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ACCESS TO JUSTICE BY TRIBUNALISATION[1]

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INTRODUCTION

"Access to justice" in its general sense means individuals access to the courts for getting justice as Courts are considered to be the primary mode of justice delivery system in the civilised society. Access to justice is one the fundamental goals of the civilised society. It is recognized as a Fundamental Right in many of the international documents. In India, the National Commission to Review the Working of Constitution (NCRWC), constituted in the 50th year of Independence, in its final report suggested for incorporation of this right as fundamental right by incorporating Art 30A, in the constitution, in following terms,

30 A. Access to Courts and Tribunals and Speedy justice- *(1) Everyone has a right to have any dispute that can be resolved by the application of law decided in fair public hearing before an independent court, or where appropriate, another independent and impartial tribunal or forum.*

(2) The right to access to courts shall be deemed to include the right to reasonably speedy and effective justice in all matters before courts, tribunal or other for and state shall take all reasonable steps to achieve the said objectives.

Thus, the traditional mode of adjudication of disputes by the courts has been in recent times supplemented by the establishment of Tribunals. The tribunals were established with the pious objective to further the cause of Access to Justice by providing speedy justice as the Courts were overburdened with backlog cases and to provide specialised adjudication of the disputes.

UNDERSTANDING THE MEANING OF TRIBUNAL

The term "Tribunal" has not been given the statutory definition. According to the dictionary[2], "tribunal" means a seat or a bench upon which a judge or judges sit in a court, "a court of justice". But this meaning is too wide to cover courts also within its ambit. Thus, in administrative law sense, tribunal is understood as a

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[2] Webster's New World Dictionary(1972) 1517

quasi-judicial body established for adjudication of specialised matter sand mostly working on the principles of natural justice.

In *Durga Shankar Mehta v Raghuraj Singh*[3], the Supreme Court defined Tribunal in the following words :

"The expression "Tribunal" as used in Article 136 does not mean the same thing as "Court" but includes, within its ambit, all adjudicating bodies, provided they are constituted by the state and are invested with judicial as distinguished from executive or administrative functions."

In *Bharat Bank Ltd.* v *Employees*[4], the Supreme Court observed that though tribunals are clad in many of the trappings of a court and though they exercise quasi-judicial functions, they are not full-fledged courts.

Thus, a Tribunal has following characteristics:

1. It must have originated from a statute.
2. It has some but not all the trappings of a court.
3. It has been granted judicial powers by the state that allows it to function as a quasi-judicial body.

REASONS FOR THE GROWTH OF TRIBUNALS

In India, the establishment of Tribunals ways back to the pre-constitution period in the year 1941 beginning with the establishment of Income Tax Appellate Tribunal. In recent times there have been mushrooming growth in the establishment of the tribunals. There has been no uniform and systematic development of the tribunals in India and they have been established as and when required.

Some of the reasons which led to the growth of the Tribunals are :

1. Shift in the State Policy from Police State to Welfare State- This shift led to increase in the government functions and activities thus resulting in various between government and citizens on one hand, and between the citizens on the other hand. Thus, to supplement the traditional court system tribunals were established.

2. Inadequacy of Judicial System- With the complexities in societies and disputes, the traditional court system proved to be inadequate, ineffective in adjudicating disputes involving complex matters. Also, the traditional system was slow, costly and formal.

3. The Judicial System is Techninal, rigid and formal- The traditional court system is rigid in its approach. It is bound by the techinal rues of procedure nd evidence and fails to take into account ground realities. Whereas, the tribunal system is practical in its approach, thus providing justice in its true and real sense.

[3] AIR 1954 SC 520
[4] AIR 1950 SC 188

4. Need for expertise- Court system are presided over by the members who are well versed with the law of the land. But, there are certain technical matters which can be well dealt by the experts in the field. Thus, tribunals are constituted for the expert adjudication of such matters.

