follow procedures allowing for the consultation of the public, or more particularly, those affected by regulation; this can result in a better articulation of public reason and a better-informed process of regulation.

In addition to a rational-decision-taking dimension and a political-sharing-of-gains-and-losses dimension, regulatory decisions often affect the *legal* rights and responsibilities of citizens, going beyond voluntary agreements by contract. In essence, therefore, regulation involves three aspects:

1. a political aspect, relating to trading off benefits and costs to different parties which in turn may require or benefit from consultation, negotiation, collaboration and cooperation with and among them;
2. a technical aspect, relating to finding the best technical and economic solutions to a problem;
3. a legal aspect, relating to protecting legal and constitutional rights of various parties.

For a regulatory structure to earn the confidence of the regulated and of the broader citizenry, it needs to have democratic legitimacy, substantive competence, and legal legitimacy, respectively. The essential design issue in regulatory structure is the relative balance between these.

Regulation through the traditional State apparatus gives primacy to the political aspect since decisions are ultimately taken by, or under the authority of, the democratically elected political executive with advice from the civil service. Over the years, the relative importance of the political executive *vis-à-vis* the civil service has increased, and indeed political interference (politicians taking decisions that by law ought to be taken neutrally by civil servants) is perceived to have increased. In India, such decisions are always subject to judicial review, and this provides the legal protection. However, the traditional State is weak in factoring in technical expertise. As already pointed out, there is no intrinsic reason why this is so, and in theory, a modernised public administration would be able to bring in expert inputs. However, current civil service rules and pay structures in India may make this more difficult to do within the administration than under an independent regulator.

When independent regulators are created, the technical aspect is accorded primacy in two ways. First, these structures explicitly provide for and incorporate the dimension of sectoral expertise. Secondly, and more importantly, decisions are made independently of the political executive and are therefore more likely to be economically efficient. In India, legal protection is also safeguarded either through the inherent power of judicial review or through the creation of an appellate tribunal. By design, the political executive—depending on the degree of independence of the regulator—has only limited influence.

Rose-Ackerman points out that court-like procedures are very good at protecting individual rights but are poor at resolving policy issues. She adds that the bureaucracy is best placed to 'balance

conflicting interests … ', though 'not to discover scientific truths or to preserve rights'.[19] In most cases, the task is to 'strike a balance between the obligation of the government to make technically competent policy choices … ' and the need to 'respond to the concerns of citizens and organised groups'.[20] 'Politically expedient choices are not per se illegitimate, but they should be acknowledged as such', rather than masked as 'scientific' or 'legal' necessities.[21] Further, as Parker and Braithwaite observe, regulation in modern times often requires 'experimentalism', whereby new arrangements are tried as needs and technologies change, and this kind of experimentalism is best done through participatory or democratic processes rather than a legalistic process. The central task of the new regulatory State is to 'connect the private capacity and practice of pluralized regulation to public dialogue and justice'. Yet, courts 'mostly reject experimentalism as a threat to the consistency of justice and scotch most kinds of collaboration as a threat to the independence of the judiciary'.[22]

For these reasons, in the United States and most western countries, the involvement of the courts in the regulatory process is broad but shallow, and courts will usually not go into the details *de novo*.[23] The position in India is different, especially but not only in environmental matters. Indian courts' involvement is broad and deep. In India, over the years, and through judicial pronouncements, the legal aspect of regulation has come to acquire a very large influence over the regulatory process, even overshadowing the technical aspect.

Independent regulators—while free from direct political control—are often required to follow consultative procedures before making regulatory decisions. Depending on the specific procedures, this allows all affected parties to make their views known before decisions are taken. In one sense, this process allows for a deeper and higher-quality participation in decision making than the processes of the administration, where the political representatives (Ministers, MPs, MLAs, or local councillors) are expected to reflect the views of constituents, and where structured consultation may not take place. When this happens, independent regulators may be able to achieve the best of both worlds—better substantive decisions (through the use of technical expertise and rational decision making), but informed by a deeper participatory process than the administration. If so, their decisions may not only be substantively better, but also more 'legitimate' and thus have greater public support.[24] This is the optimistic scenario for independent regulation.

However, consultative procedures have disadvantages too. They tend to be used more by parties who are willing to invest time and resources in responding to the consultation. The logic of collective action indicates that the general public—where a large number of people may face a small gain or loss from a decision—may not participate effectively, while a small number of people (regulated entities or well-organised interest groups) who have a lot to gain or lose may invest time and effort to make their case to the regulator. This can tilt regulatory decisions in favour of well-organised interest groups. Hochstetler argues that civil society in developing countries is more likely to be skewed in favour of the interests of relatively well-off groups.[25] In contrast to such processes, Rose-Ackerman points out, the elected political executive—because of its need to get re-elected from the population as a whole—acts as a check against the dominance of particular narrow-interest groups.[26] Thus, as Levy and Spiller point out, independent regulators have both strengths and weaknesses *vis-à-vis* the regulation by (or operation of economic entities by) the administrative State, and independent regulators are only appropriate in some contexts.[27]

In the Indian constitutional context, the pros and cons of independent versus administrative regulators on the political, technical, and legal dimensions are summarised in Table 22.3.

