PROCEDURAL FAIRNESS AND AGENCY POWER Guidance Documents, Administrative Tribunals and Emergency Discretion in the Administrative State: A Comparative Study of India and the United States

Research Paper

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ABSTRACT

Governments today rule via administrative agencies and the agencies exercise their power via three instruments which are all very much at odds with the conventional notion of a fair hearing. The first is informal guidance in the form of circulars, master directions, policy statements and manuals which all have the effect of shaping behaviour without ever going through the process of formal rule making. The second is the in-house adjudicator, the tribunal member or administrative law judge who is the one who makes the decisions on the disputes in the first instance, or at least very close to the executive branch whose policies are in question. The third is emergency discretion, the wide power to act which is conferred by statute in the name of public health or national security and which is often exercised with the normal procedural protections completely bypassed. The paper contends that the principle of procedural fairness, which is normally conceived of as a right to be heard prior to a decision being taken, is in fact a structural obligation which applies to the way in which agencies make rules, the way in which they determine who is entitled to be a party to a dispute and the way in which discretion is exercised when the state is claiming an emergency. Using a doctrinal and comparative approach the paper looks at India and the US with reference points from the UK. It reads the law along a line of development from Maneka Gandhi v. Union of India (1978) and the US Administrative Procedure Act of 1946 to the decisions of the last three years: Loper Bright Enterprises v. Raimondo and SEC v. Jarkesy (2024), Madras Bar Association v. Union of India (2025) and Learning Resources, Inc. v. Trump and Trump v. Slaughter (2026). The conclusion is that both systems have developed robust doctrines of individual fairness and comparatively weak doctrines of structural fairness. With respect to India it suggests a number of reforms: a statutory Administrative Procedure Code, a binding regime for guidance documents, an independent National Tribunals Commission and a proportionality based framework for emergency powers. Keywords: procedural fairness; natural justice; due process; administrative law; guidance documents; notice and comment rule making; administrative tribunals; administrative law judges; judicial independence; emergency powers; proportionality; India; United States.

CHAPTER 1: INTRODUCTION

1.1 Background and Context

A person generally does not come into contact with the state through a statute or a constitutional provision. Such interactions usually take place at the level of an agency: a licence is rejected, a pension is suspended, a fine is imposed, a passport is seized, or a movement order is handed down. In all these instances a public body which has been given powers makes a decision of importance, and the issue of fairness then becomes very real. Was the individual informed of what was claimed against him? Was it possible for him to make a response? Was the person making the decision independent of the case? Were the reasons for the decision given? Was the rule as applied to that individual in such a way that anyone could have commented on it? The rise of the administrative state has meant that such issues have become central in the context of constitutional government. In the nineteenth century A.V. Dicey regarded the English rule of law as being opposed to the concept of a distinct body of administrative law and he was suspicious of the French droit administratif. By 1929 Lord Hewart's book The New Despotism had warned that delegated legislation and administrative adjudication had led to the emergence of a new and unaccountable kind of power. The solution, both in England and elsewhere, was not to get rid of the administrative state or to leave it without regulation, but to place it within the framework of legal procedure. In Britain the Donoughmore Committee (1932) and the Franks Committee (1957) , and in the United States the Administrative Procedure Act of 1946, were institutional manifestations of that solution. India inherited a common-law tradition concerning natural justice, but the Constitution, which came into effect in 1950, based the administrative state on a different basis. It provides for a great deal of delegated legislation, establishes a federal arrangement of regulatory power, enables the creation of specialised tribunals by means of Articles 323A and 323B, and includes emergency powers in Part XVIII. Yet, when Articles 14 and 21 are considered together following the decision in Maneka Gandhi v. Union of India (1978) 1 SCC 248, procedural fairness acquires a constitutional status which is independent of any statute. India has therefore a well-developed body of common-law fairness principles, but it does not have a comprehensive procedural code comparable to the American Administrative Procedure Act which regulates how agencies draw up rules and hold hearings.

1.2 Statement of the Problem

Procedural fairness doctrine was developed largely for a particular paradigm: a single official When an adverse decision is made concerning a specific individual, the issue then becomes whether that individual should have had the opportunity to be heard. Although this situation is real and significant, it no longer reflects the way in which most administrative power is exercised. Three aspects of current governance fall outside this paradigm. In the first place, a large amount of regulatory activity is based not on rules which have been established through a public and participatory process but on guidance—in the form of circulars, notifications, frequently asked questions, master directions and policy statements. These documents are frequently referred to as non-binding, a designation which means that they are exempt from the procedures that apply to rules; nevertheless, in reality regulated organisations regard them as mandatory since the agency that issued them also has the power to grant licences, approvals and carry out enforcement. The term "non-binding" therefore enables an agency to achieve the practical effect of a rule without incurring the procedural expenses of creating one. Secondly, an increasing number of disputes between individuals and the state are settled not by courts but by tribunals and internal adjudicators. The fairness of this kind of adjudication is less determined by whether a hearing is formally provided than by whether the person making the decision is appointed, paid, promoted and can be dismissed in a manner which ensures they have the freedom to rule against the government. If the executive has control over the adjudicator's length of service and terms of employment, then even a perfectly standard hearing may in fact be one that takes place before an interested decision-maker. Thirdly, in times of emergency ordinary procedures are suspended or compressed. When facing public health crises, security threats or economic shocks, executives are given the discretion and speed needed and courts are frequently asked to delay action. The problem is that the powers exercised in emergencies are used by the same agencies

and are often exercised through the same kinds of guidance documents as in normal governance, and the fact is that emergencies tend to last longer than the situations which initially justified them. The issue that this paper deals with is whether the present law of procedural fairness in India and the United States is capable of bringing these three kinds of agency power under control, and if it is not, then what changes are necessary.

1.3 Significance and Contemporary Relevance

The situation has become unusually urgent since each of the three pressure points has been the subject of important judicial rulings over the past three years. In the United States the case of Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024), reversed Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), and thus brought to an end the custom of courts showing deference to reasonable interpretations by agencies of ambiguous statutes. In SEC v. Jarkesy, 603 U.S. 109 (2024), it was ruled that the Seventh Amendment entitles a jury trial where the Securities and Exchange Commission is seeking to impose civil penalties for securities fraud, and as a result the agency's power to deal with such cases itself was curtailed. The decision in Learning Resources, Inc. v. Trump (decided 20 February 2026) found that the International Emergency Economic Powers Act does not give the President the authority to impose tariffs; the main opinion used the major questions doctrine in relation to an emergency powers statute. In Trump v. Slaughter (decided 29 June 2026) a six to three majority held that the statutory protection against the removal of Federal Trade Commission commissioners contravenes the principle of separation of powers and overruled Humphrey's Executor v. United States, 295 U.S. 602 (1935), the decision on which the concept of the independent regulatory agency had been based for ninety years. In India the Supreme Court, in its judgement in Madras Bar Association v. Union of India, 2025 INSC 1330 (19 November 2025), invalidated the main provisions of the Tribunals Reforms Act, 2021, on the ground that Parliament had re-enacted those provisions in a slightly modified form following earlier decisions by the Court. The Court stated that the Act had breached the principle of judicial independence and the separation of powers and ordered the Union to set up a National Tribunals Commission within four months. During that same period there was ongoing judicial and academic discussion concerning the constitutional limits of emergency measures, including the pandemic-related restrictions and the orders suspending the internet, as well as regarding the legal status of the large number of circulars and master directions issued by the regulators. These changes move in opposite directions. While the American rulings impose new restrictions on the autonomy of agencies—whether when interpreting the law, when deciding cases, or when exercising emergency powers—they do so primarily on the grounds of the separation of powers and the rights of Congress and the President, not in the name of the individual's right to a fair hearing. The Indian decision safeguards the independence of the adjudicators but does not address the question of how regulators formulate the rules and guidance which tribunals later apply. It is therefore timely to carry out a study that brings these points together and examines what they imply for procedural fairness.

1.4 Research Objectives

The paper has the following objectives:

1. To trace the conceptual and constitutional roots of procedural fairness in India and the US and to identify the normative values which the doctrine is meant to serve.

2. To look at how the law deals with guidance documents and other forms of soft law and to assess whether the distinction between binding and non-binding instruments is a viable basis on which to exempt agencies from the rulemaking process.

3. To assess the constitutional and statutory position of administrative tribunals and in-house adjudicators with a specific focus on the independence of the decision maker.

4. To examine the limits which procedural fairness and judicial review place on the exercise of emergency power.

5. To compare the two systems, determine what lessons each can learn from the other and then suggest reforms which would be appropriate in the Indian context.

1.5 Research Questions

The study is organised around five questions.

1. What does procedural fairness require of an agency, and are the requirements the same when the agency makes a rule, decides a dispute or responds to an emergency?
2. When does a guidance document cease to be mere guidance and become a rule that must be made through a participatory process, and how do Indian and American courts draw that line?
3. What guarantees of independence must an adjudicative body possess before its decisions can be regarded as procedurally fair, and have Indian and American law secured them?
4. To what extent do emergencies permit departures from procedural fairness, and what standard of review should courts apply to emergency discretion?
5. What institutional and legislative reforms would best embed procedural fairness in the structure of administrative power?

1.6 Hypotheses

The paper tests three hypotheses.

H1. The use of the classification of an instrument as "guidance" or "non-binding" is a mechanism which agencies use to avoid the participatory rulemaking procedure. Courts who look at the formal label rather than the actual effect of the instrument leave a gap in the procedural protection.

H2. Procedural fairness in adjudication is predicated on the structural independence of the adjudicator from the executive. Legislation which gives the executive control over the appointment, tenure and conditions of service of adjudicators is inconsistent with procedural fairness even if the individual hearings themselves are formally fair.

H3. Emergencies do not relieve us of the requirement of procedural fairness, they simply alter the content of that requirement. The best way of balancing the need for urgency with the need for legality is through a combination of reasoned decision making, proportionality review and time limited authority.

1.7 Scope and Limitations

It's a comparative paper but not a symmetrical one. India is the main subject as it's written by Indian law students for an Indian audience. The US is the principal comparator as it has the most developed body of doctrine on each of the three issues. UK references are made only where UK decisions have had an impact on Indian doctrine (Ridge v Baldwin and the GCHQ case being the prime examples). It's not a comprehensive survey of all the regulatory bodies or of all the statutes which give rise to emergency powers. The US discussion is about federal law only and state administrative law is not touched upon. The paper covers developments up to October 2026. A number of the US decisions referenced are very recent and the scholarly response to them is still in its infancy so the analysis here should be read with that in mind. 1.8 Research Methodology It's a doctrinal and comparative study. The doctrinal element looks at the constitution, statutes, subordinate legislation and above all case law (the case law being the main source of data). The comparative element is a functional one: it's not asking whether the two systems use the same legal terminology, it's asking whether and how they achieve the same function, namely the control of agency power through procedure. The primary sources are the Indian Constitution, the Administrative Procedure Act 5 U.S.C. §§ 551-559 and 701-706 and the decisions of the Supreme Court of India, the Supreme Court of the United States and to a very limited extent the English courts. The secondary sources are treatises, law review articles, reports of the Law

Commission of India and of equivalent bodies and commentary on the recent decisions. The authors have made an effort to check the rulings in the most recent cases against the summaries which have been reported; readers are of course advised to go to the primary judgments for the exact references.

1.9 Review of Literature

The literature on procedural fairness and agency power is vast and can be grouped by theme. The foundations of the field were laid by the classic English debate between Dicey's Introduction to the Study of the Law of the Constitution (1885) and Hewart's The New Despotism (1929) and the Donoughmore and Franks Committee reports provided the practical agenda. The modern English treatments of the subject (Wade and Forsyth's Administrative Law, Paul Craig's Administrative Law) are all in the same vein in that they trace the way in which the courts have built up the law of natural justice and judicial review on that foundation. In the US the key work was Kenneth Culp Davis' Discretionary Justice (1969) which argued that the fundamental task of administrative law was to limit and structure discretion. Richard Stewart's article "The Reformation of American Administrative Law" (1975) 88 Harv. L. Rev. 1667 set out how procedural participation had become the substitute for the legitimacy which delegation had lost. The major analysis of the values of fair procedure was Jerry Mashaw's Due Process in the Administrative State (1985). The critics of the administrative state. Philip Hamburger's Is Administrative Law Unlawful? (2014) is the argument that administrative rule making and adjudication are in fact the reinvigoration of prerogative power which the constitutional tradition has always rejected. Adrian Vermeule's Law's Abnegation (2016) is the story told from the other end of the spectrum as a history of the judiciary's retreat in the face of the demands of the modern state. These two books are very much at the heart of the current American debate about Chevron, Jarkesy and removal power and they are relevant here because they come to opposite conclusions as to whether it is procedure or structure which is the proper instrument of control. Indian scholarship. M.P. Jain and S.N. Jain's Principles of Administrative Law, I.P. Massey's Administrative Law and S.P. Sathe's Administrative Law are the standard accounts of natural justice, delegated legislation and tribunals in India. Sudhir Krishnaswamy's Democracy and Constitutionalism in India (2009) is the leading account of the basic structure doctrine which underpins so much of the modern tribunals jurisprudence. The Law Commission of India has returned to tribunals on numerous occasions, from its 14th Report on the reform of judicial administration (1958) to its 272nd Report, Assessment of Statutory Frameworks of Tribunals in India (2017). Emergency powers. The literature goes from Carl Schmitt's view that the sovereign is the one who decides on the exception, to David Dyzenhaus's The Constitution of Law: Legality in a Time of Emergency (2006) which contends that legality can and must extend to the very exercise of emergency power. Oren Gross and Fionnuala Ní Aoláin's Law in Times of Crisis (2006), Bruce Ackerman's 'emergency constitution' proposals (2004) 113 Yale L.J. 1029 and Eric Posner and Adrian Vermeule's Terror in the Balance (2007) and The Executive Unbound (2010) cover the spectrum of views. The gap. A lot of this work deals with guidance, adjudication and emergency in isolation. Very few studies actually look at whether the three have a common structure and very few compare India and the US on all three post the decisions of 2024 to 2026. This paper attempts to address that gap.