FORTY-SECOND AMENDMENT : A turning point in the growth of Tribunals in India

The 42nd Amendment of 1976 is the landmark amendment in the history of Tribunals in India. The said Amendment gave the constitutional status to the Tribunals by inserting Article 323A and Article 323B which empowered Parliament and State Legislature to establish administrative tribunals and tribunals for other matters respectively. The said Amendments were added in the backdrop of the suggestions made by Swaran Singh Committee[5]. The Committee acknowledged the mounting arrears in the High Courts and introduced the 42nd Amendment to the Constitution while inserting Part XIV-A which included Article 323A and Article 323B.

The Constitutional status of the Tribunals can be determined by the provisions of Article 136 and 227 of the Constitution of India. Article 136 gives the power to the Supreme Court to give special leave appeal from any judgment, decree, determination, sentence or order authorised by the Tribunal in India. Further, Article 227 gives power to every High Court to be superior over ever Tribunal in the areas they have jurisdiction over.

CONSTITUTIONALITY OF ADMINISTRATIVE TRIBUNALS

Post the 42nd Amendment, the Administrative Tribunals Act, 1985 was enacted by the Parliament to provide speedy and inexpensive justice to aggrieved government servants. However, certain provisions in the Act which ousted the jurisdiction of Supreme Court and High Court led to the challenge regarding the constitutionality of tribunals.

In *Sampath Kumar*, a five-judge bench of the Supreme Court had to determine the constitutionality of Section 28 of the Act, which ousted the power of judicial review of the Supreme Court and High Courts. The bench concluded that the creation of 'alternative institutional mechanisms', which were as competent as High Courts, would not violate the basic structure of the Constitution.

Later, a 7-judge bench of the Supreme Court in *L. Chandra Kumar v Union of India*[6] ("L. Chandra Kumar") conclusively held that the power of the High Courts under Article 226 and 227 to exercise judicial

[5] Swaran Singh Committee Report, (1976) 2 SCC (Jour) 45
[6] AIR 1997 SC 1125

superintendence over the decisions of all courts and tribunals, is a part of the basic structure of the Constitution[7]. It also stated that "all decisions of Tribunals, whether created pursuant to Article 323A or Article 323B of the Constitution, will be subject to the writ jurisdiction of the High Courts under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular tribunal falls".[8]In the opinion of the court, it would serve two purposes: First, frivolous claims will be filtered by tribunals before they reach the High Court; and second, the High Court will have the benefit of a reasoned decision on merits which will assist in finally deciding the matter.[9] Finally, it stated that the tribunals performed a 'supplemental' role as opposed to a 'substitutional' role to the High Courts and the Supreme Court of India.[10]

Another significant case is Union of India wherein the Court was dealing the challenge against the Constitution of NCLT/NCLAT under the Companies Act, 1956. Section 10-X of the Companies Act, 1956 had prescribed a five-member Selection Committee with th CJI or his nominee as Chairperson and two Secretaries from the Ministry of Finance and Company Affairs and the Secretary in the Ministry of Labour and the Secretary in the Ministry of Law and Justice.

The Constitution Bench said that instead of this 5-member Committee with limited role for judiciary, the Selection Committee should ideally consist of :.

- a. Chief Justice of India or his nominee—Chairperson (with a casting vote);
- b. A Senior Judge of the Supreme Court or Chief Justice of High Court—Member;
- c. Secretary in the Ministry of Finance and Company Affairs—Member; and
- d. Secretary in the Ministry of Law and Justice—Member

Since the case was pertaining to NCLT/NCLAT, Secretary in the Ministry of Finance and Company Affairs was included. This position will be replaced by Secretary from the concerned Ministry/Department in case of other Tribunals.

This 4-member composition with two members from judiciary was approved by a subsequent Constitution Bench decision in *Madras Bar Association Case (2014)*which held the National Tax Tribunal to be unconstitutional.

In that case, the Constitution Bench observed that giving predominance to Secretaries of Departments of Central Government in appointment process cannot be accepted as the Central Government was the major litigant before the Tribunals.

[7] Ibid. at para 91
[8] Ibid. at paras 93,94 and 95
[9] Ibid. at para 91
[10] Ibid. at para 94

"The Central Government is the largest litigant before the tribunals constituted under various statutes. The independent functioning of the tribunals stands compromised where the executive has the controlling authority in the selection of members to the tribunals", the SC observed in *Rojer Mathew case* as well.