Given that India is a country where political corruption is widespread, it is sometimes thought that

an advantage of independent regulators and judicial tribunals would be reduced scope for corruption. However, such a conclusion is difficult to support in the face of the facts that not only the civil services but even the judiciary are perceived as also suffering from corruption.[28]

VI. Concerns with the Regulatory State

1. Legal Uncertainty

The regulatory State has functioned, and continues to function, under a considerable degree of legal uncertainty as to the validity of the statutes and institutional arrangements that have been set up. The primary reason for this is repeated challenges to legislation in the courts and the frequent invalidation of various parts of enactments by the courts on grounds of being unconstitutional. Several new regulators spent between five and ten years in limbo (while the legality of various sections were being adjudicated), since the courts declared that they should not function until the issues were sorted out. Surprisingly, most of the challenges to the laws passed by Parliament setting up independent regulators have:

- been through public interest litigation and not by aggrieved parties directly concerned with the subject matter of regulation;
- centred around the issue of who is appointed to the chairmanship and membership of the bodies, rather than to any substantive regulatory provisions of the enactments.

Table 22.3 Advantages and Disadvantages of Independent vs Administrative Regulators

Criterion		Independent regulator	Administrative regulator
Political aspect	Accountability to Parliament and general public	Low—no direct accountability but Government may have a formal power to give directions.	High—directly accountable to Parliament/State legislatures for policies and decisions.
	Quality of consultation	High if required under statute.	Usually low, though not necessarily so.
	Ability to reach negotiated compromises among interest groups	Medium to low, depending on flexibility/rigidity of policy framework and procedures prescribed in the legislation. Extent of compromise and innovation depends on extent of procedural restrictions. Failure to follow prescribed approach can lead to decisions being challenged.	High, since the process is explicitly political rather than 'rational'.
Technical aspect	Access to expertise	High—independent status and different service conditions enable easier recruitment of technical talent.	Medium—theoretically, can access in-house expertise in many fields and outside experts through consultation. In practice, bureaucratic process and tendency for generalist domination may reduce it.
	Ability to take decisions in an economically rational manner	High/Medium—high in theory, usually medium in practice, as seen from studies of actual behaviour.	Low—short-term political needs acquire much greater salience.
Legal aspect	Protection of legal rights	High—either through High Court/Supreme Court or through tribunal/High Court/Supreme Court.	High—through High Court/Supreme Court.
	Speed with which legal finality is reached	Can be lower if special tribunal is involved due to increased levels (and sometimes channels) of appeal.	Usually higher than for independent regulator as no tribunal is usually involved.

The challenge has usually been related to the issue or perception (almost always among lawyers practising in High Courts) that some of the functions of the regulator are actually judicial and therefore that the creation of the regulator and/or an associated judicial tribunal is a 'usurpation of judicial power', which in turn would be a violation of the basic structure of the Constitution.

At first glance, an outside observer might conclude that such repeated challenges must be the result of incompetent drafting, since something as basic as judicial independence is said to be at stake. In reality, the picture is more complicated, mainly because judicial dictums have themselves changed frequently.

Courts test new laws both against the written Constitution and against an expanding notion of the 'basic structure'. Mehta has argued persuasively that the Indian judiciary is usually concerned with expanding its own authority.[29] In several cases, judicial decisions are, in substance, acts of legislation.[30] In some cases, courts have directly exercised executive functions in regulatory matters.[31] An increasing variety of issues are now tested against the 'basic structure' doctrine, including seemingly small details. (For instance, in the case of the National Company Law Tribunal, the appointment of Joint Secretary-level technical members was considered unconstitutional, while the appointment of Secretary- or Additional Secretary-level members was ruled to be constitutional.) This means that several questions may have to be tested each and every time a new regulator is created. It also means that entities subject to regulation cannot assume that the law as legislated will in fact be implemented; they must at all times be prepared for legislation by the court, the content of which can be unpredictable.

In matters relating to regulatory bodies, the Supreme Court often gives indications during hearings about its line of thinking and then the executive, to 'save' the regulatory statute from the possibility of being struck down, makes changes. The Court then does not actually adjudicate the issue but effectively ensures a change in the legislation. *Brahm Dutt v Union of India*[32] and *Delhi Science Forum v Union of India*[33] are examples where the government made changes to the structure—in both cases by introducing a judge-headed tribunal above the regulatory body—while the case was in progress. Currently, the situation is that there is a presumption in the executive that if a new regulatory body is created, it must have an appellate tribunal because it may otherwise not survive challenge in the courts—though no such principle has explicitly been enunciated. This follows primarily from the judgments in *Brahm Dutt* and *Delhi Science Forum*, where the court indicated—but did not explicitly rule—that the existence of judicial review by the High Court and Supreme Court (applicable to all executive action) was not by itself sufficient (in the specific circumstances of those matters), and something more was necessary.

2. Excessive Delegation

Early in the life of the Indian Constitution, the Supreme Court departed from pre-Independence British tradition and introduced the concept of 'excessive delegation', namely, that *essential legislative functions could not be delegated*, and that the legislature must provide adequate guidelines for the exercise of delegated powers to avoid arbitrariness.[34] Rules made by independent regulators violating this doctrine have been struck down (for instance, when the Central Electricity Regulatory Commission introduced new disqualifications for the holding of an electricity trading licence not in

consonance with the legislative policy in the statute).[35]

3. A Turf War?

The overt reason for creating regulators is to secure independence from politics. The overt reasons for creating special tribunals are twofold: to speed up decisions (because the court system faces an enormous backlog of cases) and/or to bring in specialised expertise to assist in reaching better decisions than could be reached through a generalist judge. In many cases, the overt reasons are genuine and valid. However, it is widely perceived that in some cases at least other motivations may also be involved. There is a perception in the executive and in the legal profession that there has been a 'turf war' on the issue of regulatory bodies and that this is one of the causes of the repeated challenges on the issue of appointments.