CHAPTER 2: CONCEPTUAL AND THEORETICAL FOUNDATIONS

2.1 Key Concepts and Terminology

Four terms are used throughout the paper and it's useful to define them at the outset. Procedural fairness is the broad term for the legal requirements which govern how a public decision is made (as opposed to what the decision is). The key ingredients are notice, an opportunity to be heard, an impartial decision maker and increasingly a duty to give reasons. In English and Indian law the traditional term is natural justice (the two maxims being audi alteram partem and nemo judex in causa sua). In American law the corresponding constitutional principle is due process (from the 5th and 14th Amendments) augmented by the procedures set out in the Administrative Procedure Act. Agency power is the power to make rules, to adjudicate disputes, to grant or withhold benefits and to enforce the law which is vested in the executive or in quasi-independent

bodies by way of delegation from the legislature. It is a composite power in that the same body will often be the one to legislate, to investigate and to decide and it is that composite power which gives rise to the difficulty that procedural fairness is designed to deal with. Guidance documents are the mechanism by which an agency communicates its interpretation of the law or its enforcement intentions without the need to go down the formal rulemaking route. They take the form of circulars, master directions, policy statements, interpretive memoranda, manuals and answers to frequently asked questions. This is the category to which "soft law" is often applied. Administrative tribunals are bodies created by statute (outside the normal court system) which deal with disputes arising under a particular statute (a regulatory or welfare statute). In the US the equivalent are the administrative law judges (ALJs) and other adjudicators who sit within the agency whose statute they are administering rather than in the Article III courts where the judges are protected by their life tenure and salary.

2.2 Historical Evolution

The common law rule that a person must be heard before being punished is of course much older than the administrative state. It was applied in the 17th century to the deprivation of office and property and was subsequently extended in the 19th and 20th centuries to the decisions of the many statutory bodies which Parliament created. For a period there was some reluctance on the part of the English courts to apply the principles of natural justice to non-judicial bodies and decisions of the 1920s and 1930s were to that effect. The watershed moment was Ridge v. Baldwin [1964] AC 40 where the House of Lords held that a chief constable who had been dismissed without a hearing had been denied natural justice and that the duty to act fairly was not confined to bodies which were in fact judicial. Ridge v. Baldwin is the progenitor of the modern rule and was followed in India shortly afterwards.

In the US the growth of independent commissions from the I.C.C. in 1887 onwards and the expansion of federal regulation during the New Deal led to a very considerable amount of debate as to whether administrative law making and administrative adjudication were legitimate. The APA of 1946 was a compromise in that it didn't get rid of the administrative state but it did prescribe procedures for rule making (formal and informal) and for adjudication (in the formal case the adjudication had to be before an ALJ with a record) and it provided for judicial review of final agency action. The statute therefore put the question of the fairness of the administrative process in the hands of Congress and the courts.

India's route was quite different. The Government of India Act 1935 and the colonial legal system had already established a large executive machinery and the Constitution of 1950 was simply required to provide for delegated legislation and administrative discretion whilst recognising the primacy of the fundamental rights. The Supreme Court's early dealings with delegation were in In re Delhi Laws Act 1951 SCR 747 and more recently in Hamdard Dawakhana v Union of India AIR 1960 SC 554 where it was held that the legislature could delegate subsidiary legislative power so long as it did not in effect surrender its essential legislative function and provided adequate guidance. Natural justice was originally a common law doctrine which applied to quasi-judicial decisions only but in A.K. Kraipak v Union of India (1969) 2 SCC 262 the Court observed that the line between quasi-judicial and administrative action had become so blurred as to render the distinction meaningless and that the rules of natural justice would apply to administrative action which affects a person's rights. The watershed moment came in Maneka Gandhi (discussed in Chapter 3) where fairness was linked to Articles 14 and 21.

2.3 Why Procedure Matters: The Normative Theories

There are various accounts of why public decisions should be made via fair procedure and they matter because each of them implies a different conception of what procedural protection is for and hence a different conception of what departures are acceptable.

The instrumental or accuracy theory. The value of a procedure under this theory is in its capacity to produce correct decisions. Hearings will reveal factual errors, the other side will test the evidence and reasons will discipline the decision maker. This is the theory underpinning the American balancing test in Mathews v. Eldridge 424 U.S. 319 (1976) which asks how much a particular procedure would reduce the risk of an erroneous deprivation. The weakness of the theory is that it simply cannot account for the fact that procedure can be important when the outcome would be the same. Indian courts have grappled with this problem in the cases on the so-called 'useless formality' theory and the prejudice requirement (discussed in Chapter 3).

The dignitary or process values theory. Mashaw argued that fair procedure has value in its own right irrespective of the outcome because it is a way of showing respect for the individual as a person who has a right to be involved in decisions about their own lives. Lon Fuller's The Morality of Law (1964) made a very similar point from a jurisprudential perspective: law which is made and applied without regard to such principles as publicity, clarity, non-retroactivity and the congruence of the rule as announced with the rule as actually applied is not law at all. These accounts go some way to explaining why an unreasoned or secret decision is so objectionable even if it turns out to be correct.

The participatory and legitimacy theory. Stewart's analysis of the American 'interest representation' model was that as the old rationale of agencies as neutral administrators of the legislature's commands began to fall apart, the courts and Congress both looked to procedure as a way of ensuring that all interested parties had a say. Notice and comment rule making is the most obvious manifestation of that. In that model procedure is the mechanism by which agency power is rendered legitimate in the first place, since the agency officials themselves are not elected.

The rule of law / constraint theory. The fourth theory (associated with Dicey, Davis and Wade) is one of constraint. It's a theory of the structure of discretion. Where there is wide discretion, procedure is the mechanism which provides the principles and the checks which the statute does not. That is precisely the thrust of the Indian Supreme Court's repeated assertion that arbitrariness is the very antithesis of Article 14, as in E.P. Royappa v. State of Tamil Nadu (1974) 4 SCC 3.

The four theories are in fact overlapping but they give rise to quite different remedies. The instrumental theory is satisfied with an appeal after the fact which merely corrects the error. The dignitary theory requires a hearing prior to the decision. The legitimacy theory is all about participation at the stage of the rulemaking process itself, prior to any individual being in any way affected. The constraint theory is about the structure of the decision making body. The argument of this paper is that the three pressure points identified in Chapter 1 each map most closely onto one of the theories and that the law has been strongest in those instances where it has been most influenced by the instrumental and dignitary theories and weakest in those instances where it has had to rely on the legitimacy and constraint theories.

2.4 Agency power: delegation, expertise and its discontents

Legislatures delegate for obvious reasons. Modern regulation is a matter of technical expertise, sustained attention and the ability to react to events faster than a legislature can convene. A statute on securities, telecoms, pharma or disaster response may be able to set out the objectives and principles, but it cannot possibly cover every eventuality. Delegation to an expert body is the sensible solution. The problem is that it transfers the power of law making, adjudication and enforcement to unelected officials who are often required to perform multiple functions which constitutional theory seeks to keep separate.

The American law of delegation is in theory very strict and in practice very permissive. The nondelegation doctrine provides that Congress may not delegate its legislative power, but since J.W. Hampton, Jr. & Co. v. United States 276 U.S. 394 (1928) the test has been whether or not Congress has provided an "intelligible principle" to guide the agency. The Supreme Court has struck down a statute on this basis only twice, both in 1935 (Panama Refining Co. v. Ryan 293 U.S. 388 and A.L.A. Schechter Poultry Corp. v. United States 295

U.S. 495). In Whitman v. American Trucking Associations 531 U.S. 457 (2001) the Court reaffirmed that very broad standards would be sufficient to satisfy the test (e.g. "requisite to protect the public health"). Members of the Court have indicated an interest in a more rigorous approach in recent years (see the plurality and dissenting opinions in Gundy v. United States 588 U.S. 128 (2019)), but in FCC v. Consumers' Research 2025 the Court dismissed a nondelegation challenge to the Universal Service Fund. The upshot is that in practice the nondelegation doctrine is not the primary mechanism by which the courts police delegation, it being superseded by other interpretive tools such as the major questions doctrine (discussed in Chapter 6).

Indian law has followed a similar route. In In re Delhi Laws Act 1951 SCR 747 the Supreme Court held that the legislature may delegate subordinate legislative power but it may not in any way abdicate its essential legislative function and the limits of that are to be determined case by case. Hamdard Dawakhana v. Union of India AIR 1960 SC 554 went on to strike down a provision which entirely placed the onus of determining the diseases to which the statute applied upon the executive. In later cases such as Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd. v. Assistant Commissioner of Sales Tax (1974) 4 SCC 98 the Court was quite clear that guidance in the statute need not be exhaustive. Excessive delegation is therefore still a ground for challenge in India, though it is a ground which is very rarely successful.

2.5 The Argument in Outline: Three Gaps in Procedural Protection

The framework just described enables the paper's central argument to be put even more precisely. The traditional law of procedural fairness is the law which protects the individual subject to a particular adverse decision. It is weakest in three respects, each of which is a different way in which agency power escapes the individual hearing paradigm.

The first is the gap of the rule. Where an agency is regulating via guidance rather than via rules made after notice and comment, no individual is at that stage affected by any decision and so the normal hearing rights are not triggered. By the time an individual is in fact adversely affected by the enforcement of the guidance the standard in question will have been fixed and the hearing will be one on whether it was correctly applied. Participation, the value which most plausibly gives legitimacy to agency rule making, has been effectively circumvented.

The second is the gap of the forum. The individual's right to be heard is of little value if the decision maker is not independent. Tribunals and in-house adjudicators are the very epitome of this problem as the executive which is a party to the dispute may also be the one to appoint the adjudicator, determine their term of office and their terms and conditions of service.

The third is the gap of the exception. Emergencies are the circumstances in which the normal course of procedure is most likely to be suspended and judicial review most likely to be weakened. A theory of procedural fairness which is silent on emergencies is precisely silent in the area where the risk to individual liberty is at its highest.

The three gaps reappear throughout the rest of the chapters. Chapter 3 begins by setting out the doctrines which constitute the core of procedural fairness in the three jurisdictions under study so that the gaps can be properly situated within the context of what the law already provides.

CHAPTER 3: THE DOCTRINAL ARCHITECTURE OF PROCEDURAL FAIRNESS: INDIA, THE UNITED STATES AND THE UNITED KINGDOM

3.1 India

3.1.1 The constitutional foundation: Maneka Gandhi and the fusion of Articles 14, 19 and 21

For the first 25 years of the Constitution the Supreme Court interpreted the guarantee in Article 21 that no person shall be deprived of life or personal liberty "except in accordance with procedure established by law" as being satisfied by any procedure enacted by a competent legislature. A.K. Gopalan v. State of Madras AIR 1950 SC 27 was the case which gave that very narrow reading and left the substance of the procedure entirely to the legislature. That position was changed in Maneka Gandhi v. Union of India (1978) 1 SCC 248. The petitioner's passport had been impounded under section 10(3)(c) of the Passports Act, 1967 "in the interests of the general public" and the Government initially refused to give any reasons. The Court held that the procedure referred to in Article 21 must be "fair, just and reasonable" and not arbitrary, fanciful or oppressive and that Articles 14, 19 and 21 are not mutually exclusive but form a single guarantee. The principle of natural justice was held to be implicit in that requirement and the rule against arbitrariness in Article 14 was applied to the procedure itself. The impounding was not set aside, the Court observing that the Government had promised to hear the petitioner after the fact, but it did lay down that the power to impound could be exercised only after fair procedure.

The decision has two effects on the argument of this paper. Firstly it makes procedural fairness a constitutional requirement which binds both Parliament and the Executive. A statute which provides for a manifestly unfair procedure is open to challenge. Secondly it opens the way for the view (which was developed in later cases) that fairness can be claimed in respect of any state action which affects a right, whether or not that action is of a judicial or quasi-judicial character.

3.1.2 Audi alteram partem: notice, disclosure, and hearing

The first rule of natural justice is that there must be adequate notice of the case, access to the material and a proper opportunity to be heard. The Supreme Court has held these to be constituent elements of a fair hearing and has held that they must be applied in the context of the particular case. In A.K. Kraipak v. Union of India (1969) 2 SCC 262 the Court said that the rules of natural justice are rules to secure justice or to prevent miscarriage of justice and that they apply to both administrative and quasi-judicial proceedings unless expressly excluded by statute. The case is of course well known for its pronouncement on the rule of bias (discussed below), but its real significance is that it effectively swept away the distinction between administrative and quasi-judicial action which had previously been the basis of the doctrine.

Another significant case is Mohinder Singh Gill v. Chief Election Commissioner (1978) 1 SCC 405 which came before the Court shortly after Maneka Gandhi. The Election Commission had ordered a fresh poll in a constituency in the wake of reports of violence, without giving the candidate any opportunity to be heard. The Court was of the view that in the circumstances the Commission was not bound to give a hearing as the exigency of having to conduct the election within the time frame prescribed by law would have made a full hearing impossible. The Court did however reiterate a principle of continuing importance, namely that an administrative order is to be judged on the reasons given at the time it is made and cannot be justified by the submission of fresh reasons in an affidavit. That case therefore is a good illustration of both the contextual nature of the hearing right and the link between fairness and reasoned decision making.

3.1.3 Nemo judex: the rule against bias

The second rule is that the decision maker must be disinterested. In Kraipak, a member of the selection board for the Indian Forest Service was himself a candidate for selection and sat on the board when his own name came before it. The Court held the selection to be vitiated and applied a test based on the likelihood of bias,

the impression which a reasonable person would form rather than proof of actual bias. That test was developed in Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation AIR 1959 SC 308 and further elaborated in Ranjit Thakur v. Union of India (1987) 4 SCC 611 where a court-martial sitting in the case of an accused was set aside because the officer in command had a prior grievance with the accused.

