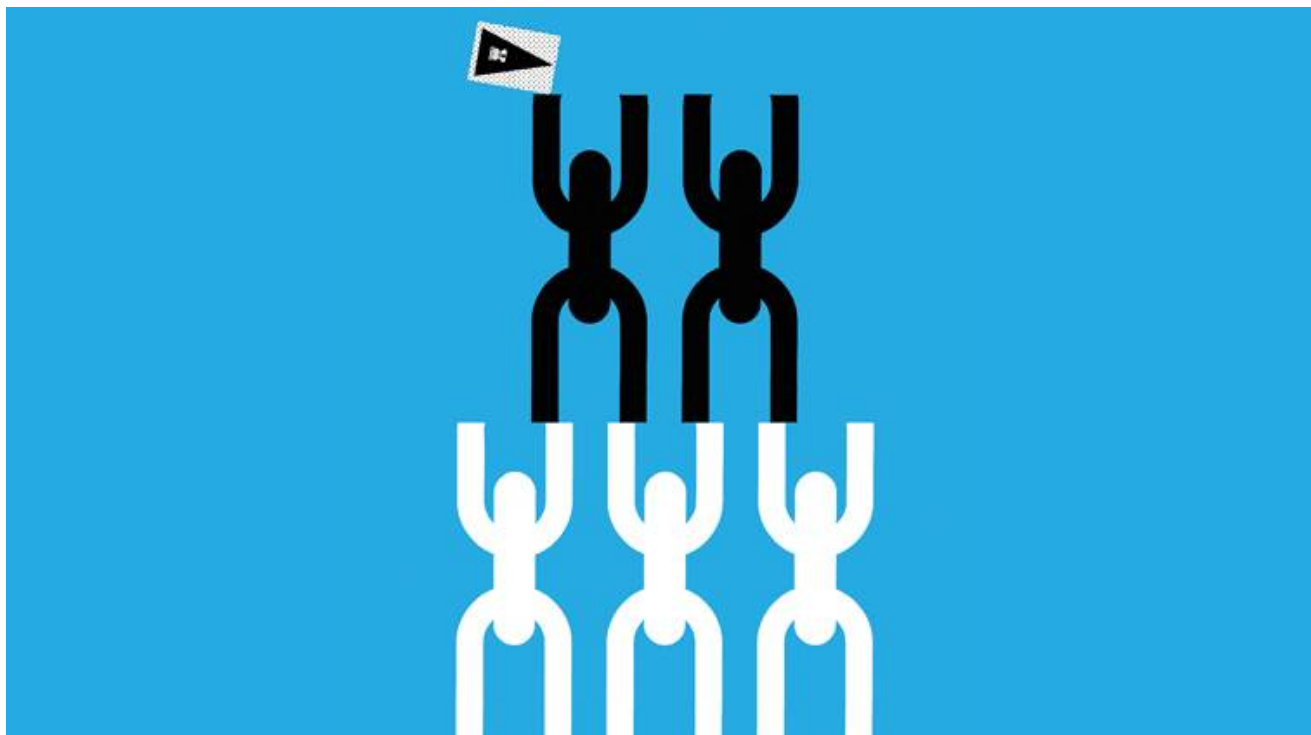


An Independent Institutions Bill remains a long-unrealised constitutional aspiration

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An independent institutions bill should seek the following objectives: One, multi-partisan appointments, two, operational independence and impartiality, and three, accountability to the legislature rather than the executive. (Illustration by CR Sasikumar)

The independence and credibility of our (admittedly imperfect) state institutions have never been so thoroughly in doubt since the Emergency. Characterised as the fourth branch of the state — because of their distinctiveness from the executive, legislature and judiciary — these institutions are tasked with the protection of key constitutional values such as democracy, legality, impartiality, probity, human rights and price stability. While Chapter Nine of the South African Constitution explicitly guarantees independence to the fourth branch of the state, the Indian Constitution does so implicitly by expecting Parliament to enact a law prescribing detailed mechanisms for appointments to and functioning of such institutions — for example, through Articles 280(2) and 324(2). However, an Independent Institutions Bill remains a long-unrealised constitutional aspiration.