On the one hand, the creation of regulatory bodies is perceived as a means for civil servants to secure post-retirement employment, and (where posts at the level of High Court judge are involved) to secure that employment at a higher status than most civil servants enjoy before retirement. There is considerable evidence that this has in fact been a motivation for civil servants involved in the design of such institutions. For instance, the facts that every one of these bodies specifies an age of mandatory retirement that is several years higher than the civil service retirement age, and that the overwhelming majority of those appointed are in fact at or above retirement age are clear pointers. There seems to be no objective reason that suitably qualified and competent regulators from the civil service or outside cannot be found until they reach the age of 60. (Indeed, the ability to confer post-retirement employment on civil servants is arguably detrimental to civil service professionalism and ethics.)[36]

A second perception among lawyers is that these bodies—this applies more to tribunals than to the regulators themselves—were created to reduce the role of the courts and to reduce the extent and quality of judicial review of executive action. There is clear evidence that, in the 1970s and 1980s, this was indeed a motivation for creating tribunals, especially the administrative tribunals. A third perception among lawyers is that allowing selection of members (particularly judicial members) by a mechanism that is not completely controlled by the High Courts or Supreme Court could result in reduced independence. Again, there is indirect evidence from the 1970s and 1980s (though not in recent times) that such a motivation within the political executive was present.

On the other hand, the counter-view is that the challenges are primarily motivated by the interests of the legal profession. A reduced role for the courts could also mean a reduced role for lawyers. Regulators do not require lawyers to represent parties before them. Some tribunals allow other professionals to represent applicants (eg, accountants) whereas this would not be possible in the courts. The tendency of the legal profession to argue that part of the work of regulators is 'judicial' is seen in the same light—as an attempt to avoid loss of work. Equally importantly, the selection for posts in tribunals would be controlled by a different process from that used in the courts, and this disturbs established patterns of advancement in the legal profession.

Based on this hypothesis, the usual approach has been to create, on top of each regulatory body, a special tribunal headed by a retired judge and comprising mainly retired judges. The premise appears to be that the post-retirement opportunities for civil servants can best be insulated from challenge by providing similar opportunities for lawyers and judges. This hypothesis is supported by a scrutiny of

age limits for appointment. For example, in the National Green Tribunal (NGT), there are three different limits:

- 70 years for the Chairperson/Judicial Member if the person had previously been a Supreme Court judge (for whom the retirement age is 65)
- 67 if the Chairperson/Judicial Member if the person had previously been a High Court judge or Chief Justice (for whom the retirement age is 62) and
- 65 for non-Judicial Members (civil servants/technical experts, for whom the retirement age is 60).

For the same post, namely, Chairperson/Judicial Member, there are two different retirement ages based on previous employment, unconnected to any objective determination of what would be a suitable maximum age. The only apparent operating principle seems to be 'equality of post-retirement opportunity' at exactly five years from the normal retirement age.

Thus, if this is a 'turf war', then the creation of tribunals—run by judges and with ample opportunities for lawyers—is seen as the terms of the ceasefire. A way to end any such war (or perception) would be to amend the statutes and turn these into career (rather than post-retirement) posts for all streams—judicial and non-judicial. That way the 'noise' arising from the (credible) belief that tribunals and regulators are created to serve bureaucratic or political interests can be avoided. It may also stiffen the backbone of retiring civil servants and increase judicial independence by eliminating the 'carrot' of post-retirement appointments.

4. Multiplicity of Channels of Appeal and Lack of Finality

Introducing independent regulators has the positive effect of increasing subject matter expertise and independence. But to the extent it involves the creation of a new appellate tribunal, it may increase the number of levels of appeal before a decision becomes final. This is of considerable importance because of several features of the Indian legal system:

1. Courts often go into the merits of executive action rather than confine themselves to the Wednesbury principles or procedural fairness. Therefore, persons aggrieved by a regulatory order have a chance of success in challenging it even if it was procedurally correct and fair.
2. *Stare decisis* often cannot be assumed because, as already mentioned, the Supreme Court has quite often reversed its earlier decisions. The presumption of constitutionality of statutes is weakly applied in the case of Acts creating regulators. Thus legal uncertainty is high.
3. Most courts have heavy backlogs of cases and final orders can take years at each level. Courts often grant interim stays of the action of a regulator, which may be in operation for several years.
4. Higher courts tend to overrule lower courts with a high frequency. Desai stated in respect of the telecom sector that 'courts are more likely to dismiss than confirm the findings of the regulator'.[37]
5. Though there are no rigorous statistics, it is generally believed that the proportion of cases appealed is very high. Partly this is because of the high probability of reversal on appeal, the relative ease of obtaining interim stays (see 3 above) and relatively low legal costs at the High Court level.