Indian law does have a very limited range of exceptions for necessity (where there is no other competent authority), but the area of institutional bias is far less developed. The argument in the tribunals litigation over executive control of appointments and tenure is in essence an argument about institutional bias.

3.1.4 Reasoned decisions

A further element of fairness which is now generally accepted (though not one of the original ingredients of natural justice) is the duty to give reasons. In Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India (1976) 2 SCC 981 the Supreme Court held that where an authority is exercising quasi-judicial functions it is bound to give reasons and that the requirement of reasons was an essential safeguard against arbitrary exercise of power. In S.N. Mukherjee v. Union of India (1990) 4 SCC 594 a Constitution Bench held that the requirement of reasons applies to authorities exercising quasi-judicial functions and that reasons are necessary so that the court can exercise its power of judicial review. Kranti Associates Pvt. Ltd. v. Masood Ahmed Khan (2010) 9 SCC 496 compiled the authorities and set out the reasons for the rule: it promotes fairness, ensures that the decision is considered and is rational, assists the appellate and review courts and fosters public confidence in the decision making process.

3.1.5 Exceptions, necessity and the prejudice requirement

Natural justice in India is not an absolute principle. The major exception is where a hearing is simply impracticable or rendered impossible by the nature of the case. In Union of India v. Tulsiram Patel (1985) 3 SCC 398 a Constitution Bench considered the second proviso to Art 311(2) which permits the dismissal of a civil servant without an inquiry in certain circumstances, one of which is where it is not reasonably practicable to hold an inquiry. The Court held the proviso to be valid and that natural justice may be dispensed with either by statute or by the exigencies of the case. It was necessary for the authority to record in writing its reasons for dispensing with the inquiry and the decision to dispense with the inquiry was of course subject to judicial review.

A second line of cases deals with the consequences of a breach of procedure. In State Bank of Patiala v. S.K. Sharma (1996) 3 SCC 364 the Court drew a distinction between a breach of the substantive principles of natural justice (which will normally result in the decision being invalid) and a breach of a procedural provision (in which the complainant has to show that he has been prejudiced). In Aligarh Muslim University v. Mansoor Ali Khan (2000) 7 SCC 529 the "useless formality" doctrine was applied and it was held that relief would not be granted where only one conclusion was possible on the facts admitted. Dharampal Satyapal Ltd. v. Deputy Commissioner of Central Excise, Gauhati (2015) 8 SCC 519 is a good summary of the exceptions and the point that natural justice is not a rigid code.

3.1.6 Legitimate expectation, arbitrariness and proportionality

3.1.6 Legitimate expectation, arbitrariness and proportionality

Three further doctrines add to the concept of natural justice. There is the doctrine of legitimate expectation which was recognised in cases such as Navjyoti Coop. Group Housing Society v. Union of India (1992) 4 SCC 477 and Punjab Communications Ltd. v. Union of India (1999) 4 SCC 727. This provides that a public authority may be required to act in accordance with a reasonable expectation of treatment which it has created through a promise, a consistent practice or a published policy. This is relevant to the present paper as it links the concept of fairness with guidance: if an authority issues guidance and people plan their lives on the basis of that guidance, the authority may be in breach of natural justice if it subsequently abandons that guidance.

The doctrine of arbitrariness (traced to E.P. Royappa v. State of Tamil Nadu (1974) 4 SCC 3 and applied to legislation in Shayara Bano v. Union of India (2017) 9 SCC 1) equates arbitrariness with a violation of equality under Article 14. The doctrine of proportionality (which the Court had applied in service law and which it developed in Om Kumar v. Union of India (2001) 2 SCC 386 and Modern Dental College and Research Centre v. State of Madhya Pradesh (2016) 7 SCC 353) requires that a restriction on a right must (a) pursue a legitimate aim, (b) be rationally connected to that aim, (c) be necessary in the sense that no less restrictive alternative would achieve the aim and (d) strike a proper balance between the benefit and the burden. Proportionality was given a central place in the privacy judgment K.S. Puttaswamy v. Union of India (2017) 10 SCC 1 and as Chapter 6 will show it has become the principal tool of judicial control over emergency measures.

3.1.7 Rule-making and the legislative exception

Indian law, as in English and American law, has always treated the making of general rules as outside the ambit of the hearing right. In Union of India v. Cynamide India Ltd. (1987) 2 SCC 720 the Supreme Court held that price fixing under a statute was a legislative function and that the rules of natural justice did not require a hearing as the function was one which affected a class and not an individual. That is the Indian equivalent of the American distinction between Londoner v. Denver and Bi-Metallic (discussed below) and has the obvious consequence that the doctrine of natural justice on its own confers no right to a hearing in the making of rules. Any right to participate in rule making in India must therefore be derived from statute, from executive policy or from the practice of the regulator. The significance of that for guidance documents is the subject of Chapter 4.

3.2 The United States

3.2.1 Constitutional due process

The due process clauses of the 5th and 14th Amendments are the constitutional floor in the US and the APA is the statutory framework. The constitutional principle is that there is a distinction between the adjudication of individual cases and the creation of general rules. In Londoner v. Denver, 210 U.S. 373 (1908), the Court held that a landowner who was assessed for a street improvement was entitled to notice and a hearing as the assessment was in respect of a small number of individuals on individual grounds. In Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915), the Court held that a general increase in the valuation of all taxable property in Denver did not require a hearing as the rule was one which applied to a large number of people and the remedy for those affected was to be found in the political process. Those two cases established the parameters of the debate which continues to this day as the line between the particular and the general, between adjudication and legislation is easy to draw in theory and very difficult to draw in practice.

The modern law of due process in the context of adjudication was established in Goldberg v. Kelly, 397 U.S. 254 (1970) which required an evidentiary hearing prior to the termination of welfare benefits and Board of Regents v. Roth, 408 U.S. 564 (1972) which established that due process protection is only required where there is a protected property or liberty interest. The most significant case in this area is Mathews v. Eldridge, 424 U.S. 319 (1976) which held that the amount of process due is a function of a balancing exercise between the private interest affected, the risk of an erroneous deprivation under the existing procedures and the probable value of additional safeguards and the government's interest (including the fiscal and administrative cost of providing additional process). Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) applied that framework to require a pre-termination opportunity to be heard in the case of a public employee with tenure.

On bias the Court has held that due process requires an impartial decision maker. In Tumey v. Ohio, 273 U.S. 510 (1927) and Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) the Court has recognised that a direct pecuniary interest or an extreme risk of bias is a constitutional violation. In Withrow v. Larkin, 421 U.S. 35 (1975) the Court held that the mere fact that an agency has both investigative and adjudicative functions does not by itself offend due process so long as the decision makers are not shown to be actually biased. That case

is important to this paper in that it places the burden of showing structural bias on the person who complains of it and it is the doctrine which underpins the later disputes about in house adjudication.

3.2.2 The Administrative Procedure Act

The main body of federal administrative law is contained in the Administrative Procedure Act (5 U.S.C. §§ 551-559 and 701-706). With respect to rulemaking, § 553 requires that in the case of informal or notice and comment rulemaking the agency shall publish a notice of proposed rulemaking in the Federal Register, provide interested persons with an opportunity to submit written comments and then, after consideration of the matter before it, adopt the rules in a form which contains a concise general statement of the basis and purpose of the rules. § 553(b)(A) provides an exemption from the notice and comment requirement for "interpretative rules, general statements of policy or rules of agency organization, procedure or practice" and § 553(b)(B) permits an agency to waive the requirement where good cause is shown. The exemption for interpretive rules and policy statements is the basis of the American law on guidance documents discussed in Chapter 4. With respect to formal adjudication, §§ 554, 556 and 557 set out the requirements of notice, a hearing before the agency or an ALJ, the right to present evidence and to cross examine, a decision on the record and the separation of the investigative and prosecutorial functions from the adjudicative functions.

Judicial review under § 706 allows a court to set aside agency action which is arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law, or which is the product of a failure to observe a procedure required by law. The arbitrary and capricious standard has evolved into a doctrine of reasoned decision making. In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), the Court required a searching and careful inquiry into the agency's decision. In Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983), it was held that the agency must examine the relevant data and articulate a satisfactory explanation and that rescission of a rule requires reasoned analysis. In Department of Homeland Security v. Regents of the University of California, 591 U.S. 1 (2020), the Court held that the agency must consider the important aspects of the problem (including reliance interests) and that it cannot rely on post hoc rationalisations (a principle reaffirmed in Department of Commerce v. New York, 588 U.S. 752 (2019) where the rationale given for the addition of the citizenship question to the census was found to be contrived). These are the American equivalent of the Indian principle in Mohinder Singh Gill that an order must stand or fall on the reasons recorded when it was made.

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) established a limit on judicial creativity in this area. The Court held that courts could not impose on agencies procedural requirements which went beyond those set out in the APA and in the agency's statute and thus rejected the notion that courts could create a common law of administrative procedure. The effect of that decision is that in the US the content of procedural fairness in rulemaking is essentially statutory. That is in contrast to India where there is no such statute and the courts in principle have more scope to develop procedural requirements as a matter of constitutional law (though they have not done so in respect of rulemaking).

3.2.3 Statutory interpretation and agency power after Loper Bright

Procedural fairness and statutory interpretation are of course related. The more latitude an agency has to interpret its own statute the greater its law making power and the more important the procedures by which it exercises that power.

3.3 The United Kingdom

English law provided the basis for a great many of the principles which India and other common law jurisdictions have since adopted. Ridge v. Baldwin [1964] AC 40 established that the principles of natural justice apply to the making of administrative decisions which affect a person's rights. Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 (the GCHQ case) was the case which laid down the

modern classification of the grounds of judicial review as illegality, irrationality and procedural impropriety and held that national security could be a reason for not giving a hearing but that it was for the court to decide whether the government had in fact shown that national security was at stake. R v. Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531 recognised that in the interests of fairness it may be necessary to disclose the gist of the case and the reasons for a decision. In Osborn v. Parole Board [2013] UKSC 61 the Supreme Court stressed that the purpose of a hearing is not simply to improve the quality of the decision but to give effect to the individual's right to participate (a statement of the dignitary theory discussed in Chapter 2). On proportionality the test set out in Bank Mellat v. HM Treasury (No. 2) [2013] UKSC 39 is the modern one.

The UK has also established a statutory framework for tribunals via the Tribunals, Courts and Enforcement Act 2007 which created a single two tier tribunal system and provided for the independence of tribunal judges. In R (UNISON) v Lord Chancellor [2017] UKSC 51 the Supreme Court found employment tribunal fees to be unlawful on the grounds that they were a barrier to access to justice. The English experience is therefore of relevance to Chapter 5 as a model of statutory tribunal independence.

3.4 Synthesis: What the Core Doctrines do and do not cover

The three systems are in broad agreement. Each requires notice and an opportunity to be heard where an individual is likely to be adversely affected by a decision, requires the decision maker to be free from bias, increasingly requires reasons and will accept that those requirements may be modified in the circumstances of urgency, necessity or the nature of the function. Each will exempt general rule making from the hearing requirement and so will leave participation in rule making to statute or practice.

They differ in the source and the form of the rules. Indian law is constitutional and judge made and is therefore flexible with the attendant advantages and disadvantages of that form. American law is both statutory and constitutional and is highly detailed, having a very comprehensive procedural code which the courts are expressly prohibited from adding to. English law is of common law origin but is increasingly statutory in the tribunal context.

For the purposes of this analysis the bottom line is that the core principles deal pretty well with the individual hearing and pretty badly with the three gaps identified in Chapter 2. They don't tell us how to deal with instruments which have an effect on conduct without themselves having been developed through some form of participatory process; they don't tell us what level of independence is required of the adjudicator (as distinct from whether or not the particular decision maker was biased); and they don't tell us how far in the circumstances of an emergency fairness may be permitted to be compromised beyond the general recognition that urgency is a factor. The next three chapters look at each of those in turn.

CHAPTER 4: GUIDANCE DOCUMENTS AND THE BYPASSING OF RULEMAKING PROCEDURE

4.1 The phenomenon of soft law in administration

Regulators have a number of ways in which they communicate with the public. At one extreme are rules which are the product of a formal, participatory process and which have the force of law. At the other extreme are the more informal means of communication such as a press release, a speech by an official or an answer to a frequently asked question. In between these two lie a whole range of instruments which the agencies themselves would categorise as guidance. These include circulars, master directions, policy statements, interpretive bulletins, staff manuals, no-action letters and enforcement priorities. They are issued for good reasons. Guidance can be used to clarify the meaning of a complex statute, to set out how the agency intends to exercise its discretion, to ensure consistency across the field and to let the regulated community know what to expect. All of this can be done at a fraction of the cost and time of a formal rule making exercise.

The legal import of guidance is dependent upon its classification. If it is a rule in the legal sense then it must be made in accordance with the procedure for rules (in the US this is the notice and comment procedure and in India it is usually the procedure in the parent statute, which in some cases will involve laying before Parliament). If it is guidance then the procedure does not apply and the instrument is not binding. The classification therefore serves a significant purpose and it also creates an incentive. An agency which wants to impose a requirement quickly and without the onerous process of public participation will have a strong incentive to characterise that requirement as guidance and then to rely on its practical power over the regulated parties to ensure compliance.

The real power is in the practical effect. A bank, an insurer, a quoted company or a licensed professional who has been told by its regulator what the regulator thinks the law is, is not going to go to the trouble of testing that interpretation by non-compliance. The regulator has the power of licence, the power of approval, the power of inspection and the power of penalty. A 'non-binding' statement is therefore in effect binding. That's what is known as the problem of practical or pragmatic bindingness and it's a problem that the law has struggled with as it's very difficult to prove and the benefits of guidance are very real.

This chapter looks at the issue under both American and Indian law. It asks whether the formal distinction between binding and non-binding offers sufficient protection to the people affected and it looks at the first of the hypotheses (H1) set out in Chapter 1.

