

# Tribunalisation of Justice in India- A Challenge to The Judicial System or Not

Nithya S Nair

LLM

School Of Law,

Christ University.

## ABSTRACT

The interruption in the administration of justice is one of the main hurdles to the creation of tribunals. Due to the pendency of cases in different courts, domestic tribunals and other tribunals, specific laws have been created to resolve the situation that arose. In the legal perspective, a 'tribunal' is different from a national tribunal. The 'domestic tribunal' refers to administrative agencies designed to control professional behavior and impose disciplenesship among members through the exercise of investigative and adjudicative powers. Whereas, tribunals are the quasi-judicial bodies set up to adjudicate disputes relating to specified matters exercising jurisdiction under the statute that establishes them. However, while expressing concern over the enormous pendency of appeals against orders by different tribunals in the country, the Supreme Court had asked the Law Commission to examine whether tribunalisation obstructed the effective functioning of the apex tribunal. The Law Commission submitted its 272nd Report on 'Assessment of Legislative Frameworks of Tribunals in India' after it had been requested by the Supreme Court in *Gujrat Urja Vikas Nigam Ltd. v. Essar Power Ltd*<sup>1</sup> to find changes to be made with regard to the legislative structure of various tribunals and the process and conditions for the appointment of Chairpersons and Members to these tribunals. This paper goes through a summary of the tribunals 'past, their operation and program disadvantages. It also does an update on the law commission's 272nd survey.

**KEYWORDS:** TRIBUNAL, CONSTITUTIONALITY OF TRIBUNALS, DRAWBACKS, REFORMATION FRAMEWORKS

## INTRODUCTION

The idea of tribunalisation came into being in India before the country's independence, with the creation of the Income Tax Appellate Tribunal. Upon independence, a need for versatile and timely settlement of administrative conflicts was felt. Tribunalisation's main goal was to provide the community with specialist and swift justice. After the Indian Constitution was adopted, the Constitution granted many rights for the benefit of the individuals. Due to the overburden of cases and appeals, technicalities in practice etc., people's right to justice and speedy trials could not be offered by the existing judicial system. Hence, the need for administrative tribunals to be established could not be ignored. In its 14th Report (1958) entitled "Reform of Judicial Administration," India's

---

<sup>1</sup> (2016) 9 SCC 103

Law Commission recommended that an appeal tribunal or tribunals be established at the Center and in the States. Later, in its 58th Report (1974) entitled 'Structure and Jurisdiction of the Higher Judiciary,' the Law Commission recommended that separate High-Powered Tribunal or Commission be set up to deal with the matters of operation and that the last resort be to approach the Courts. The Tribunals have the power to adjudicate on a wide range of subjects affecting daily life. Tribunals act as an effective mechanism for reducing the judicial burden. The Courts were considered incapable of providing timely and accessible justice to the parties concerned with their complicated processes, legalistic fronts and attitudes. Particularly in technical cases, it was felt that the essence of the legislation required adjudicatory boards composed of individuals with expert knowledge of how these laws work. The Tribunals arose not only with the promise of a swift, effective, autonomous dispensation of justice, but also with the experience and skills in specialized fields that the judges of conventional courts found to be lacking.<sup>2</sup>

## HISTORY OF TRIBUNALISATION

In 1976, through the 42nd amendment, the Parliament incorporated Chapter XIV A into the Constitution, making arrangements for judicial competence with respect to the constitution in the form with tribunals of qualified adjudicatory bodies. This amendment gave birth to such abilities by adding the Arts. 323A and 323B respectively, dealing with the Judicial and other tribunals. The Statement of Objects and Reasons following the 42nd Amendment, when presenting this Bill in Parliament, outlined the need to create tribunals in the country in the interests of a more effective and expeditious method of delivery of justice. The Bill accordingly claimed that Chapter XIV A was being inserted in the Constitution "to minimize the mounting arrears in High Courts and to ensure the speedy disposal of service matters, tax matters and certain other matters of special importance in the light of the socio-economic development"<sup>3</sup>. Thus, while preserving the Supreme Court's jurisdiction pursuant to Art. 136 of the Constitution, it sought to provide for tribunals to deal with such matters while, under Art. 226 of the Constitution, amending the written jurisdiction of the High Court. Accordingly, Article 323A providing for the judgement or trial by Administrative Tribunals of differences concerning the recruitment and terms of service of persons employed to public services under the jurisdiction of the Union of India or the Government of the State; Clause 2 of this Article deals with Parliament's rights in respect of the jurisdiction, powers and authority to be exercised by such tribunals as are distinguished from judicial tribunals. By comparison, Art. 323B provided for the creation of tribunals for other matters, as provided for in Clause 2. Consequently, tribunals were formed for different purposes throughout the world, in accordance with these two provisions.<sup>4</sup>