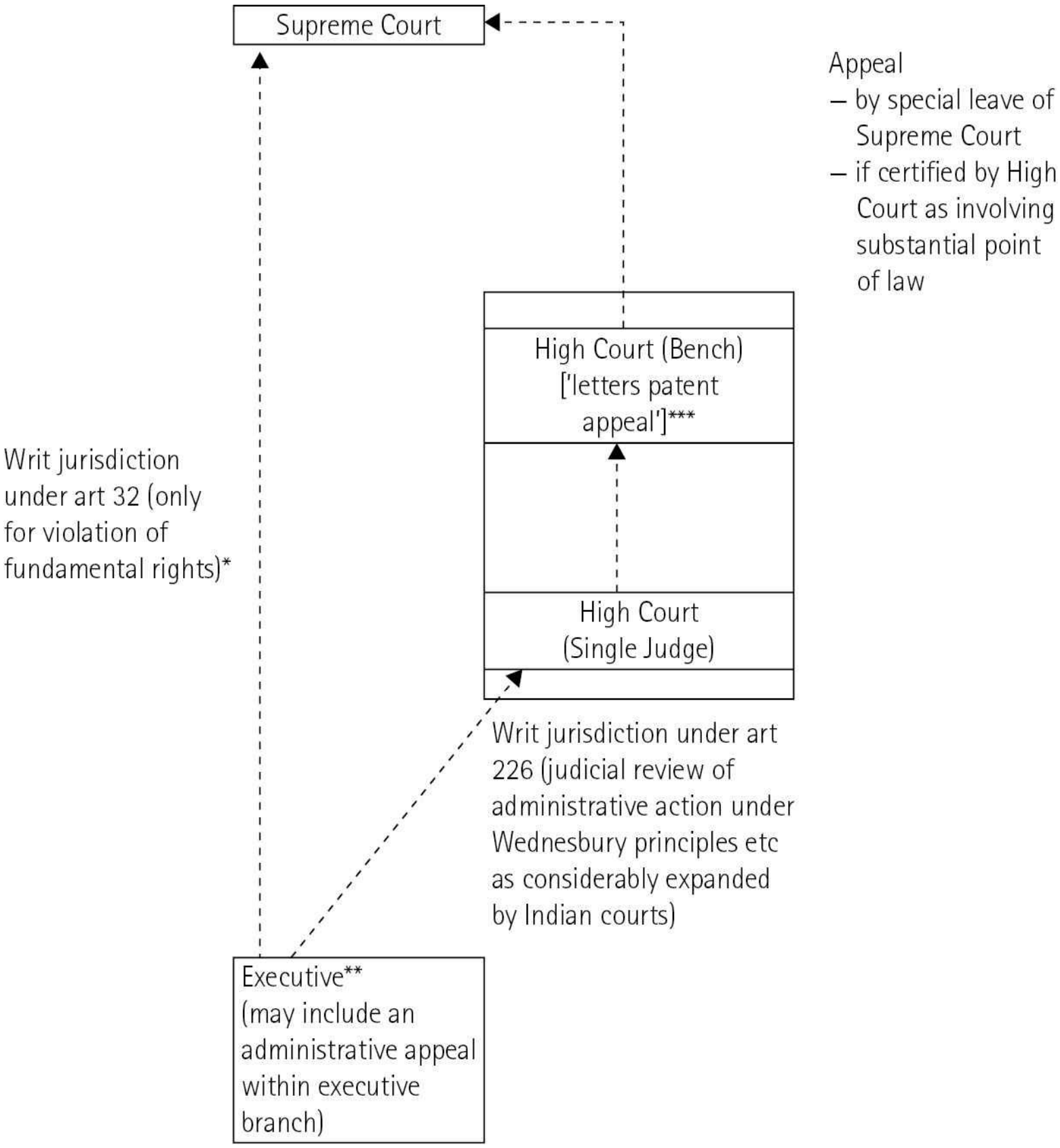
Figures 22.1–22.3 outline the route that regulatory decisions take in different situations. Figure 22.1 relates to decisions taken by regulators within the traditional executive (eg, the Directorate General of Civil Aviation (DGCA) or the Directorate General of Hydrocarbons (DGH)) and by regulators (like the Reserve Bank of India) who do not have a special tribunal attached to them. Here, there is no statutory right of appeal, but the High Court can review the matter under its writ jurisdiction based on the general principles of judicial review of administrative action. Appeal to the Supreme Court is by special leave or if the High Court certifies the case as fit for appeal due to its legal or constitutional importance. The dotted lines reflect the fact that appeal is not a matter of right, though in practice High Courts rarely refuse to hear writs on administrative matters.

Figure 22.2 relates to a regulator with an attached tribunal with a single bench. The appeal to the Supreme Court may be statutory (ie, leave of the Court is not needed) or may be subject to special leave.

Figure 22.3 relates to regulators (who may be part of the administration) for whom a national regulator with *multiple benches* exists. This is similar to Figure 22.2, but with the additional possibility of more than one High Court being involved—this is because a bench of a national tribunal may cover more than one State. It is not inconceivable that more than one High Court may have jurisdiction in the same matter.