4.2 The rise of guidance and the avoidance of notice and comment

The development of guidance is a well-documented phenomenon in the regulatory systems of many countries. In the US the process of notice and comment rulemaking has become increasingly complex over the last 50 years with the courts requiring agencies to respond to substantial comment, to base their rules on a developed record and to provide detailed justification for their decisions. This has been described as the 'ossification' of the rulemaking process and Thomas McGarity's article "Some Thoughts on 'Deossifying' the Rulemaking Process" (1992) 41 Duke L.J. 1385 was a classic piece arguing that the sheer weight of the process had led agencies to adopt less formal modes of operation. Robert Anthony's article "Interpretive Rules, Policy Statements, Guidances, Manuals and the Like: Should Federal Agencies Use Them to Bind the Public?" (1992) 41 Duke L.J. 1311 was a piece that took the issue at a fundamental level and argued that agencies should not be permitted to bind the public through instruments which had not gone through the rulemaking process. Peter Strauss's "The Rulemaking Continuum" (1992) 41 Duke L.J. 1463 was a more sophisticated piece which viewed guidance as one point on a continuum of agency lawmaking and one which had legitimate uses which should be allowed.

The same is true in India (though the structure of the Indian system is of course different). The principal alternative to formal subordinate legislation there is the executive instruction or the regulator's circular. The Indian statutes will often confer on the Central Government or on a statutory body the power to make rules or regulations (subject to prior publication, laying before Parliament and in some cases consultation). In addition to this there is a very large volume of circulars, notifications, office memoranda and directions issued by the same authorities under general powers of administration or under provisions which permit the issue of directions or guidelines. The SEBI for instance makes regulations under s.30 of the SEBI Act, 1992 (s.31 of that Act requires such regulations to be laid before Parliament) but it also issues a very large number of circulars and master circulars under its general powers in s.11 of the Act (these are not subject to the requirement of prior publication or laying before Parliament). The Reserve Bank issues master directions under powers such as s.35A of the Banking Regulation Act, 1949. The tax authorities issue circulars under powers such as s.119 of the Income Tax Act, 1961. In each case there is a formal system of rule making, but the bulk of the actual regulatory content is in the instruments which fall outside that system.

4.3 The United States

4.3.1 The statutory exemption and the classification problem

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4.3.1 The statutory exemption and the classification problem

Section 553(b)(A) of the APA excludes from the notice and comment requirements "interpretative rules, general statements of policy or rules of agency organization, procedure or practice". That is a perfectly legitimate distinction. A legislative or substantive rule creates new legal obligations and new legal rights and is a rule of law if properly made. An interpretative rule is a statement of what the agency takes the statute or existing rule to mean. A general statement of policy is a statement of how the agency intends to exercise its discretion in the future. In theory neither of the latter two types of rule creates new law at all; the first is simply a statement of the agency's view of the law as it currently exists and the second is a statement of an intention to do something in the future (a tentative intention). It is only in the individual case that the law is given its final form by a court or by the agency itself.

The problem has always been the line between the two categories. The Supreme Court has recognised that the line is "fuzzy" in that no single test will work in every case. It has nonetheless stated the general principle that a substantive rule is one which has the force and effect of law, whereas an interpretive rule is one which merely advises the public as to the agency's construction. Chrysler Corp v Brown 441 U.S. 281 (1979) and Shalala v Guernsey Memorial Hospital 514 U.S. 87 (1995) are the leading authorities.

The lower federal courts (and most particularly the D.C. Circuit) have developed the working tests. The classic formulation is in Pacific Gas & Electric Co. v. Federal Power Commission, 506 F.2d 33 (D.C. Cir. 1974) which distinguishes a policy statement (which merely announces an intention to do something without establishing a binding norm) from a rule which is intended to be and which in fact is a binding norm. American Mining Congress v. Mine Safety & Health Administration, 995 F.2d 1106 (D.C. Cir. 1993), set out four questions to assist in determining whether an agency instrument is a legislative rule: (1) would there be an adequate basis in the statute for enforcement action in the absence of the instrument; (2) has the agency published the instrument in the Code of Federal Regulations; (3) has the agency explicitly relied on its general legislative authority; and (4) does the instrument in fact amend a prior legislative rule. In Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000), the court found that an EPA guidance document on emissions monitoring was in fact a legislative rule as the agency and the states treated it as mandatory and the document was drafted in the language of obligation. The court there was very clear about the concern that agencies may use guidance to impose requirements without the benefit of public comment. A similar approach was taken in General Electric Co. v. EPA, 290 F.3d 377 (D.C. Cir. 2002) where guidance on the disposal of PCBs was held to be a legislative rule which required notice and comment.

The cases demonstrate that American courts are prepared to look through the label where the evidence of binding effect is compelling. They have adopted a test which is based on the agency's own conduct and the language of the document and it is entirely possible for an agency to mitigate the risk by drafting guidance in a purely hortatory fashion and by leaving the formal possibility of deviation. The classic risk is therefore that the guidance will be drafted to avoid the label rather than the effect. A further example was United States v Texas where the Fifth Circuit held that the 2014 memorandum establishing a programme of deferred action for certain immigrants (DAPA) was a substantive rule which would have been subject to notice and comment and the Supreme Court upheld that position by a 50-50 split (579 U.S. 547 (2016)). The case serves to illustrate that the issue may be of considerable consequence and potentially very political and that the courts have not applied a single, predictable standard.

4.3.2 Interpretive rules and judicial deference: Perez, Auer, and Kisor

The treatment of interpretive rules is of course intimately connected with the doctrine of deference. In Auer v. Robbins, 519 U.S. 452 (1997), the Court held that a court will defer to a reasonable interpretation of its own ambiguous regulations by an agency, even if that interpretation is contained in an informal document such as an amicus brief or a guidance letter. John Manning's article "Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules" (1996) 96 Columbia Law Review 612 took that doctrine to its logical conclusion in that it allowed the agency to make and interpret its own law in contravention of the principle of separation of functions. The force of that argument was particularly strong in the context of guidance. If the agency can issue guidance without any formal procedure and the courts will defer to that guidance as to the meaning of the agency's regulations, then the agency can in effect amend its rules by interpretation.

In Perez v. Mortgage Bankers Association, 575 U.S. 92 (2015), the Supreme Court held that an agency which has issued an interpretive rule is not required to follow notice and comment in order to change it. That was a rejection of a D.C. Circuit rule which had held that notice and comment was required to amend a definitive interpretation as it was to create it. It was a decision based on the statutory text and on Vermont Yankee, and it effectively increased the agency's flexibility in this area.

In Kisor v. Wilkie, 588 U.S. 558 (2019), the Court upheld Auer deference but characterised it as a very limited doctrine. Deference is only available where the regulation is genuinely ambiguous after the Court has gone through all the normal tools of construction, where the agency's interpretation is reasonable, where it is the agency's own authoritative or official position, where it is based on the agency's expertise and represents its considered judgment rather than an ad hoc position taken in the course of litigation or a new interpretation which would be a source of surprise. The decision is of some interest in that it recognises the very real concerns of those who feared that guidance could be used as a mechanism to circumvent the rule making process and it does so by imposing appropriate conditions.

4.3.3 The effect of Loper Bright on guidance

Loper Bright Enterprises v. Raimondo (2024) is about the interpretation of statutes rather than regulations, but the impact on guidance is very significant. Prior to Loper Bright, an agency interpretation of an ambiguous statute that had been issued in the course of a notice and comment rulemaking or formal adjudication was entitled to Chevron deference. Interpretations contained in less formal materials (opinion letters, policy statements, manuals etc.) were generally not entitled to Chevron deference, being instead subject to the more limited Skidmore deference which is based on the thoroughness, validity and consistency of the agency's reasoning (the Mead Corp. line of cases, 533 U.S. 218 (2001) and Skidmore v. Swift & Co., 323 U.S. 134 (1944)). Post Loper Bright, the rule is that the court must independently determine the meaning of the statute and will only give Skidmore-type deference to the agency's view where that view is persuasive. In respect of guidance documents the outcome is unequivocal. An interpretation in guidance is not binding on a court and will only be given Skidmore-type respect to the extent that it is persuasive. The practical power of the guidance is unaffected, but the legal protection it has in court has been eroded.

The decision also changes the incentives. If the courts are no longer going to give deference to agency interpretations even where those interpretations have been adopted as part of the rulemaking process, then an agency has less incentive to bear the cost of rulemaking in order to get that deference. That may result in agencies relying more on guidance and enforcement (where there is no judicial test of the outcome at all) or alternatively in relying on express delegations of discretion in the statute (where deference to the exercise of the delegated authority continues). It's not yet clear what the net effect will be in terms of guidance usage and that will have to be seen over the coming years.

4.3.4 Executive regulation of guidance

The American system has also tried to regulate guidance via executive rather than judicial means. In 2007 the Office of Management and Budget issued a Final Bulletin on Agency Good Guidance Practices (72 Fed. Reg. 3432 (25 Jan 2007)) which required agencies to make their significant guidance available to the public, to allow comment on it and to state that the guidance is not binding. In 2019 Executive Order 13891 directed agencies to adopt guidance procedures and to publish guidance on a central website and stated that guidance is not to be used to impose binding obligations. That order was revoked in 2021 by Executive Order 13992. The Administrative Conference of the United States in Recommendation 2017-5, Agency Guidance Through Policy Statements, recommended that agencies avoid using guidance to bind the public, that they should allow the public to put forward alternative approaches and that they might, on a voluntary basis, consider using a notice and comment procedure for significant guidance. The history is thus one of both recognition of the problem in the American system and of the transience of executive solutions as they can be undone by any administration.

4.4 India

4.4.1 The legal status of circulars and executive instructions

The Supreme Court has most fully considered the status of administrative circulars in the context of tax and customs cases where there are literally thousands of circulars issued by the CBDT and the CBIC respectively. The principles are fairly well settled. A circular issued by the Board under a statutory power will bind the officers of the department who are subordinate to the Board and the department cannot take a position inconsistent with it (Paper Products Ltd. v. Commissioner of Central Excise (1999) 7 SCC 84 and Commissioner of Central Excise v. Dhiren Chemical Industries (2002) 2 SCC 127). The circular does not however bind the assessee in the sense of restricting the assessee's right to argue that the statute has a different meaning. It does not bind the courts who are entitled to determine the meaning of the statute for themselves. In Commissioner of Customs v. Indian Oil Corporation Ltd. (2004) 3 SCC 488 the court held that a circular cannot create a burden or take away from the statute, though it may be a source of relief within the statute. The same principle is apparent in Union of India v. Azadi Bachao Andolan (2004) 10 SCC 1 and in Commissioner of Central Excise, Bolpur v. Ratan Melting and Wire Industries (2008) 13 SCC 1 which reiterates that a circular which is contrary to the statute has no legal force, distinguishing between the effect of the circular on the department and the effect on the courts.

It's a perfectly coherent doctrine, it's a doctrine of hierarchy rather than one of process. It deals with the question of whether the instrument is consistent with the statute rather than the question of whether the instrument was produced by a process which gave the affected person an opportunity to be heard. A circular which is consistent with the statute may well be binding on officers, may well shape the behaviour of the regulated entities and may well have been prepared in total absence of any consultation.

A like approach applies to the executive instructions of the Government in the exercise of the executive power under Articles 73 and 162. The Supreme Court has held that such instructions may be used to fill gaps in a scheme of legislation but they may not in any way supplant or conflict with the statute or the rules made under it. In Vasu Dev Singh v. Union of India (2006) 12 SCC 753 the Court held that instructions issued by the executive where the statute or the rules are silent are valid only to the extent that they are supplementary and not in any way in derogation of the statute and that an instruction cannot create a restriction on a right. The principle thus places a limit on what the instructions can do but says absolutely nothing as to how they are to be made.

4.4.2 Fairness read into guidance: Rajesh Agarwal and IAMAI

Indian courts have on occasion applied the principles of procedural fairness and proportionality to guidance instruments which had an effect on an individual's rights. Two of the decisions demonstrate the possibilities.

In State Bank of India v. Rajesh Agarwal (2023) 6 SCC 1 the Supreme Court was dealing with the Reserve Bank of India's Master Directions on Frauds. Those Directions permitted a bank to classify an account as fraudulent and the consequences of that classification were very serious indeed (in effect the borrower would be cut off from all institutional finance). The Master Directions did not provide for any hearing prior to classification. The Court held that the principles of natural justice must be incorporated into the Directions and that the borrower must be given notice, an opportunity to respond to the material and a reasoned order. That is of course of great significance to this paper as it demonstrates that where a regulatory instrument has the potential to have serious consequences for an individual, the Court may be prepared to impose a requirement for procedural protection at the point of application even if the instrument itself is silent on the matter. It also shows the limits of that approach as the Court provided for the principles of natural justice at the stage of the individual hearing, but did nothing to address the process by which the Directions themselves were made.

In Internet and Mobile Association of India v. Reserve Bank of India (2020) 10 SCC 274 the Court set aside the April 2018 circular issued by the Reserve Bank which directed regulated entities not to deal in virtual currencies or to provide services to persons who did. Applying the proportionality test the Court found that the Bank had not established that virtual currency trading had in any way caused harm to the entities it was regulating and that the measure (in effect a ban on the exchanges) was disproportionate. The case is of some significance in that it treated a circular issued to regulated entities as an exercise of power which could be tested against the fundamental right to carry on a trade and it showed that a circular from the regulator can in fact have the effect of a prohibition. It did not require that the circular be issued after consultation and the Court looked at the substance of the measure rather than the process by which it was issued.