<sup>2</sup> M.P. JAIN & S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW, Vol.1 668 (6th ed., Lexis Nexis Butterworths Wadhwa 2007)

<sup>3</sup> Statement of Object and Reasons, The Constitution (42nd Amendment) Act, 1976

<sup>4</sup> H.M SEERVAI, CONSTITUTIONAL LAW OF INDIA 3059 (4th ed., Universal Law Publishing Co. 2008)

## DEFINING TRIBUNAL

The term ' Tribunal ' was not defined in the Constitution or any other legislation. But it was well-defined by the courts in the following cases:

In *Durga Shankar Mehta v Thakur Raghuraj Singh*<sup>5</sup>, Supreme Court described Tribunal as ' The term Tribunal as used in Article 136 does not mean the same thing as ' Court, ' but includes all adjudicating bodies within its jurisdiction, given that they are appointed by the State and invested with the judiciary, as distinct from strictly administrative or executive functions..

A tribunal's basic test within the scope of Article 136 is that it is an adjudicating body (other than the tribunal) with the state's judiciary. In *Associated Cement Co. Ltd. v. P.N. Sharma*<sup>6</sup> it was held that the proceedings followed by the courts are regularly prescribed and, while exercising powers, the courts must comply with the proceedings and, on the other hand, the proceedings to be followed by the courts cannot always be prescribed strictly. It was argued that "the basic and fundamental characteristic common to both the courts and the tribunals is the exercise of judicial duties and the exercise of judicial powers necessarily in a sovereign state." The Tribunal does have some but not all of the Court's trappings.

## CONSTITUTIONALITY OF TRIBUNLAS

After the 42nd Amendment, the Administrative Tribunals Act, 1985 was enacted by Parliament to provide the aggrieved government officials with quick and affordable justice. The passage of the Act itself, however, gave rise to the first issue concerning the constitutionality of tribunals. In *S.P.Sampath Kumar v. Union of India*<sup>7</sup>, the Supreme Court's five-judge bench had to decide the constitutionality of Section 28 of the Administrative Tribunals Act, which abolished the Supreme Court and the High Court's powers of judicial review. The bench concluded that the creation of ' alternative institutional structures,' as professional as high courts, would not infringe the constitution's basic structure. It also passed directives about tribunal members credentials, manner of appointment, etc. About the appointment process, the court stated that the recommendations of a High Powered Selection Committee (chaired by India's Chief Justice or his / her designate) must be followed normally, unless reasons for failing to follow them are given.

However, a decision by the High Court of Andhra Pradesh in *Sakinala Harinath and Ors. v State of Andhra Pradesh and Ors*<sup>8</sup>, presented a different method and indicated that a provision overthrowing the authority of judicial review of High Courts and Supreme Court, would be against the basic structure doctrine. Subsequently, the Supreme Court, in *R.K. Jain v Union of India*<sup>9</sup> criticized the reasoning behind the Sampath Kumar decision and emphasized that the scope of the High Court's judicial review under Article 226 cannot even be ruled out by