Yet another variant is the Company Law Tribunals where apart from the executive, there is a national tribunal and then an appellate tribunal, with further recourse to the High Court and Supreme Court (these are not yet functional, as their creation has been stayed by the Supreme Court). Tribunals may or may not have jurisdiction to hear challenges to delegated rule making by the regulator, depending on the wording of the relevant statute;[38] if jurisdiction exists, such cases follow a path analogous to that in Figure 22.2. If the tribunal does not have jurisdiction—as has been held for the Telecom Disputes Settlement Appellate Tribunal, for example—the rule would have to be challenged in the High Court in the first instance. The Law Commission, when examining the issue of environment courts, had expressed the hope that if a statutory appeal to the Supreme Court were provided, then the High Courts would not entertain writs under Article 226 on the ground that a specific alternative remedy is available. However, in practice, the High Courts have not behaved as the Law Commission expected. For instance, the Madras High Court entertained a writ petition challenging an order of the Chennai (Madras) bench of the National Green Tribunal on appeal against a decision of the environmental regulator in the neighbouring State of Karnataka (which has a separate High Court but no separate bench of the tribunal).[39] A safe operating principle is that if any court can possibly exercise jurisdiction on a matter, it will.

Traditional Executive

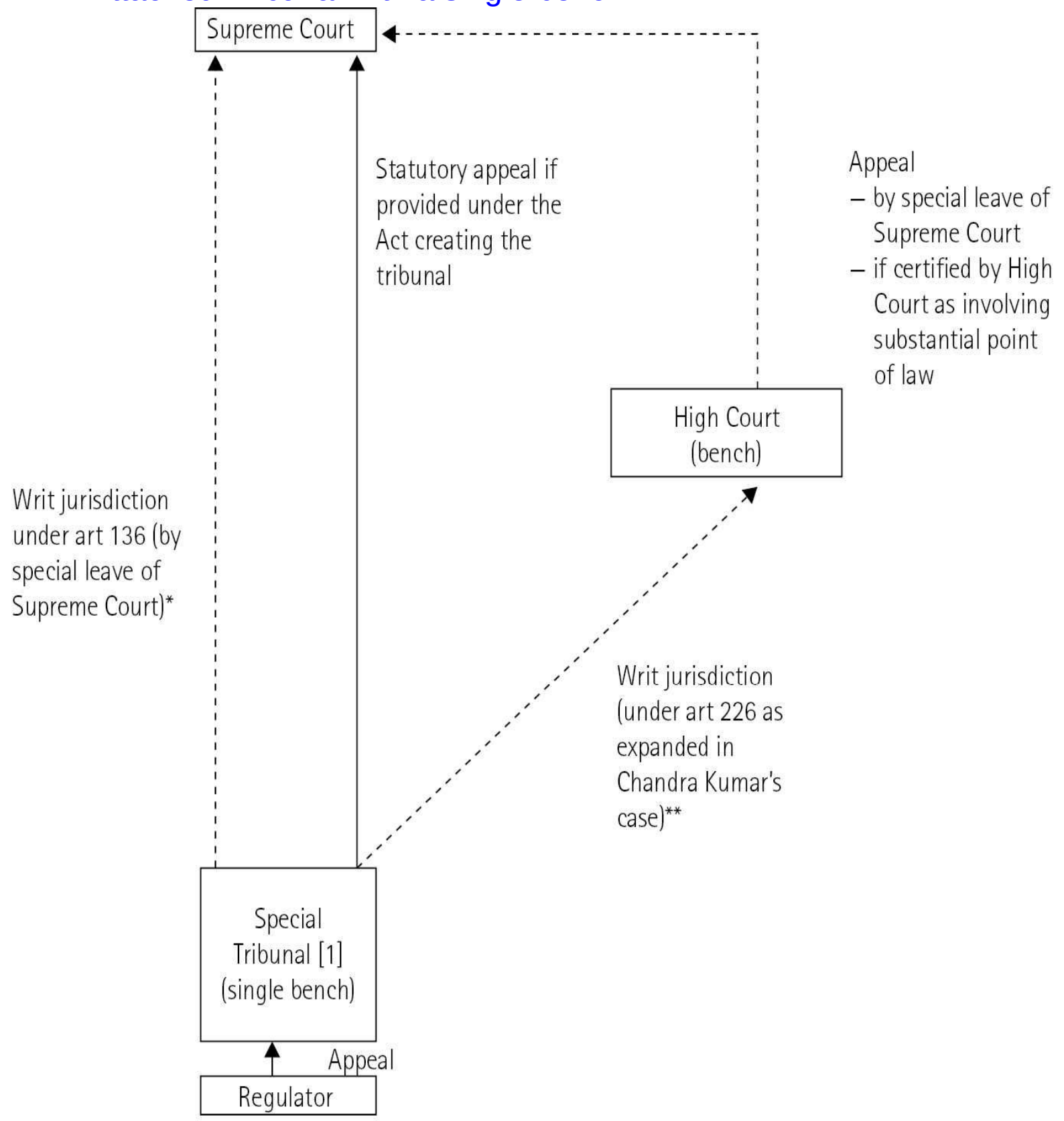


* Not routinely entertained.
** Also applies to regulatory bodies not linked to a special tribunal—eg, Reserve Bank of India.
*** May not be available in certain High Courts/for certain matters.

- - - - - - - - - - - - ▶ Appeal/Writ leave of the Court (not automatic)
——————————▶ Statutory appeal (ie, right to appeal)

FIGURE 22.1 Administrative Decisions: The Route to Finality (Type 1)

Attached Tribunal with a single bench



[1] Examples: TDSAT, CAT, SAT, Appellate Tribunal for Electricity.

* Rarely entertained after Chandra Kumar's case.