4.4.3 Consultation in Indian regulatory practice

Indian law imposes very few general duties to consult. The Pre-Legislative Consultation Policy of 2014 (a policy of the Union Government) requires that departments should publish draft legislation and a summary of it on their departmental website for a minimum of 30 days and take into account the comments received. It is a policy rather than a statute and it applies only to primary legislation (not to subordinate legislation or guidance). Certain specific statutes do impose consultation or transparency requirements on particular regulators. The Telecom Regulatory Authority of India Act, 1997 requires the TRAI to ensure transparency in the exercise of its powers and TRAI has developed the practice of issuing consultation papers and holding open house discussions. The Insolvency and Bankruptcy Board of India has adopted regulations on the mechanism for issuing guidelines which require a consultation process. The SEBI has, as a matter of practice, published draft regulations and consultation papers for comment. These are all good examples but they are all dependent upon the particular regulator's statute or practice and they don't extend to the vast number of instruments issued by the Reserve Bank, the tax authorities, the ministries and all the other bodies which have no such obligation.

Some regulators also run informal guidance schemes. The SEBI (Informal Guidance) Scheme, 2003 enables market participants to ask the staff for their view on the application of the securities laws to a particular set of facts and to receive a response which is expressly not binding on the Board. Such schemes have the advantage of certainty and of being cheap and they also demonstrate how the market will regard non-binding guidance as authoritative.

4.5 Comparative Analysis

Two features of the comparison are worth highlighting.

Firstly the two systems are asking different questions. American law (via the APA) is asking whether the instrument should have been made by that particular process. That's a question of process and the answer will depend on whether it is in fact a legislative rule. Indian law is asking whether the instrument is consistent with the statute and in the appropriate circumstances with the Constitution. That's a question of substance and hierarchy. The Indian approach protects the statute and the individual's constitutional rights but does nothing to protect participation. The American approach protects participation (at least in theory) but that protection is predicated on the classification of the instrument and is therefore open to the kind of strategic behaviour we've already discussed.

Secondly, both systems have developed doctrines of correction which operate at the point of application. The US courts require the agency to be open-minded in the application of a policy statement and to be prepared to consider a challenge to the policy in the individual case. Decisions such as Appalachian Power look at whether the guidance is in fact being applied as if it were mandatory. The Indian courts have similarly developed a doctrine of fairness in the application of the instrument as in Rajesh Agarwal. In both cases the correction is post hoc and applies to the individual rather than at the level of the instrument itself.

The comparison also highlights a difference in the distribution of institutional responsibility. In the US we have executive and administrative bodies that have on numerous occasions produced voluntary guidelines on good guidance practice and a research institution (the Administrative Conference) has made recommendations. In India there is no such body with a standing mandate to make recommendations on procedural reform across the various regulators and the Law Commission's attention to tribunals has not been mirrored by any attention to guidance.

4.6 Evaluation of Hypothesis H1

The first theory was that the classification of an instrument as guidance is used to circumvent the participatory rulemaking process and that courts who rely on the label rather than the effect leave a protection gap. The analysis does some support the hypothesis and some modify it.

The hypothesis is borne out by the fact that there is clearly an incentive to use guidance in both systems, the amount of guidance is substantial and the formal classification of the guidance dictates the process. In the US the D.C. Circuit in both Appalachian Power and General Electric has recognised the risk and has responded to it where there is clear evidence of binding effect. In India the position of Rajesh Agarwal and IAMAI is that the Supreme Court is aware of the potential for circulars to have the effect of rules. The hypothesis is also supported by the absence of any requirement in the Indian position for the parties to have participated in the making of the guidance, the courts simply looking at consistency with the statute and proportionality of the measure.

The hypothesis must be qualified in two ways. Firstly it would be wrong to regard guidance as per se illegitimate. The efficiency and certainty that guidance brings are real and the result of a very demanding procedure for all agency pronouncements could well lead to less rather than more communication between the regulator and the regulated. The ossification literature is clear on this point in that a very rigid rulemaking process can in fact lead agencies to take informal action. Secondly the evidence of agencies deliberately mislabelling rules as guidance is largely anecdotal and drawn from the litigated cases which is a highly biased sample. There has been no systematic study of the extent of strategic behaviour in India.

The better view is that the law requires a graduated approach. Instruments which are in effect binding should be subject to the full participatory process. Instruments which are genuinely just guidance (e.g. explanations, statements of enforcement priorities) should not be subject to the full procedure but should be published, be

accessible, be subject to a duty to consider challenges in the individual case and be open to review. The proposals for reform in Chapter 8 are based on that approach.

CHAPTER 5: ADMINISTRATIVE TRIBUNALS, IN-HOUSE ADJUDICATORS AND THE INDEPENDENCE OF THE DECISION-MAKER

5.1 The problem of the adjudicator

Tribunals and in house adjudicators were created precisely because the normal courts were seen as being too slow, too formal and too general to deal with the sheer volume and the technicality of the disputes which arise under modern regulatory statutes. A tribunal can specialise, can have members with the requisite technical background, can be more flexible in the way it applies the rules of evidence and can deal with cases much more quickly and at much lower cost than a court. Those are genuine advantages and any modern state would be utterly dysfunctional without them. The downside is of course that a tribunal which is staffed, funded and controlled by the very Executive which is a party to the majority of the disputes it deals with is in a position of structural pressure which the court system is specifically designed to avoid.

The point is directly on the rule against bias as set out in Chapter 3. The classical rule is the rule against the personal interest of the individual decision maker. A complete theory of procedural fairness must also have regard to the interest of the institution itself. A decision maker may have no personal interest in the case at all, yet be appointed for a short period, be dependent on the executive for reappointment, be paid and housed by a ministry which is a party to the proceedings and be removable at the executive's pleasure. A party to the proceedings may therefore rationally suspect that the hearing is not a real hearing despite its formality. That is the second gap identified in Chapter 2, the gap of the forum.

The individual hearing rights of notice, disclosure and reasons of course don't close the gap as they can be fully complied with by a dependent adjudicator. The doctrine of prejudice (which requires the complainant to show what difference a fair procedure would have made) is also of little assistance in this context as the defect is structural and the impact of it cannot be traced to any one decision. The law must therefore look at the structure itself: the conditions of appointment, tenure, remuneration and removal of adjudicators and the extent to which the executive can influence them.

This chapter looks at how the problem has been dealt with in the US and India and it tests the second hypothesis (H2).

5.2 The United States

5.2.1 Article III, public rights and the limits of non-judicial adjudication

The American analysis starts with Article III of the Constitution which provides that the judicial power of the United States shall be vested in the federal courts and that the judges thereof shall hold office during good behaviour and that their salaries shall not be diminished. Those are the constitutional hallmarks of judicial independence. The issue is how much adjudication can be delegated to bodies which do not have those guarantees.

The Court's position has always been rooted in the concept of public rights. It was established in Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856), where the Court held that Congress may delegate to non-judicial bodies the determination of issues arising out of the Government's own dealings with private individuals (e.g. the collection of revenue from a customs officer) and that such matters do not require adjudication by an Article III court. The principle was developed in Crowell v. Benson, 285 U.S. 22 (1932), where the Court held that an administrative agency could make findings of fact in a workers' compensation claim between private parties so long as an Article III court retained the power to review questions of law and jurisdictional facts. The principle was limited in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), in which a plurality held that bankruptcy courts could not

constitutionally exercise the jurisdiction conferred upon them over state law claims, and again in Stern v. Marshall, 564 U.S. 462 (2011) where the same reasoning was applied to a bankruptcy court's decision on a state law counterclaim. In the intervening period, Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986), took a more flexible approach, viewing the issue as one of balancing the interests in preserving judicial power against the practical advantages of administrative adjudication and holding that a party may waive the right to an Article III forum. In Oil States Energy Services, LLC v. Greene's Energy Group, LLC, 584 U.S. 325 (2018), the Court upheld the inter partes review procedure in the Patent Office as an exercise of the power to review the grant of a public franchise.

5.2.2 SEC v. Jarkesy and the Seventh Amendment

In Jarkesy, 603 U.S. 109 (2024), the Court held that where the SEC is seeking civil penalties against a defendant for securities fraud the defendant is entitled to a jury trial under the Seventh Amendment and the SEC may not therefore pursue such claims in its own administrative proceedings. The Court found that the claim was of the type traditionally tried in a court of law and that the public rights exception did not apply as fraud claims have common law analogues and are not unique to the government. The Court did not decide the additional arguments the Fifth Circuit had accepted, namely that Congress had unconstitutionally delegated to the agency the power to choose the forum and that the restrictions on the removal of administrative law judges were unconstitutional.

Jarkesy is of considerable significance in terms of procedural fairness but is of very limited scope. It constrains the range of cases in which an agency can use in-house adjudication and it does so in the name of a procedural right (the right to a trial by jury) which is very much associated with the concept of an independent fact finder. It only applies to claims which are of a type that would be common law claims for a legal remedy and it leaves untouched the vast number of in-house adjudications which fall within the realm of public rights (benefits, licences, immigration, customs etc). It was also a case about the allocation of cases between the agency and the court rather than one about the independence of the agency adjudicator.

5.2.3 Administrative law judges: appointment and removal

The APA provides a range of protections for the ALJ designed to ensure their independence. The ALJ is the one who conducts the formal adjudication and who will either make the initial decision or the recommended decision. The Act keeps the ALJ separate from the investigative and prosecutorial functions (5 U.S.C. § 554(d)), prohibits ex parte communication on the merits and under 5 U.S.C. § 7521 an ALJ may only be removed for good cause, which must be established and determined by the Merit Systems Protection Board after a hearing. The Supreme Court in Butz v. Economou, 438 U.S. 478 (1978) held that the functions of the ALJ are akin to those of a judge and that they are entitled to absolute immunity in the performance of their adjudicative duties.

The constitutional status of ALJs has been the subject of considerable recent litigation. In Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477 (2010), the Supreme Court held that ALJs are not independent federal judges and therefore are not entitled to the full range of protections afforded to federal judges under the Constitution. the structure of in-house adjudication at the threshold, rather than only after they had undergone it.

5.2.4 The tension between independence and accountability: Slaughter

The line of decisions on removal power reveals the classic tension that runs through American administrative law. On the one hand you have the principle that adjudicators and regulators must be free of political direction if they are to act fairly. On the other hand you have the principle that those who exercise executive power under the Constitution must be answerable to the President, the only official elected by the entire country. Humphrey's Executor v. United States, 295 U.S. 602 (1935), settled the issue in favour of independence for multi-member commissions which were viewed as exercising quasi-legislative and quasi-judicial functions.

The balance has been gradually eroded in the decisions in Free Enterprise Fund, Seila Law LLC v. CFPB, 591 U.S. 197 (2020) and Collins v. Yellen, 594 U.S. 220 (2021).

In Trump v Slaughter (29 June 2026) the Court ruled by a 6 to 3 majority (Roberts C.J. concurring) that the statutory protection against at-will removal of FTC commissioners is a violation of the separation of powers and overruled Humphrey's Executor. The majority appear to have considered the "quasi-legislative" and "quasi-judicial" labels to be inadequate and have left open the question of bodies which exercise no element of the executive power. Commentators have read the decision as at least temporarily preserving the special position of the Federal Reserve. The effect on adjudicators is not yet clear. The reasoning seems to be that the President has the power to remove principals who exercise executive power and it is not yet clear how it will operate in the case of ALJs (whose protections stem from the APA and the removal regime of 5 U.S.C. § 7521) or bodies whose function is primarily adjudicative. The decision could be read narrowly as being about the removal of principal officers or it could be read more broadly as a holding that independence from the power of the President is incompatible with the exercise of any form of executive power.

As to the significance of the decision for our purposes it's all about the structure of American thought. The Court is primarily concerned with the accountability of the Executive to the elected President and with the distribution of power between the branches. It is not really concerned with the independence of the judge as a safeguard to the litigant. The balance between these two considerations may be achieved, if at all, by structural remedies of the type proposed in the recent literature (mandatory replacement of departed officers, bipartisan appointment requirements, enhanced adjudicative functions of the courts etc) but that will be sorted out in future cases and through legislation.

5.3 India

5.3.1 The constitutional origins of tribunals: from Sampath Kumar to Chandra Kumar

Tribunals in India antedate the Constitution but their real significance came with the 42nd Amendment in 1976 which introduced Articles 323A and 323B. Article 323A gave Parliament the power to set up administrative tribunals to adjudicate disputes relating to the recruitment and conditions of service of public servants. Article 323B gave Parliament and the State Legislatures the power to set up tribunals for certain specified subjects (taxation, industrial and labour disputes, land reform, foreign exchange to name a few). Both of these articles allowed for the exclusion of the jurisdiction of all courts save that of the Supreme Court under Article 136. Parliament exercised the first of these powers in the Administrative Tribunals Act, 1985.

In S.P. Sampath Kumar v. Union of India (1987) 1 SCC 124 the Supreme Court confirmed the exclusion of High Court jurisdiction in the case of tribunals, treating them as a viable alternative to the High Courts so long as they were staffed by persons of the requisite competence and independence. The Court made a number of recommendations to ensure their independence, including that the Chairman should be a person of judicial experience and that the Executive should not have any control over appointments. These recommendations were not all implemented in the manner envisaged and the experience of the next decade led the Court to re-examine the matter.

In L. Chandra Kumar v. Union of India (1997) 3 SCC 261 a seven judge bench held that the power of judicial review exercised by the High Courts under Articles 226 and 227 and by the Supreme Court under Article 32 is part of the basic structure of the Constitution and that the clauses of Articles 323A and 323B which excluded the jurisdiction of the High Courts and the corresponding provisions of the 1985 Act were therefore ultra vires. The Court held that tribunals could continue to function as courts of first instance and could test the validity of statutes other than the statute which created them but their orders would be subject to the scrutiny of a Division Bench of the High Court in whose jurisdiction the tribunal was located. The Court also recommended that all tribunals be brought under a single nodal ministry (preferably the Ministry of Law) rather than the

ministry which sponsored them. That recommendation was not implemented for decades and its implementation is the subject of the National Tribunals Commission directive of 2025.