<sup>5</sup> AIR 1954 SC 520

<sup>6</sup> AIR 1965 S.C. 1595

<sup>7</sup> AIR 1987 SC 386

<sup>8</sup> 1993 (3) ALT 471

<sup>9</sup> AIR 1993 SC 1769

a constitutional amendment. Lastly, a 7-judge bench of the Supreme Court in *L. Chandra Kumar v Union of India*<sup>10</sup> it concluded that, according to Articles 226 and 227, the right of the High Courts to exercise judicial superintendence over the judgments of all courts and tribunals is part of the constitution's basic structure. It also claimed that "all Tribunals' decisions, whether created pursuant to Article 323A or Article 323B of the Constitution, shall be subject to the written jurisdiction of the High Court's pursuant to Article 226 of the Constitution, before a High Court Division Bench under whose territorial jurisdiction the specific tribunal falls." It also addressed issues related to appointments to administrative tribunals, where it emphasized that the tribunals required a judicious combination of both special members and members of the judiciary. The court proposed the inclusion of a judge of the Supreme Court in the selection committee set up to nominate members to the tribunal as a means of maintaining the independence of the tribunals. Lastly, it claimed that the tribunals played a 'supplementary' function as opposed to a 'substitutional' position for India's high courts and supreme court. The early phase of tribunal litigation concentrated on the constitutionality of the creation of tribunals without violating the inherent powers of the high courts and the supreme court. *L. Chandra Kumar*'s decision marked the end of this process, by maintaining tribunals' constitutional validity if certain conditions were met. The most important of these conditions was that the writ jurisdiction of the High Courts under Articles 226 and the Supreme Court under Article 32 of the Constitution should not be removed.

## THE NCLT AND THE NTT CASES

Since tribunals enshrined in constitutionality, the focus has shifted to the efficient and effective operation of tribunals. Having known as a parallel adjudication mechanism has meant that the tribunals have the same level of independence as the tribunals have. These two themes have persisted in all litigation post *L. Chandra Kumar*. Two cases are particularly relevant, i.e. *Union of India v R. Gandhi*<sup>11</sup> ("NCLT Case") in 2010 and the NTT Case in 2014.

### a) Independence of Tribunals

In the NCLT case, the constitutional validity of the NCLT and the NCLAT had to be dealt with by a Supreme Court constitution bench. The judgment identified 14 major shortcomings in the legislation creating such tribunals, which had to be remedied in order to stand the test of constitutionality. The court particularly focused on the issue of these tribunals' independence. The court found that the tribunals' independence had been undermined by the inclusion of the 'sponsoring agency' director in the selection committee. However, the tribunals were dependent on these departments for support, services, work space, etc., which provided a departmental framework for intervention. Also, civil servants who became members of the tribunals

<sup>10</sup> AIR 1997 SC 1125

<sup>11</sup> (2010) 11 SCC 1; The judgment in NCLT Case has been reiterated in *Madras Bar Association v Union of India (Madras Bar Association-II)* (2015) 8 SCC 583, which is a sequel to the NCLT Case. It dealt with the amendments brought to the Companies Act, 1956 by the Companies Act, 2013.

maintained lien with their parent cadre, leading to further intervention by the executive. The court proposed a four-member selection committee headed by the Chief Justice of India or his / her nominee, a Senior Judge of the Supreme Court or High Court Chief Justice, Secretary of the Ministry of Finance and Company Affairs, and Secretary of the Ministry of Law and Justice as members in order to preserve the independence of the tribunals.

In addition, the Chief Justice of India's competition was mandated to ensure the independence of the tribunals for the removal / suspension of the President / Chairperson of the tribunals. Subsequently, the National Tax Tribunal Act, 2005 (NTT Act), was declared unconstitutional by a five-judge Supreme Court bench in NTT case. While doing so, the court enumerated some principles that addressed the independence issue. First, the court overturned the provision allowing the central government to decide on the venue, authority and setting up of benches, transfer of representatives, etc. as undue intervention by the executive. As the government itself was a stakeholder before the tribunal, those powers were seen as undermining the tribunal's independence. Contrary to the criticism in the NCLT case, the provision for the composition of the NTT Chairpersons / Members Selection Committee was also reversed, as it consisted of more executive members than judicial members. A majority of the executive members on the selection committee would, in the court's opinion, undermine the tribunal's independence. The reappointment clause has also been seen as weakening the tribunals' impartiality. It was ventured that such an establishment would limit the decision-making ability of the Chairpersons/Members in mode that would favor them to get reappointed<sup>12</sup>.

#### b) Efficiency of Tribunals

From R.K. Jain to L. Chandra Kumar, the courts tried to shed some light on the issue of tribunal malfunctioning and offered recommendations. One consistent recommendation was to entrust the duty of administering tribunals to the Ministry of Law and Justice. This argument was repeated in the NCLT case, where the court further indicated that no facilities should be provided by the respective supporting departments or parent ministries concerned. Also highlighted as a cause for failure was non-uniformity with respect to appointment process, qualifications required, service requirements, removal procedure etc. The central government has acknowledged this question of non-uniformity by tabling the Tribunals, Appellate Tribunals and Other Authorities (Conditions of Service) Bill, 2014 and notifying the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and Other Conditions of Members' Service) Rules, 2017, enacted under the Finance Act, 2017. The growth of the tribunals and their inclusion in the Indian legal system can be understood through the prism of various precedents which have been set overtime. The debate on tribunals has now moved from constitutionality issues toward making them a more effective adjudication mechanism, thus ensuring that they maintain the same amount of independence as normal tribunals.