** Almost always entertained after Chandra Kumar's case.

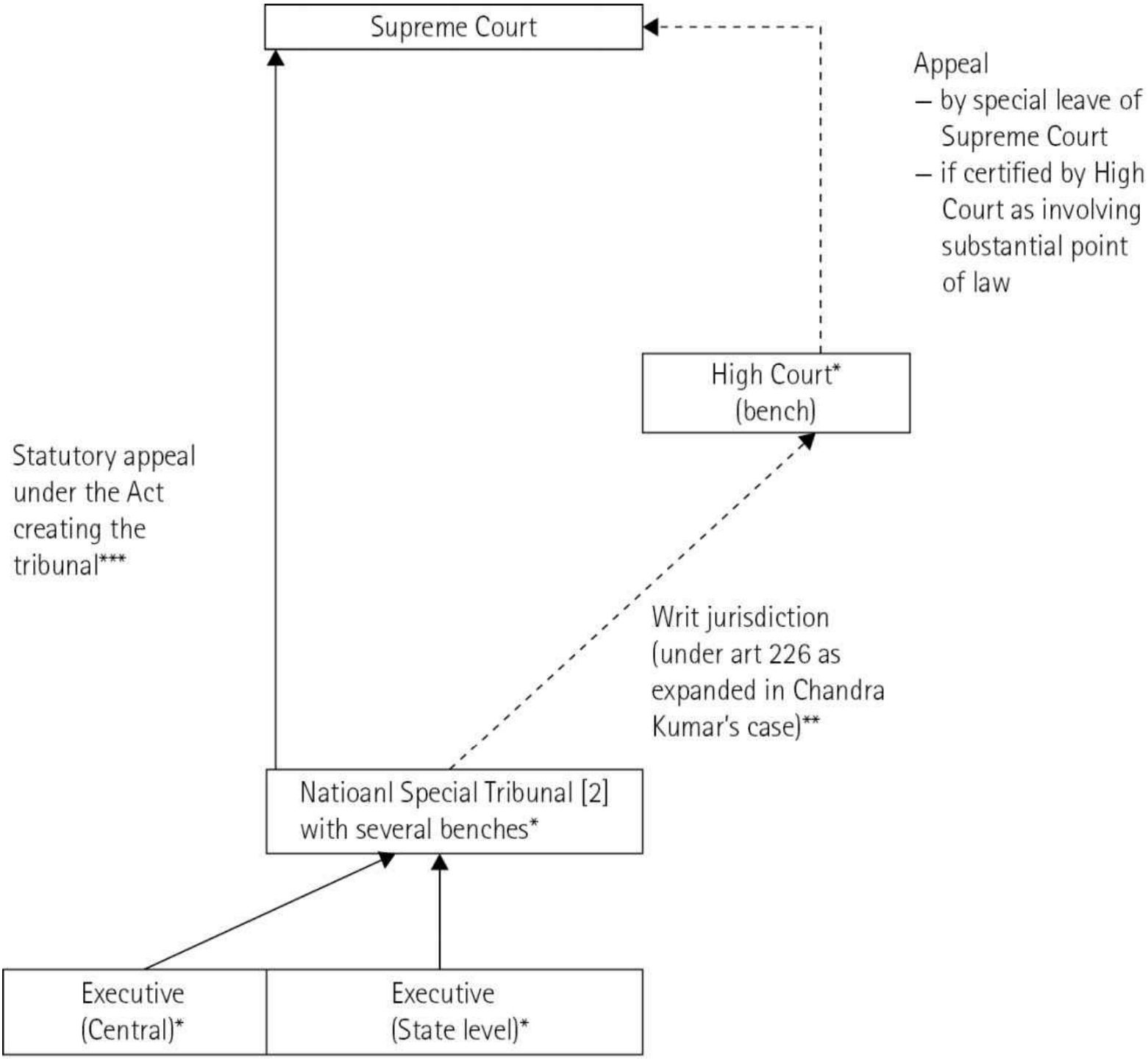
- - - - - - - - - - - - ▶ Appeal/Writ by leave of the Court (not automatic)

——————————▶ Statutory appeal (ie, right to appeal)

FIGURE 22.2 Regulatory Decisions: The Route to Finality (Type 2)

The point to note is that if the creation of an independent regulatory body also involves the creation of a tribunal (as it often does, either for genuine substantive reasons or for reasons of expediency), then while there may be substantive benefits to the quality of regulation, the procedural effect is to increase the number of *levels* of appeal and in some cases to create multiple *channels* of appeal (ie, more than one route of appeal at a given stage). In 1987 the Supreme Court explicitly recognised the adverse effect of the additional layer of appeal if the High Courts were given jurisdiction, but reversed itself ten years later;[40] therefore such tribunals are effectively courts of first instance, even if their composition is akin to that of the High Court. The tribunals themselves may be quicker in disposing of cases, but if these decisions are again challenged in High Courts, the overall time taken increases. Thus the regulator-cum-tribunal structure may delay the attainment of finality of regulatory decisions and increase risks and uncertainty for the parties involved. The total time taken is generally long. For instance, a Competition Commission case was initiated in 2010, decided by the Commission (regulator) in August 2011, the appeal was decided by the Tribunal in May 2014 and then reached the Supreme Court on statutory appeal. (In this case, the parties—based in Delhi which is the seat of the Supreme Court—did not choose to take the matter to the High Court.)[41]

Attached Tribunal with several benches



[2] Example: NGT

* The State where the cause of action arises and the tribunal bench may be in different States. If so, more than one High Court may have jurisdiction. The government of one State may have to argue a case in the High Court of another State.