5.3.2 Independence as a constitutional requirement: R. Gandhi, the National Tax Tribunal and Rojer Mathew

A second line of decisions dealt with the requirements of independence. In Union of India v. R. Gandhi, President, Madras Bar Association (2010) 11 SCC 1, the Court considered the requirements of the National Company Law Tribunal and the National Company Law Appellate Tribunal created by the amendments to the Companies Act, 1956. It was held that Parliament could constitutionally transfer the jurisdiction of the High Court in company matters to tribunals, provided that the tribunals were as independent as the High Court and had members of equivalent qualifications. The Court found a number of defects in the proposed scheme, particularly with regard to the composition of the selection committee and the qualifications of the technical members and directed that those defects be remedied.

In Madras Bar Association v. Union of India (2014) 10 SCC 1 the National Tax Tribunal Act, 2005 was struck down. The Court found that the Act was contrary to the basic structure of the Constitution in that it transferred the High Court's appellate jurisdiction on substantial questions of law in tax matters to a tribunal and that the composition of the tribunal did not ensure independence. The judgment is a very strong one in its insistence that any body which replaces a High Court must be a court. It also relies upon the principle established in Supreme Court Advocates-on-Record Association v. Union of India (2016) 5 SCC 1 and the National Judicial Appointments Commission decision that the independence of the judiciary is a part of the basic structure and that the executive cannot have a decisive role in the appointment of judges.

The problem came to a head with the Finance Act 2017 (Part XIV) which merged a number of tribunals and empowered the Central Government to make rules as to the qualifications, appointment, tenure and conditions of service of the members of those tribunals. In Rojer Mathew v. South Indian Bank Ltd. (2020) 6 SCC 1, a Constitution Bench was asked to consider the challenge and criticised the scheme on the grounds among others of the executive's preponderant role in selection and the lack of any guidelines in the delegation of the power to make rules. The Rules were set aside, the Union was directed to make fresh rules in accordance with the observations of the Court and the need for a National Tribunals Commission to take over the administration of the tribunals from the executive departments was affirmed.

5.3.3 The cycle of legislative override: the 2020 Rules, the 2021 Ordinance and the 2021 Act

What comes next is one of the most remarkable sequences in recent Indian constitutional practice. In November 2020, in Madras Bar Association v. Union of India (the 2020 decision, commonly known as MBA IV), the Court looked at the Tribunal (Conditions of Service) Rules, 2020 which the Union had framed following Rojer Mathew. It set aside various provisions which were inconsistent with the earlier directions, namely the minimum age of 50 years for appointment, the short term and the composition of the search cum selection committees. It directed that members should have a term of five years with eligibility for reappointment and laid down the composition and powers of the committees.

In April 2021 the Union passed the Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 which in effect reinstated a number of the features that had been struck down previously: a minimum age of 50, a term of four years and a process whereby the selection committee would recommend a panel of two names from which the Government would make its selection. In July 2021, in Madras Bar Association v. Union of India (the 2021 decision, MBA V), a three judge Bench set aside those provisions of the Ordinance. Nageswara Rao J described the deviation from the earlier directions as an impermissible legislative override. By a majority of 2:1 the Court held the minimum age provision to be invalid, Hemant Gupta J dissenting on the ground that an ordinance could not be struck down simply because it was in conflict with a previous order

of the Court. to the High Courts and other forums. The Act was challenged by the Madras Bar Association and others, including Jairam Ramesh, in Writ Petition (Civil) No. 626 of 2021.

5.3.4 Madras Bar Association v. Union of India (2025)

On 19th November 2025 in Madras Bar Association v. Union of India, 2025 INSC 1330, a Bench of C.J. B.R. Gavai and Justice K. Vinod Chandran set aside the key provisions of the Tribunals Reforms Act, 2021. The provisions in question were s.3(1), s.3(7), s.4, s.5, s.6 and s.7(1) and the provision relating to the powers of the Central Government. The Court held that the Act was merely a reiteration of the very provisions which had been struck down earlier and that this was an impermissible override of binding precedent under Article 141. It was held that the provisions infringed upon judicial independence and the separation of powers which are part of the basic structure. The Court observed that tribunals which are substituting for High Courts must be subject to the same constitutional standards of independence and cannot be subject to executive control in respect of their appointment, tenure, remuneration or administration.

The Court held that the principles and directions set out in the 2020 and 2021 judgments would continue to apply to the appointment, qualifications, tenure and conditions of service of tribunal members until Parliament passed legislation to resolve the constitutional issues. Appointments for which the search-cum-selection committee process had been completed prior to the coming into force of the Act were to be protected. Most importantly, the Court directed the Union to set up a National Tribunals Commission within four months of the judgment (this was in effect the proposal that had been made in the Court's judgments since the L. Chandra Kumar case). Vinod Chandran J, in a brief concurrence, described the Act as old wine in a new bottle.

The judgment is of importance for three reasons. It is the first time the doctrine of legislative override has been applied in a systematic manner. The legislature can of course remove the basis of a judicial decision by changing the law (the Court has recognised this in Indian Aluminium Co. v. State of Kerala (1996) 7 SCC 637) but it cannot simply re-enact the provisions which have been declared invalid and then direct that they shall now apply. It affirms that the independence of adjudicators is a basic structure value and not merely a matter of statutory design. It moves the discussion from the rules to the institutional question of who runs the tribunals and places the onus on the legislature and the executive to create a body which is independent of the sponsoring ministries.

The decision is of limited scope. It doesn't in itself create a National Tribunals Commission and its effectiveness will be down to whether and how the Union chooses to comply. It only covers the tribunals which have been established to perform the functions previously performed by the High Courts and makes no provision for the independence of the multitude of adjudicating officers, appellate authorities and departmental inquiry officers who operate within the executive. It makes no reference to the procedures by which tribunals arrive at their decisions which will continue to be subject to the general principles of natural justice as enunciated by the Court and to the individual statutes of each tribunal.

5.3.5 Regulator-adjudicators and the combination of functions

Beyond the tribunals per se, the way Indian regulators combine functions is such as to give rise to the very issue which the US Supreme Court considered in Withrow v. Larkin. The SEBI (Securities and Exchange Board of India) has the power to make regulations, to investigate breaches of those regulations and to adjudicate on the cases through its adjudicating officers and its Whole Time Members with appeals to the Securities Appellate Tribunal. The Competition Commission of India has the power to investigate alleged breaches and then to decide on the basis of the report. In Competition Commission of India v. Steel Authority of India Ltd. (2010) 10 SCC 744 the Supreme Court looked at the structure of the Commission and the relationship between its investigative and adjudicative functions and it made it clear that the principles of natural justice (including a hearing on the report of the investigation) must be observed. The Court has not, of

course, held that the mere combination of functions in a regulator is a constitutional infraction in itself and that is essentially the same position as in Withrow.

5.4 The United Kingdom as a comparator

The UK model is different. The Tribunals, Courts and Enforcement Act 2007 established a First Tier Tribunal and an Upper Tribunal which are structured in chambers, are run by a single service and are headed by a Senior President of Tribunals (who is a judge). The Constitutional Reform Act 2005 places on the Lord Chancellor and the other Ministers a statutory duty to preserve the independence of the judiciary and it created the Judicial Appointments Commission which appoints judges and tribunal members in a process which is entirely free from ministerial selection. That is the statutory embodiment of the Franks Committee's 1957 recommendations that tribunals should be seen as a mechanism for adjudication rather than as part of the administration of the departments which they serve. The Supreme Court's decision in R (UNISON) v Lord Chancellor [2017] UKSC 51 affirms that access to the tribunal system is a part of the rule of law and that any executive action which seeks to obstruct that access will be subject to review. The English experience is consistent with the view that the independence of the adjudicators is best achieved through a combination of statute, institutional design and a commitment from the judiciary to enforce that independence.

5.5 Comparative Analysis

The two main systems looked at the problem from opposite ends and the contrast is very instructive.

In the US the constitutional framework provides robust protection to the independence of Article III judges and rather weak protection to the independence of non-Article III adjudicators. The courts have been the ones to draw the line between the two, primarily through the public rights doctrine and the Seventh Amendment which will determine when an agency can adjudicate at all. With respect to ALJs the protection is statutory. The recent Lucia, Axon and Slaughter decisions have all served to shift the balance in terms of the structural issues such that they are now being resolved in terms of the President's appointment and removal powers rather than in terms of the litigant's right to an independent decision maker. The net effect of Slaughter has been to move the legal position in the US towards greater executive control of the agencies with the independence of the adjudicators being dependent upon the strength of the statutory protection and upon whatever limits the Court may be prepared to place on bodies which don't exercise executive power.

In India the Supreme Court has treated the independence of the adjudicator as a basic structure value which in turn will limit the power of both the legislature and the executive. It has held that tribunals performing the functions of High Courts have the attributes of High Courts and has been prepared to strike down legislation which gave the executive control over appointments and tenure. The Court has in effect acted as the guardian of adjudicator independence against the elected branches. It has of course been criticised for judicial overreach and the constant back and forth with Parliament has been a very expensive process. The principal benefit is that it is a litigant centred approach and the doctrine is put in terms of what a fair tribunal ought to be rather than in terms of the distribution of power between the branches.

The comparison serves as a lesson for both systems. US law could learn from the Indian approach in which independence is a condition of fair adjudication (particularly in the discussion of how Slaughter should apply to adjudicators). Indian law could learn from the US focus on the structure of adjudication within agencies, specifically the separation of the investigative and adjudicative functions in formal proceedings which is enshrined in the APA and which has no equivalent in a general Indian statute.

5.6 Evaluation of Hypothesis H2

The second theory is that procedural fairness in adjudication is predicated upon the structural independence of the adjudicator from the executive and that legislation which enables the executive to control the appointment, tenure and conditions of service of the adjudicator is incompatible with fairness even if the

individual hearings themselves are properly conducted. The Indian evidence for this is very strong. From Chandra Kumar to the Madras Bar Association (2025) the Supreme Court has consistently held that a hearing which is not in fact independent is of no value and they have applied that principle to strike down legislation. The US evidence is somewhat mixed. Jarkesy and Axon provide some support for the proposition that the structure of adjudication is a matter of procedural right. Slaughter takes a different view and sees the independence of the decision maker from presidential control as a constitutional problem rather than a safeguard (at least in the case of officers who are exercising executive power). Some of the tension may be resolved by distinguishing between independence in the sense of freedom from political direction in the determination of individual cases (which may be compatible with the President being able to appoint and remove the principal officers) and independence in the sense of security of tenure (which is not). The issue is not settled.

The hypothesis therefore stands with the caveat that it identifies a necessary but not a sufficient condition. Independence in itself does not guarantee that a procedure is fair and an entirely independent tribunal could still be following an unfair procedure. The independence of the adjudicators, the quality of the rules by which they work and the standards by which they decide are three distinct elements of fair adjudication. This chapter has dealt with the first of these and the others are the subject of Chapters 3.

CHAPTER 6: EMERGENCIES AND EXECUTIVE DISCRETION

6.1 The Problem of Exceptional Power

Every legal system has to decide what it will do when a threat arises which seems to require a degree of speed and flexibility which normal procedure cannot deliver. War, terrorism, epidemics, natural disasters and economic crises all generate a pressure to concentrate decision in the executive, to reduce the amount of deliberation and to treat the normal safeguards of the individual as mere luxuries which can be put on one side. The pressure is not in any way illegitimate. A government which cannot act in an emergency has failed in its fundamental role and a process which takes months is of no use when a decision is required in hours.

The danger is just as real. Emergency powers have a very bad track record in terms of the abuse of executive power and they tend to outlive the very circumstances which gave rise to them. The problem for the law is that the very facts which determine whether an emergency exists and what the appropriate measures are are in the hands of the executive and the courts are very reluctant to second guess them. Emergencies are therefore the paradigm in which the judicial doctrine of deference is both most seductive and most dangerous.

This is the third gap in Chapter 2, the gap of the exception. The individual fairness principles set out in Chapter 3 offer a rather feeble response to it. They will acknowledge that urgency may be a sufficient basis for omitting the pre-decisional hearing, but they say very little about how the urgency is to be established, how long it can last, what is to take the place of the hearing that has been omitted and what the limits of the power are. This chapter looks at how Indian and American law have dealt with those issues, with particular reference to the recent case law and it is in this context that we will test Hypothesis 3.

6.2 Theoretical Models of Emergency Governance

The literature is full of models. Schmitt's famous thesis in Political Theology (1922) was that sovereignty is expressed in the power to decide on the exception and that the legal order must recognise a space in which law is suspended. Very few liberal writers would accept that thesis in that form, yet it captures the instinct which lies behind much of the emergency practice.

Gross and Fionnuala Ní Aoláin in Law in Times of Crisis (2006) identify three broad models. The first is the 'business as usual' model which is that the normal law applies in an emergency and the legal system requires no special rules. The second is the 'accommodation' model where the law is modified in an emergency but remains in force, with the law being capable of conferring special powers subject to conditions. The third is

the 'extra-legal measures' model where officials can act outside the law in an emergency, with some form of later approval or accountability. Gross himself has advocated a version of the third model. Bruce Ackerman has proposed in (2004) 113 Yale Law Journal 1029 a constitutional framework for emergency power which would give the executive short term authority which would be subject to progressively greater legislative approval in order to prevent the creation of permanent emergencies. David Dyzenhaus in The Constitution of Law (2006) argues that the rule of law requires that the courts continue to review executive action in an emergency and cautions against 'grey holes' (where the form of the law is preserved but judicial review is in fact empty) and 'black holes' (where there is no law at all). Eric Posner and Adrian Vermeule in Terror in the Balance (2007) and The Executive Unbound (2010) take the opposite view, arguing that legal constraints on the executive are weak in an emergency and that political and institutional constraints do the work.

The position of the paper is most in line with Dyzenhaus' (with a very modest caveat). The rule of law does not prohibit the exercise of executive discretion in an emergency. It does require that such discretion be grounded in authority, that it be exercised for reasons which can be stated and tested, that it be time limited and that the person affected have an opportunity (however long after the fact) to challenge it. Those are not demands for the full armoury of normal procedure. They are demands for a minimum structure.