<sup>12</sup> NTT Case at para 89 (J. Khehar's judgement)

## REFORMING THE TRIBUNALS FRAMEWORK

Three contemporary efforts at reorganizing the tribunal system are as follows

1. 74th Parliamentary Standing Committee Report on the “The Tribunals, Appellate Tribunals and Other Authorities (Conditions of Service) Bill, 2014”.
2. Finance Act, 2017.
3. 272nd Law Commission of India Report on “Assessment of Statutory Frameworks of Tribunals in India”.<sup>13</sup>

## DRAWBACKS OF TRIBUNAL

Even though, tribunals play a very vital role in the wellbeing of modern society, yet it has some flaws in it. Some of the most important evils with the tribunal are:

- a) Lack of independence
- b) Administrative concerns: Non-uniformity in regulation
- c) Jurisdiction of the High Court
- d) Pendency and Vacancy in Tribunals

1. Lack of Independence with Tribunals: Judicial independence theory derives its origins from the doctrine of the separation of powers. Ministries are often parties in front of the very tribunals whose workers, budgets, and administration they deal with. A revolving door between ministry bureaucracy and tribunal posts is further problematizing this. It is therefore important to determine the independence of the tribunal on the basis of the following parameters: (a) the election of members; (b) the dismissal of members; (c) the selection of members; (d) the recruitment of judges / bureaucrats; (e) the procurability of appointment.

2. Administrative Concerns: Non-Uniformity in Regulation: Three types of apprehensions fall under the realm of administration: (a) Inconsistencies in qualifications, tenure and age of retirement; and (b) Nodal Ministries.

(a) Qualifications : The most common qualifications for members of the judiciary in various tribunals are: (i) a retired or serving judge of the Supreme Court, chief justice of the High Court; or (ii) a person who is or has been a judge of the High Court or has the qualifications to be a judge of the High Court; or (iii) a person who is or has been or is qualified as a district judge; (iv) a member of the Indian Legal Services; There is also a variation in qualifications and experience among the technical / expert leaders.

<sup>13</sup> Justice Rajesh Bindal, National Judicial Academy, “Tribunalisation of Justice in India: Boon or Bane?”, available at:

[http://nja.nic.in/Concluded\\_Programmes/2017-18/P1048\\_PPTs/4.Tribunalisation%20of%20Justice%20In%20India.pdf](http://nja.nic.in/Concluded_Programmes/2017-18/P1048_PPTs/4.Tribunalisation%20of%20Justice%20In%20India.pdf) (last accessed on 19<sup>th</sup> May, 2019)

(b) Tenure: Short tenure of 3-5 years precludes the development of domain expertise which can influence the tribunals' effectiveness. This was stressed both in the case of the NCLT and in the opinion of the 74th Standing Committee of Parliament. The former proposed a term of 5-7 years while the latter suggested regular appointment scheme (where the tenure ends at the retirement age).

(c) Age of retirement: Retirement age varies from 62-70 years for chairmen to 62-65 years for other members (and is 60 years for bureaucracy members), resulting in unequal tenure in benches. Such uneven tenures also hamper the lack of continuity within institutions. Uniformity on this count was recommended in the 232nd Report of the Law Commission, which suggested 70 years and 65 years respectively for Chairpersons and other Members. The report of the 74th Parliamentary Standing Committee suggested that the retirement age should be uniform across the same post (i.e. Chairperson, Vice-Chairperson, Members) rather than differentiated on the basis of the source of appointment (i.e. whether the appointee is a retired High Court judge, Supreme Court judge, district judge, etc.), since the latter would amount to treating the same class of people differently. The 272nd Law Commission Report recommended 70 years for the members of the judiciary and 67 years for the others.<sup>14</sup>

(d) Nodal Ministry: There is a degree of variation in the appointment process, membership requirements, retirement age, finances, and the different tribunals' facilities. L. Chandra Kumar criticized these contradictions due to tribunals functioning under separate ministries saying that the administration of tribunals needs a single nodal authority or ministry to improve performance.