** Currently maintainable, per interim decision of Supreme Court and decisions of Madras and Uttarakhand High Courts, even if statutory appeal to Supreme Court is provided.

*** If not provided for in the statute, then appeal by special leave under Article136 would apply.

- - - - - - - - - - - - ▶ Appeal/Writ by leave of the Court (not automatic)

——————▶ Statutory appeal (ie, right to appeal)

FIGURE 22.3 Regulatory Decisions: The Route to Finality (Type 3)

The long route to finality does have effects on economic growth to the extent that it increases uncertainty in regulated sectors of the economy. Entities in those sectors must be prepared for this. One implication for regulated entities is that they need to try as far as possible to secure an initial order that is acceptable by making sure their point of view is adequately put forward. When deciding to appeal a decision, they need to weigh the expected benefits of changing the regulator's decision against the probability of success, the time and costs of the appellate process, and the financial consequences of the continuing uncertainty. They may sometimes be better off by not challenging a suboptimal decision of a regulator because of the uncertainties and costs of the appeal process. Of course, this cannot prevent a challenge by another party.

VII. CONCLUSION

In an important statement of modern regulation, Rubin has suggested that the 'essentially administrative character of the modern state is irreversible'[42] and that the 'three branches of government exist only in our minds'.[43] He argues that the three-branch structure is a problematic and outdated metaphor that inadequately captures the reality of the modern State and which has been retained because of 'social nostalgia'.[44] Alternative metaphors must, he posits, be imagined, like that of a network of interconnected institutions. The evolution of Indian constitutional law lends strong support to Rubin's contention and reflects an attempt to deal with the emerging contours of the modern regulatory State.

Although some general principles have begun to emerge, as discussed above, the constitutional issues relating to the regulatory State are still relatively fluid. In the years to come, there are several possibilities on how this may evolve. Some of the possible scenarios are the following:

1. The current pattern—where the government continues to create new regulators and (partly to reduce the chance of the regulatory statute being struck down) tribunals—may continue. The issue of commonality of administration of the tribunals themselves and the volume of work relating to appointments to them may require some form of centralisation of the tribunal administration. The Supreme Court in various cases has expressed itself in favour of all tribunals being administered by the Law Ministry. While this may work well for tribunals constituted entirely of judicial members, it has serious disadvantages when it comes to mixed tribunals involving the selection of non-judicial members and staff.
2. The current move to independent regulators may continue but the special tribunals may be supplanted by making provisions in the regulatory statutes for appeals to the High Court. This may also be accompanied—over time—by a creation of specialised divisions in the High Courts as is common in England and as advocated by the Malimath Committee.[45] This reversal of tribunalisation will greatly reduce the adverse perceptions of the legal profession and possibly eliminate challenges to the composition and membership of the regulators themselves.
3. The current pattern may continue but with the age of retirement for all members reduced to the normal age of retirement of their parent service so that the option of post-retirement employment

is removed. This may reduce the incentive to create regulators without adequate justification to serve bureaucratic interests, and reduce adverse perceptions and apprehensions that have been generated in the minds of the courts and lawyers.

4. The government and other stakeholders may, considering the delaying effect of the additional layer of appeal, slow down the move to 'independent' regulators and stick to traditional administrative arrangements and regulators like the DGCA or DGH, whose status is (say) that of Secretaries/Additional Secretaries to Government rather than that of High Court judges. Expert opinion and input could be brought into the administrative procedures and supplemented by mandatory requirements to consult affected stakeholders and the public (eg, in the manner prescribed in the Administrative Procedures Act in the USA). This may produce outcomes that will be qualitatively—except for the presence of political influence which is not always a bad thing—as good as those with independent regulators. Judicial review will remain available through the traditional mode of writ jurisdiction.

---

[*] The views expressed in this chapter are strictly personal.

[1] Navroz K Dubash and Bronwen Morgan, 'Understanding the Regulatory State of the South' (2012) 6(3) Regulation & Governance 261.

[2] In recent years, Deputy Ministers and Parliamentary Secretaries have not been appointed in the Union government.

[4] AIR 1955 SC 549 [12].

[6] *A Sanjeevi Naidu v State of Madras* (1970) 1 SCC 443 [10].

[3] All references to 'Articles' are to Articles of the Constitution of India. When a figure in parentheses follows the numbered Article, it denotes a clause of that Article, eg Article 77(3) means clause 3 of Article 77.

[5] KP Krishnan, Remarks at the Conference to discuss draft chapters of this Handbook, 18 July 2014, New Delhi.

[7] Broadly, companies where the Central and/or State Government(s) hold a majority of the shares or otherwise control the composition of the Board of Directors.

[8] Eg, Central and State Electricity Regulatory Commissions where the Commission is only mandated to follow the *policy* laid down by the government.

[9] Eg, the Competition Commission.

[10] KP Krishnan, Remarks at the Conference to discuss Draft Chapters of this Handbook, 18 July 2014, New Delhi.

[11] Competition Act 2002, s 36(3):

> Every proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purposes of section 196 of the Indian Penal Code (45 of 1860) and the Commission shall be deemed to be a civil court for the purposes of section 195 (2 of 1974) and Chapter XXVI of the Code of Criminal Procedure, 1973.