6.3 India

6.3.1 The constitutional framework and the lesson of ADM Jabalpur

Part XVIII of the Constitution provides for three types of emergency. Article 352 enables the President to declare an emergency if he is of the opinion that the security of India is threatened by war, external aggression or (since the 44th Amendment) armed rebellion. Article 356 is the provision for the failure of the constitutional machinery of a State. Article 360 is the financial emergency provision. Articles 358 and 359 provide for the suspension of the freedoms under Article 19 and the suspension of the right to move the courts to enforce certain fundamental rights respectively where a proclamation under Article 352 is in operation. The rights under Articles 20 and 21 cannot be suspended in this way (since the 44th Amendment in 1978).

The constitutional history of the Emergency of 1975-77 is the paradigm case of Indian law on this issue. In A.D.M. Jabalpur v. Shivkant Shukla (1976) 2 SCC 521 a majority of the Supreme Court held that during the Emergency no person had the right to approach any court for a writ of habeas corpus to challenge their detention and that Article 21 was the only source of the right to life and liberty. Khanna J in his dissent held that the rule of law and the right to life were not confined to Article 21 and that the State could not claim the power to take life without law. The majority decision is now widely regarded as one of the Court's most serious errors. In K.S. Puttaswamy v. Union of India (2017) 10 SCC 1 the plurality opinion of Chandrachud J is that Jabalpur was wrongly decided and that the view of Khanna J in his dissent was the correct one. The significance of the episode for the principle of procedural fairness is that it demonstrates what occurs when a court treats the Emergency as a ground on which to stop reviewing: it effectively abandons the very people for whom review is of the utmost importance.

The Court's modern approach to Article 356 is the opposite. In S.R. Bommai v. Union of India (1994) 3 SCC 1 a nine judge Bench held that a proclamation under Article 356 is amenable to judicial review, that the Court can look at whether there was any relevant material to support the President's satisfaction and that the power cannot be exercised to dismiss a State government on grounds which are irrelevant or mala fide. Bommai is the case which establishes that even the most politically sensitive of emergency powers is not beyond the reach of the Court.

6.3.2 Emergency powers in ordinary legislation

The more relevant development for our purposes is the expansion of emergency powers under ordinary legislation (i.e. powers which do not require a proclamation under Part XVIII and which are used on a daily basis). The Epidemic Diseases Act, 1897 (section 2) enables the State Governments and the Central

Government in certain circumstances to take special measures and make regulations in the event of an epidemic. The Disaster Management Act, 2005 created the National Disaster Management Authority, the State and District Authorities and the National Executive Committee (section 10) which may issue orders in the course of the disaster response and section 72 of the Act gives it overriding effect over any inconsistent legislation. Section 144 of the Code of Criminal Procedure, 1973 (now section 163 of the Bharatiya Nagarik Suraksha Sanhita, 2023) enables a Magistrate to issue orders to prevent disturbance or danger in the case of urgency. Section 20 of the Telecommunications Act, 2023 and the rules made thereunder permit the temporary suspension of telecommunications services in the case of a public emergency or for the purpose of public safety. A range of preventive detention laws including the National Security Act, 1980 are also in force.

These powers have three things in common. They are all expressed in broad terms, they are all exercised via executive orders (many of which are not subject to prior consultation or to being laid before Parliament) and they are all in practice implemented through guidelines, standard operating procedures and advisories the legal status of which is not clear. They thus combine the first two gaps with the third. The administration of the Covid-19 lockdown in 2020 is a perfect example of this. The national lockdown was enacted via orders made under s 10(2) of the Disaster Management Act and was accompanied by a plethora of guidelines, clarifications and answers to frequently asked questions from the Ministry of Home Affairs as well as a very large number of State and local orders. Many of these instruments were in fact capable of carrying criminal penalties under the Act and the general criminal law, even though they were all presented as being of a purely advisory nature.

6.3.3 Judicial control: Anuradha Bhasin and the proportionality framework

The key recent decision on judicial control of emergency discretion is Anuradha Bhasin v. Union of India (2020) 3 SCC 637 which dealt with the suspension of internet and telecom services and the imposition of restrictions under s. 144 CrPC in J&K after August 2019. The Court held that freedom of speech and expression and the freedom to carry on a trade or business via the internet are both protected under Article 19 and that any restriction on either of those freedoms must be proportionate. With regard to the suspension of internet services it held that such an order must be in accordance with the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017; that an indefinite suspension is not permissible; that the order must be published and must state the reasons for it so that it can be challenged; that there must be a periodic review by the review committee as provided for in the Rules; and that the order must set out the material facts and the reasons. It was also held that the power under s. 144 cannot be exercised to suppress legitimate expression or the exercise of democratic rights. The Court did not itself order the restoration of the services and that was widely criticised. The only real contribution of the judgment in terms of judicial control of emergency power is the requirement that orders be reasoned, published and reviewable. That is in essence a rule of procedural fairness in respect of emergency power.

The next decision in Foundation for Media Professionals v. Union Territory of Jammu and Kashmir (2020) 5 SCC 746 was to apply the Bhasin principles to a restriction on mobile data speed. The Court was not prepared to order the restoration of high speed services and instead set up a special committee comprising senior officers of the Union and the Union Territory to look into the need for the restriction. The decision has been criticised on the basis that it substituted an executive committee for a judicial determination and is a classic example of the problem that arises when courts recognise their own inability to assess security assessments and so pass the review on to bodies which are not independent.

In the pandemic the Court has dealt with the exercise of emergency powers in a number of ways. In a series of suo motu proceedings it looked at the supply of oxygen and essential medicines in 2021 and set up a national task force. In Gaurav Kumar Bansal v. Union of India (2021) it directed the NDMA to recommend guidelines on ex gratia to the families of those who had died of Covid-19, holding that the duty to lay down minimum standards of relief under s.12 of the Disaster Management Act is a mandatory one. In Jacob Puliyel v. Union of India (2022) it held that bodily integrity is protected under Article 21, that no one can be compelled to be

vaccinated and that the restrictions imposed by State governments on the access of the unvaccinated to public places were, on the facts before it, disproportionate. Those decisions are indicative of a Court that is prepared to impose structure on emergency administration by reference to statutory duties and proportionality, albeit with a cautionary approach in respect of the exercise of its own judgement as to necessity.

6.3.4 Procedural fairness in urgency: the Indian doctrines

Indian law has long recognised that urgency may alter the substance of natural justice. In Mohinder Singh Gill it was held that an order for a fresh poll could be made without hearing in the circumstances. In Swadeshi Cotton Mills v. Union of India (1981) 1 SCC 664 it accepted that a takeover of an industrial undertaking under the Industries (Development and Regulation) Act, 1951 could be effected without a prior hearing where urgency required, but it was equally clear that a hearing after the decision would be available. In Tulsiram Patel it upheld the second proviso to Article 311(2) but required that the reasons for dispensing with an inquiry be recorded and that the decision to dispense be subject to review. In Maneka Gandhi it was content that the hearing should follow the impounding of the passport. The common thread is that urgency may justify the postponement of procedure but not its total abolition and that the authority invoking urgency must be able to give reasons for doing so which can be examined. Those are precisely the principles which should be extended to the wider field of emergency administration where they have so far been applied in a rather inconsistent manner.

6.4 The United States

6.4.1 The constitutional framework and the Youngstown tradition

The Constitution itself contains no general emergency clause (apart from the one in Art I, section 9 which allows the privilege of the writ of habeas corpus to be suspended in cases of rebellion or invasion). The law of emergency has been developed by the courts principally through the doctrine of separation of powers. The starting point is of course Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) where the Court held that President Truman's seizure of the steel mills during the Korean War was unlawful as he had neither the authority of Congress nor any inherent power to pass laws. Justice Jackson's concurrence in that case laid out the now well established three part test: presidential power is at its zenith when the President is acting under the authority of Congress, it is in an intermediate zone when Congress is silent and it is at its lowest ebb when the President is acting against the expressed or implied will of Congress.

The record of the Court in wartime and security cases is mixed. Korematsu v. United States, 323 U.S. 214 (1944) is the classic example of the Court upholding the exclusion of persons of Japanese ancestry from the West Coast on the basis of military judgment. In Trump v. Hawaii, 585 U.S. 667 (2018) the Court upheld the President's proclamation restricting entry from certain countries pursuant to the INA, but in so doing it expressly said that Korematsu was wrongly decided and had been repudiated. In Hamdi v. Rumsfeld, 542 U.S. 507 (2004) a plurality held that a US citizen detained as an enemy combatant was entitled to notice of the factual basis of the classification and a fair opportunity to rebut it before a neutral decision maker. The plurality applied the Mathews v. Eldridge balancing test to the question of what process was due and concluded that the process could be modified in the circumstances of a war, e.g. by allowing the use of hearsay and a presumption in favour of the government's evidence. It did not however accept that the executive's assertion of necessity would end the inquiry. In Boumediene v. Bush, 553 U.S. 723 (2008) the Court held that detainees at Guantanamo were entitled to the constitutional privilege of habeas corpus and that the statutory alternative was inadequate. Hamdi is the clearest example of the principle that procedural fairness in an emergency is adapted rather than abandoned.

6.4.2 Statutory emergency powers

The more practical area is that of statutory authority. The National Emergencies Act of 1976 provides the framework for Presidential declarations of emergency and allows Congress to terminate an emergency by joint resolution (subject to Presidential veto) so that in practice termination would require a two-thirds majority in each House. Once an emergency is declared the President is given access to a wide range of statutory powers (the National Emergencies Act of 1976 is just one example) including those under the International Emergency Economic Powers Act of 1977 (IEEPA), 50 U.S.C. § 1701 et seq. A number of national emergencies have been in force for many years. Public health legislation gives the Secretary of HHS (and by delegation the CDC) the authority to take measures to prevent the spread of communicable diseases.

The administrative procedure for emergency rulemaking is the good cause exception in 5 U.S.C. § 553(b)(B) which permits an agency to bypass notice and comment where it finds (and states in the rule) that notice and comment would be impracticable, unnecessary or contrary to the public interest. The courts have interpreted the exception very narrowly (see Utility Solid Waste Activities Group v. EPA, 236 F.3d 749 (D.C. Cir. 2001)) and the agency must give reasons for its invocation. The upshot is that the procedural basis for emergency rules is subject to judicial review and the courts have been reluctant to treat the exception as a general licence.

6.4.3 The major questions doctrine as an emergency law doctrine

The biggest development in US emergency law over the past five years has been the use of the 'major questions' doctrine to review broad delegations of power invoked in a crisis. The doctrine is that if an agency is claiming to find in a statute a power of enormous economic and political significance then the Court will require that that power be explicitly authorised by Congress. The Court identified and applied the doctrine in West Virginia v EPA 597 U.S. 697 (2022) in relation to the EPA's authority to regulate carbon emissions from power stations.

Its use in the context of emergency measures commenced during the pandemic. In Alabama Association of Realtors v. Department of Health and Human Services, 594 U.S. 758 (2021), the Court in a per curiam opinion vacated the CDC's nationwide moratorium on residential evictions, finding that the statutory authority to adopt measures necessary to prevent the spread of disease did not include such a moratorium. employers received federal funds, on the ground that it fell within the Secretary's authority over the conditions of participation in the programmes. In Biden v. Nebraska, 600 U.S. 477 (2023), the Court held that the HEROES Act of 2003, which allows the Secretary of Education to waive or modify student-loan provisions in connection with a national emergency, did not authorise a programme to cancel a large amount of student debt.

The pattern culminated in Learning Resources, Inc. v. Trump (decided 20 February 2026), in which the Court held, by six votes to three, that IEEPA, which allows the President to regulate importation after declaring an emergency, does not authorise the imposition of tariffs. Chief Justice Roberts delivered the opinion. The principal opinion, joined in the relevant part by Justices Gorsuch and Barrett, relied on the major questions doctrine. Justice Kagan, joined by Justices Sotomayor and Jackson, agreed that IEEPA does not authorise tariffs but would have reached that result through ordinary statutory interpretation without invoking the doctrine, and Justice Kavanaugh, joined by Justices Thomas and Alito, dissented, arguing that the word "regulate" and historical practice supported the President's authority. Congressional authority over tariffs was treated as the key consideration, and the Court observed that the President has no inherent authority to impose tariffs in peacetime.

The doctrine is controversial, and its application to emergencies is arguably a procedural device of a particular kind. It does not give an affected person a hearing or a right to reasons, and it is not concerned with the individual. It forces the political branches to legislate in order to create large new powers and to decide the issue through the procedures of bicameralism and presentment, rather than through executive decision. Its supporters see it as a restoration of the proper structure of deliberation, and its critics see it as an indeterminate

doctrine that substitutes judicial judgment about significance for a reading of the statute, and that may impede rapid action when speed is truly needed. For the purposes of this paper, the significant point is that it is a structural response to the problem of emergency delegation, in contrast to the individual response of Hamdi and Bhasin, and the two approaches are complementary.

7.3 The Hypotheses Reassessed

The analysis supports the paper's three hypotheses, each with qualifications.

H1 (guidance and the avoidance of participation) is supported insofar as the volume and practical effect of guidance create an incentive to avoid rule-making, but it must be qualified by the recognition that guidance has legitimate uses and that the rigidity of formal rule-making may be part of the problem. The conclusion is that the law needs a graduated regime, not a prohibition.

H2 (independence of the adjudicator) is strongly supported by the Indian experience, and the American position is mixed and unsettled after Slaughter. It must be qualified by the observation that independence is necessary but not sufficient for fair adjudication.

H3 (emergencies change the content but not the existence of fairness) is supported by the convergent practice of both systems. It must be qualified by recognition that judicial deference remains common in practice and that the effectiveness of the principles depends on institutions that can supply independent scrutiny.