3. Pendency and vacancy in tribunals: The absenteeism by tribunal members is one of the major causes behind delays. Presiding officers themselves have been overworked and since there is usually no extra capacity available, as found in the CAT, this results in delay. The vacancies question with respect to the Indian judiciary is neither recent nor exclusive to the courts. In fact, the tribunals also suffer from the same manpower shortage issues. The 74th Parliamentary Standing Committee Report expressed its concern about vacancies being a source of tribunal instability.<sup>15</sup>

4. Jurisdiction of the High Court: The constitutionality of forming tribunals has always revolved around the question of setting them up, without disturbing the constitutional courts' intrinsic powers, i.e., the High Courts and the Supreme Court. In multiple cases, clauses requiring direct appeals to the Supreme Court while by-passing the High Court's jurisdiction have been scrutinized by the judiciary. Seven-judge bench ruling in L. Chandra Kumar sets out the law in this respect in detail.

Although discussing the constitutionality of exclusion of High Court jurisdiction in service matters against the CAT's orders, the court identified two primary issues with legislative appeals directly to the Supreme Court. Firstly, a direct appeal to the Supreme Court was too costly and unavailable for litigants; and secondly, such an

<sup>14</sup> Law Commission of India, 272nd Report, Recommendation G

<sup>15</sup> Varun Chirumamilla, "The Aches and Pains of India's Armed Forces Tribunals" Bar and Bench 17th November, 2017 available at <https://barandbench.com/armed-forces-tribunals/>, (last accessed on 15th may, 2019)

appeal clause would cause the Supreme Court docket to be congested. To address this question, the court stated that, under Article 226, an aggrieved party should be allowed to move to the High Court before a division bench from all the tribunals' decisions. It also claimed that under Article 136 of the Constitution, no appeal from a tribunal decision should lie before the Supreme Court. In recent times, in *Gujarat Urja Vikas Nigam Ltd. v Essar Power Limited*<sup>16</sup>, the Supreme Court specified that direct appeals to it from tribunals bring about the denial of admittance to the High Court thereby fetching a substitute for them.

## CONCLUSION

In the Delhi Bar Association case<sup>17</sup>, it was argued that Parliament's statutory ability to form tribunals could not be called into question. The Union of India's claim was that vesting jurisdiction with tribunals would leave the High Courts without any trial, but the Court rejected this. Tribunals should not be seen as government divisions as part of the administration nor should they appear to be so separate as to be exempt from ordinary court jurisdiction. The Supreme Court power can never be reversed. The jurisdiction of the High Courts may be abolished without impacting the jurisdiction of the Supreme Court as held in the case of Sampath Kumar and suggested by the Law Commission, but it must be accountable to an independent body that is neither an arm of the government nor an ordinary tribunal. To ensure the integrity of this scheme, the Supreme Court must also be vigilant in accepting appeals from order of tribunals.

Therefore, it can be argued that the administration has become an important part of government as well as the life of the individual in the present scenario. Because of this increasing role, it is important to set up a competent authority to redress grievances by people and adjudicate disputes. Hence, the idea of administrative tribunals has arisen and is thriving rapidly in India carrying both shortcomings and strengths.

## REFERENCE

- 1.M.P. JAIN & S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW, Vol.1 668 (6th ed., Lexis Nexis Butterworths, Wadhwa 2007)
2. H.M SEERVAI, CONSTITUTIONAL LAW OF INDIA 3059 (4th ed., Universal Law Publishing Co. 2008)
3. GOVERNMENT OF INDIA, LAW COMMISSION OF INDIA, Report No.272, 'Assessment of Statutory Frameworks of Tribunals in India', October, 2017
4. Gautam Swarup, 'Indiscriminate Tribunalisation and The Exclusive Judicial Domain: An Analysis of The 42 ND Amendment in The Light of Decisions of The Supreme Court', National Law School of India Review, Vol. 23, No. 2 (2012), pp. 97-119

<sup>16</sup> (2016) 9 SCC 103

<sup>17</sup> Union of India v. Delhi bar Association, (2002) 4 S.C.C. 275