[12] *Brahm Dutt v Union of India* (2005) 2 SCC 431 [6].

[13] Kathryn Hochstetler, 'Civil Society and the Regulatory South: A Commentary' (2012) 6(3) Regulation & Governance 362, 362.

[14] Dubash and Morgan (n 1) 264.

[15] Dubash and Morgan (n 1) 265.

[16] OP Agarwal and TV Somanathan, 'Public Policy-making in India: Issues and Remedies' (2005) Centre for Policy Research Working Paper, August 2005.

[17] KP Krishnan, Remarks at the Conference to discuss Draft Chapters of this Handbook, 18 July 2014, New Delhi.

[18] Navroz K Dubash, 'Independent Regulatory Agencies: A Theoretical Review with Reference to Electricity and Water in India' (2008) 43(40) Economic and Political Weekly 43, 46.

[19] Susan Rose-Ackerman, 'Law and Regulation' in Keith E Whittington, R Daniel Kelemen, and Gregory A Kaldeira (eds) *The Oxford Handbook of Law and Politics* (Oxford University Press 2008) 582.

[20] Rose-Ackerman (n 19) 584.

[21] Rose-Ackerman (n 19) 582.

[22] Christine Parker and John Braithwaite, 'Regulation' in Mark Tushnet and Peter Cane (eds) *The Oxford Handbook of Legal Studies* (Oxford University Press 2005).

[23] Arun K Thiruvengadam and Piyush Joshi, 'Judiciaries as Crucial Actors in Southern Regulatory Systems: A Case Study of Telecom Regulation' (2012) 6(3) Regulation & Governance 327, 328.

[24] Dubash (n 18) 51.

[25] Hochstetler (n 13) 362.

[26] Rose-Ackerman (n 19) 588.

[27] Brian Levy and Pablo T Spiller, 'The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunication Regulation' (1994) 10(2) Journal of Law, Economics, and Organization 201.

[28] See eg, Ministry of Personnel, Public Grievances and Pensions, 'Civil Services Day, April 21, 2012: Background Papers for Panel Discussions' <http://darpg.nic.in/darpgwebsite_cms/Document/file/BG_Papers_CSD_2012.pdf>, accessed October 2015; 'RS impeaches Justice Soumitro Sen for "misappropriating" funds' *The Indian Express* (New Delhi, 18 August 2011) <http://archive.indianexpress.com/news/rs-impeaches-justice-soumitro-sen-for-misappropriating-funds/833874/>, accessed October 2015; Krishnadas Rajagopal, 'President to look into complaint against ex-CJI Balakrishnan' *The Indian Express* (New Delhi, 10 May 2012) <http://archive.indianexpress.com/news/sc-directs-centre-to-probe-graft-charges-against-excji-balakrishnan/947658/>, accessed October 2015; Dhananjay Mahapatra, 'Eight Chief Justices were corrupt: Ex-law minister' *The Times of India* (New Delhi, 17 September 2010) <http://timesofindia.indiatimes.com/india/Eight-chief-justices-were-corrupt-Ex-law-minister/articleshow/6568723.cms>, accessed October 2015.

[29] Pratap Bhanu Mehta, 'India's Judiciary: The Promise of Uncertainty' in Devesh Kapur and Pratap Bhanu Mehta (eds) *Public Institutions in India: Performance and Design* (Oxford University Press 2005).

[30] For instance, the Supreme Court's decision giving itself the power of appointment of judges has been described by legal scholars as 'audacious' and 'hard to justify in the face of evidence that both the text of the Constitution and the expressed intention of the framers went against its reasoning and final outcome: Thiruvengadam and Joshi (n 23) 331.

[31] See eg, *Swasthya Adhikar Manch v Union of India*, Writ Petition (Civil) No 33/2012, Supreme Court of India, order dated 21 October 2013.

[32] (2005) 2 SCC 431.

[33] (1996) 2 SCC 405.

[34] See eg, *Rajnarain Singh v Chairman, Patna Administration Committee* AIR 1954 SC 569; *Devi Dass Gopal Krishnan v State of Punjab* AIR 1967 SC 1895.

[35] *Global Energy Ltd v Central Electricity Regulatory Commission* (2009) 15 SCC 570.

[36] KP Krishnan and TV Somanathan, *The Civil Service* (forthcoming).

[37] Ashok V Desai, *India's Telecommunications Industry: History, Analysis, Diagnosis* (Sage Publications 2006) cited in Thiruvengadam and Joshi (n 23) 339.

[38] See *L Chandra Kumar v Union of India* (1997) 3 SCC 261 [93]; *Bharat Sanchar Nigam Ltd v Telecom Regulatory Authority of India* (2014) 3 SCC 222 [108], [124]–[126].

[39] *Vijayalakshmi Shanmugam v Secretary, Ministry of Environment and Forests* (2014) 2 MLJ 316.

[40] See *SP Sampath Kumar v Union of India* (1987) 1 SCC 124; *L Chandra Kumar* (n 38).

[41] *DLF Ltd v Competition Commission of India* Appeal No 20/2011 (Competition Appellate Tribunal).

[42] Edward L Rubin, *Beyond Camelot, Rethinking Politics and Law for the Modern State* (Princeton University Press 2005) 19.

[43] Rubin (n 42) 15.

[44] Rubin (n 42) 15.

[45] Government of India, 'Report of the Arrears Committee' (1990).