The central thesis of the paper follows. Procedural fairness cannot be confined to the individual hearing. It must be built into the structure of administrative power at three levels: how rules and standards are made, who decides disputes under them, and how discretion is exercised when ordinary procedure is relaxed.

7.4 Objections and Responses

Several objections may be made to this structural conception of fairness.

The cost objection. Procedure is costly, and more procedure for guidance, for adjudication and for emergency orders will slow government and reduce its capacity to respond. The response is that the proposal is graduated and that the heaviest procedures are reserved for instruments that bind in effect. The ossification literature shows that excessive procedure has costs, but it does not show that no procedure is optimal. Moreover, a good deal of what is proposed, such as publication, reasons and consultation for significant measures, is inexpensive.

The accountability objection. The American decisions, especially Slaughter, rest on the view that officials who exercise executive power should be accountable to an elected President, and that independence from the President is inconsistent with democratic accountability. The response is that accountability and independence apply to different functions. Accountability is a proper principle for the making of policy, and independence is a proper principle for the decision of individual disputes. The proposals in Chapter 8 are consistent with this distinction because they place independence in adjudication, not in policy formation.

The judicial overreach objection. The Indian cases on tribunals have been criticised as an example of the Court asserting authority over the legislative and executive branches. The response is that the Court's insistence on independence responds to a repeated pattern of legislative re-enactment of provisions already found invalid, and that the proposal to establish a National Tribunals Commission is a means of resolving the conflict by institutional design rather than by continuing confrontation.

The democratic legitimacy objection. An alternative view holds that the proper remedy for the abuse of delegated power is political, through legislative oversight and the electoral process, and that extending procedural requirements through courts displaces democratic judgment. The response is that political control of delegated power has been weak in both systems, since the volume of delegated legislation and guidance far

exceeds the capacity of legislatures to review it, and that procedural requirements are themselves a means of strengthening democratic control by making the process visible.

CHAPTER 8: REFORM PROPOSALS AND RECOMMENDATIONS

The proposals that follow are directed principally to India, since the argument of this paper is that India has strong doctrines of individual fairness but lacks the structures that would secure fairness at the levels of rule, forum and exception. A shorter set of observations on the United States is given in section 8.6.

8.1 A Statutory Administrative Procedure Code

India should enact a general administrative procedure statute. The idea is not new, and it has been discussed from time to time in the writings on administrative law and in the work of the Law Commission and the Administrative Reforms Commissions. The merit of a statute is that it would convert the accumulated judge-made principles into clear rules, would give regulators and citizens certainty, and would place the responsibility for procedural design on Parliament, not exclusively on the courts. It need not replicate the American APA, which is a product of its own history, and it should be designed in the light of Indian conditions, in particular the very large number of regulators and the diversity of their statutes.

The following elements are recommended.

1. Definitions and scope. The Code should define subordinate legislation, guidance, adjudication and emergency orders, and should apply to the Central and State Governments and to statutory regulators, subject to specified exceptions.

2. Participation in rule-making. Draft subordinate legislation should be published, with an explanatory statement of the reasons and the intended effect, for a minimum period (thirty days is a reasonable default, in line with the 2014 policy for primary legislation), and the authority should be required to consider the comments received and to publish a reasoned response with the final rule. Exceptions should be permitted for urgency, but an urgent rule should lapse after a fixed period, such as ninety days, unless re-made through the ordinary procedure.

3. Reasons. Every rule and every adjudicative decision affecting rights should be accompanied by a statement of reasons, consistent with S.N. Mukherjee and Kranti Associates.

4. Minimum standards for adjudication. Adjudicative proceedings should satisfy minimum standards of notice, disclosure, hearing and reasoned decision, and in regulators that combine functions, there should be functional separation between investigation and decision.

5. Judicial review and remedy. The Code should specify the grounds of review and the remedy for non-compliance, including the power of the court to remit for compliance and, where appropriate, to treat the instrument as ineffective until the procedure is followed.

6. A standing body. A standing administrative law commission or council, with a mandate to monitor practice, propose reforms and issue guidance, should be established, modelled on the functions of the American Administrative Conference and the Council on Tribunals and its successors in the United Kingdom.

8.2 A Binding Regime for Guidance Documents

The Code, or if it is not enacted, a separate Guidance Code issued by the Government and adopted by regulators, should regulate guidance on the following lines. These proposals respond to the finding of Chapter 4 that Indian law controls the substance of guidance but not the process of its making.

First, a central register. Every regulator and ministry should publish its guidance on a central, searchable website, and guidance that is not published should have no effect against a regulated person. Second, a statement of status. Each instrument should state whether it is guidance or a rule, the statutory provision under which it is issued, and whether it is intended to bind. Third, consultation for significant guidance. Guidance that is likely to have a substantial effect on a class of persons should be put out for public comment before it is finalised, using a lighter process than for rules. Fourth, an open-mind duty and a means of challenge. A regulator should be required to consider any request by an affected person to depart from guidance in an individual case, and to give reasons for refusal. Fifth, review and sunset. Guidance should be reviewed periodically and should lapse after a fixed period, such as five years, unless renewed. Sixth, and most importantly, a rule of effect: no person should be subject to a penalty or other adverse consequence for failure to comply with guidance alone, unless the obligation is also found in a statute or in a rule made through the participatory procedure. The last proposal answers the problem of practical bindingness directly by requiring that obligations be imposed in the form and through the process that the legislature has prescribed.

The courts can contribute without waiting for legislation. They should look to the effect of an instrument and not its label, as the D.C. Circuit did in Appalachian Power and as the Indian Supreme Court did in IAMAI, and should be prepared to hold that an instrument that operates as a rule but was not made as one lacks legal force, at least as against persons who did not have an opportunity to be heard.

8.3 Tribunals: Implementing the National Tribunals Commission

The Court's direction in Madras Bar Association (2025) that a National Tribunals Commission be established within four months should be implemented through legislation drafted in consultation with the judiciary, in order to avoid a further cycle of legislative override and judicial invalidation. The following design features are recommended.

1. Independence from sponsoring ministries. The Commission should take over the administration of tribunals, including their finances, infrastructure and staffing, from the ministries whose decisions come before them. Its budget should be secured by a statutory guarantee that insulates it from annual executive discretion.

2. Selection. Appointments should be made on the recommendation of search-cum-selection committees in which the judicial members are in a majority and the chair, a judge nominated by the Chief Justice of India, has a casting vote, in accordance with the directions in the 2020 and 2021 decisions. The Government's role should be confined to the formal appointment of the person recommended.

3. Tenure and conditions of service. Tenure should be at least five years with eligibility for reappointment, in line with the Court's directions, and conditions of service should be uniform across tribunals and should not be altered to the disadvantage of a sitting member.

4. Discipline and removal. Removal and discipline should be by an independent process, with judicial participation.

5. Procedure and data. A tribunal procedure committee, modelled on the Tribunal Procedure Committee in the United Kingdom, should make uniform rules of procedure, and the Commission should publish regular data on the pendency, disposal and quality of tribunal decisions.

6. Regulators. The statutory regulators that combine investigative and adjudicative functions should be required to establish functional separation between those functions, so that the officers who investigate do not take part in the decision.

The lesson of the history in Chapter 5 is that detailed rules enacted without the participation of the judiciary invite challenge. A body of the kind proposed would supply the institutional continuity that the cycle of rules, ordinance and Act has lacked.

8.4 A Framework for Emergency Powers

The five principles in Chapter 6, authority, necessity and proportionality, reasons and publicity, temporal limits and review, and post-decisional remedy, should be embodied in legislation. The Epidemic Diseases Act, 1897, which dates from the colonial period and has been amended only in a limited way, is a particular candidate for modernisation. The Disaster Management Act, 2005, and the other statutes that allow emergency orders should be amended to provide for the following.

1. Declaration and reasons. An emergency order must be in writing, must set out the facts on which it is based and the reasons for the measure chosen, and must be published promptly, with exceptions only for demonstrated and specific security needs.

2. Proportionality record. The authority must record why a less restrictive alternative would not suffice.

3. Sunset and legislative review. Orders that restrict fundamental rights should lapse after a fixed period, such as fourteen or thirty days, unless renewed, and renewal should require review by the relevant legislature or by a committee of it.

4. Independent review. The review committees provided under the telecom suspension rules and similar regimes should include a judicial member and members who are not serving officers of the executive that made the order. The experience of Anuradha Bhasin and Foundation for Media Professionals shows that review by officers of the same executive is a weak safeguard.

5. Post-decisional hearing and remedy. Persons affected must have access to a prompt post-decisional hearing and to compensation or other relief where the measure is found to have been unlawful.

6. Transparency reporting. The government should publish regular reports on the use of emergency powers, including the number and duration of orders, so that their use can be scrutinised and the evidence base for review improved.

The courts should, for their part, adopt the position that deference extends to assessments of fact within the executive's expertise but not to the existence of legal limits, and they should avoid delegating the review of emergency orders to executive committees without independent members.

8.5 Judicial Practice

Several changes in judicial approach would strengthen procedural fairness even without legislation. Courts should recognise institutional bias as a distinct ground, and should hold that structural defects in a decision-making body, such as executive control over the tenure of its members, are not cured by the absence of demonstrated prejudice in a particular case. They should treat the requirement of reasons as applying to emergency measures, so that the invocation of urgency is itself reasoned and reviewable. They should be willing to look at the practical effect of regulatory guidance and to grant relief where it operates as a rule without having been made as one. And they should supplement their remedial repertoire with the power to grant interim relief against emergency orders that appear on their face to be disproportionate, since the harm of a restriction on liberty is often complete by the time the final decision is made.

8.6 Observations on the United States

The American law is not the main subject of the proposals, but three observations may be made. First, the Administrative Conference's Recommendation 2017-5 on guidance should be enacted as legislation, so that the practices it recommends do not depend on the policy of the administration in office, as the fate of Executive Order 13891 showed. Second, in the aftermath of Slaughter, Congress has the opportunity to design the structure of adjudication so as to secure the independence of decision-makers in individual cases while accepting presidential control over policy. Proposals in the recent literature, including mandatory replacement of removed officers and bipartisan appointment requirements, are examples of the kind of structural design

that may be explored. The independence of ALJs and of other adjudicators should, in particular, be secured by statute and not left to inference from the removal cases. Third, the National Emergencies Act should be reformed so that declared emergencies lapse after a fixed period unless Congress renews them, which would implement the temporal principle of Chapter 6.

8.7 Feasibility and Sequencing

It would be unrealistic to expect all of these reforms to be adopted at once. A feasible sequence would begin with measures that depend on executive action and the Court's existing directions: the National Tribunals Commission, the central register of guidance and the adoption by individual regulators of consultation practices. It would continue with targeted amendments to emergency statutes, since the legislative changes needed are modest and the experience of the pandemic has made the case for them. The enactment of a general Administrative Procedure Code would be the final stage, building on the experience of the earlier measures. The Law Commission or an expert committee could be asked to prepare a draft code, and a pilot application to a small number of regulators could test the proposals before they are extended generally.

CHAPTER 9: CONCLUSION

This paper began with the observation that the citizen meets the state through its agencies, and that the fairness of that meeting depends on much more than whether a hearing is offered at the end of a process. It has examined three instruments through which agencies exercise power, namely guidance documents, in-house adjudicators and emergency discretion, and has argued that each opens a gap in the protection that the traditional law of procedural fairness provides.

The research questions can now be answered. On the first, procedural fairness requires different things at different stages. In adjudication it requires notice, disclosure, an unbiased decision-maker and reasons. In rule-making it requires participation, and in emergencies it requires that urgency be reasoned, proportionate and temporary. The requirements are not the same, but they derive from a common idea, that those who are subject to public power should be able to understand it, to take part in its making where it is general, and to contest its application where it is particular.

On the second question, a guidance document ceases to be mere guidance when it binds in effect. American courts have developed tests that look to the language of the instrument and the conduct of the agency, and Indian courts have developed a hierarchy principle that holds guidance subordinate to statute and have read fairness and proportionality into the application of guidance in particular cases. Neither system has adequately addressed the absence of participation in the making of guidance that functions as a rule.

On the third, an adjudicative body must be structurally independent of the executive in appointment, tenure and conditions of service before its decisions can be regarded as procedurally fair. India has recognised this as a basic structure value and has acted on it repeatedly, most recently in Madras Bar Association (2025). The United States has strong protections for Article III judges but has a less settled position for other adjudicators, and the decision in Trump v. Slaughter (2026) has made the question more pressing.

On the fourth, emergencies permit departures from ordinary procedure but not the abandonment of procedure. The convergent practice of the two systems, from Hamdi and Anuradha Bhasin to the recent American major questions decisions, supports a framework in which authority, proportionality, reasons, temporal limits and post-decisional remedy supply the structure that the ordinary hearing would otherwise provide.

On the fifth, the reforms proposed in Chapter 8 aim to embed these principles in institutions: a statutory administrative procedure code, a binding regime for guidance, a National Tribunals Commission and a statutory framework for emergency powers. They are offered as proposals for discussion, and some will no doubt require refinement in the light of practice.

The paper has the limitations that were noted at the outset. It is doctrinal and not empirical. The recent American decisions on which it relies are very recent, and the scholarly and judicial reaction to them is still developing. Its treatment of India is based on reported decisions of the Supreme Court and does not examine the practice of individual regulators, which varies widely. Several lines of further research suggest themselves: an empirical study of the volume and legal effect of guidance issued by Indian regulators; a study of how the reasoning in Slaughter is applied to adjudicators and to bodies exercising adjudicative functions; a monitoring study of the implementation of the National Tribunals Commission directive; and a dataset of emergency orders in India, with their duration and the outcomes of challenges.

The broader point is simple. A legal system that guarantees a fair hearing to the individual but leaves unregulated how standards are set, who sits in judgment, and what happens when the state invokes urgency has secured the form of fairness without its substance. The task for administrative law in the coming years is to make procedural fairness structural.

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