In the Indian context, institutions of the fourth branch include the Election Commission, Lokpal, Central Bureau of Investigation, Reserve Bank, National Statistics Commission, National Human Rights Commission, Information Commission, commissions for various marginalised groups, Central Vigilance Commission, Comptroller & Auditor General, Attorney

General, Public Service Commission, University Grants Commission, Finance Commission, Niti Aayog, media regulators and many others. Some of these institutions are constitutional; others have quasi-constitutional status.

An Independent Institutions Bill should seek the following objectives: One, multi-partisan appointments, two, operational independence and impartiality, and three, accountability to the legislature rather than the executive. The contours of this bill are outlined below.

Key to achieving these purposes is to put multi-partisan legislative committees — called Independent Institutions Committees (IICs) — in the driving seat. Parliamentary IICs could include two nominees of the ruling party/alliance (including any party providing support from the outside) and a nominee each from the three largest Opposition parties in each House. The vidhan sabha IICs could have one governmental nominee and one each from the two largest Opposition parties. These details can be fine-tuned, but a united Opposition should be able to defeat the government, forcing it to compromise with at least one key Opposition party. Thus designed, the IICs will include the voice of the powerful regional parties of the day, and not just the two national parties. The IICs should be guaranteed adequate staff and resources to permit the proper discharge their functions.

The Rajya Sabha's IIC should issue a public advertisement at least three months before a post in an institution is due to become vacant. Based on applications and consultations with relevant stakeholders (including existing members of that institution, MPs from the relevant state for state-level appointments, area experts and activists), the IIC should draw up a shortlist of at least two — and no more than five — names to fill up the posts.

From this shortlist, the final selection should be made by the Lok Sabha's IIC for central institutions, and the relevant vidhan sabha's IIC for state institutions. Apart from fourth-branch institutions, parliamentary IICs could also deal with the appointments of governors while the state-level mechanism (involving the Rajya Sabha and vidhan sabha IICs) could be used to appoint police chiefs. All shortlisting and decisions on appointments must be made by a single-transferable vote. Appointment decisions should ideally be made before the post falls vacant — responsibility should be fixed for the failure to do so within three months of the vacancy arising.

Judicial independence demands that judges stay out of politically-salient appointments completely (except to the judiciary and to administrative tribunals) — that is the key lesson one can learn from the controversy linking Justice A K Sikri's role in Alok Verma's removal to his post-retirement benefit as well as the multiple judicial recusals in the case challenging the appointment of the CBI's interim director.

The appointments should be for a fixed term. Removal from office should require at least four votes in the Rajya Sabha IIC, after a specially-instituted independent inquiry finds a breach of a statutorily specified offence. All institutional decisions should be made by a governing

committee rather than the chief officer acting on her own. Except promotions within the institution, appointees should not be eligible for any public office after stepping down. Salaries, perks and staff provisions should be statutorily protected. Transfers and interim appointments may be made only by a majority vote in the Rajya Sabha IIC. A robust guarantee of non-interference by the executive should be anxiously policed by the courts.

The Bill should require fourth branch institutions to regularly publish reports about their functioning. Based on these public reports, the Lok Sabha or vidhan sabha IIC, as the case may be, should question their senior staff in annual, televised, hearings. The Rajya Sabha IIC may, by a majority vote, decide to summon them at any time for questioning on particular matters.

Yes, we must “Save the Constitution”. But a slogan is not enough. The current Opposition should put its money where its mouth is, and make a manifesto commitment to enact the Independent Institutions Bill.

This article first appeared in the print edition on March 16, 2019, with the title ‘Holding up the fourth branch’. The author is an associate professor in law at the universities of Oxford and Melbourne