ISSUES RELATING TO TRIBUNALISATION

1. Lack of Independence of Tribunals

- Manner of Appointment

The members of the Tribunals are appointed by the Selection Committee. In *Union of India v R. Gandhi*(NCLT Case)[11] the Court observed that selection committees are often not independent, since secretaries of the sponsoring department are a part of them.[12]Moreover, several department bureaucrats are appointed as tribunal members, continuing their lien with the parent cadre.[13] Since departments also fund and assist with the day to day administration of these tribunals, it creates a clear conflict of interest when decisions by these departments are challenged in the tribunals they administer.[14]In such a situation can one really expect fair administration of justice?

In order to ensure independence, the say of the executive needs to be reduced. Otherwise members may become biased in order to ensure reappointment and would be less inclined to take fair decisions. NCLT Case also held that selection committees should have an equal number of judicial and executive members, with the casting vote reserved for the senior-most judicial member.[15]

- Removal of Members

The security of the tenure and the removal procedure have a great bearing on the independence of the tribunal. Since the removal of the members of the Tribunal are directly in the hands and discretion of the executive there exists all possibility of pleasing the executive by the tribunal members to ensure their continuance in the system. The grounds of removal of members pf different tribunals are different and also are very subjective in nature like one of the ground is proved incapacity and misbehaviour which gives an unfettered discretion in the hands of executive. Also, the procedure for removal is also not uniform. The 74th Parliamentary Standing Committee recommended that there must be uniformity not only in the grounds of removal but also in the procedure of removal.[16]

[11] (2010) 11 SCC 1
[12] Ibid
[13] Ibid
[14] Ibid
[15] Ibid
[16] Parliamentary Standing Committee, 74th Report, at para 30

Judicial Enquiry before removal of the member ensures that the removal is not done arbitrarily by the executive. But, however, this requirement of judicial enquiry is not present uniformly in all the tribunals. While some provide for a consultation with the Chief Justice of India followed by an inquiry by a Supreme Court judge nominated by him/her[17], others such as the FCAT have a procedure where a member maybe removed after a consultation/on the recommendation of the Chairperson.[18]

- Appointment of Retired Judges and Bureaucrats

The trend among the various tribunals is to appoint retired judges and bureaucrats as the members of the tribunal. This really makes one question the independence of the justice delivery system. Such a trend has been criticised since it is seen as having the potential to compromise the independence of the judiciary[19].Thus, Tribunals are the post-retirement lucrative places for these retired judges and bureaucrats and raises doubts regarding impartial adjudication of the disputes. This is because such post retirement options act as 'perverse incentives' to toe the executive line when deciding high stake cases against the government.[20]

2. **Pendency of Cases**

The very objective of establishing Tribunal was to provide speedy justice. But, the reality depicts a very different picture of the Tribunal System. The 272nd Law Commission Report highlighted worrying pendency figures for the CAT (44,333 cases), CESTAT (90,592 cases), ITAT (90,538 cases)[21] and the AFT (10,222 cases)[22]. One of the significant cause behind delays is absenteeism by tribunal members[23]. Thus, this highlights the casual approach of the members towards disposing the cases.

[17] Some examples are: National Green Tribunal (Section 10(1)& 10(2) of the National Green Tribunals Act, 2010; National Company Law Tribunal and Appellate Tribunal (Section 419(1)& 419(2) of the Companies Act, 2013); Appellate Tribunal for Benami Transactions (Section 35(1) & 35(2) of the Benami Transactions Prohibition (Amendment) Act, 2016); Prevention of Money Laundering Appellate Tribunal. (Section 32, The Prevention of Money Laundering Act, 2002).

[18] Such a procedure is prescribed for the Film Certification Appellate Tribunal (Rule 43(8), Cinematographer (Certification) Rules, 1983).

[19] Avijit Chatterjee, 'Stormy Sinecures' 24th November, 2014, The Telegraph, available at https://www.telegraphindia.com/1140924/jsp/opinion/story_18866574.jsp (last accessed on 14th February, 2018); Apoorva Mandhani, 'CJI Dattu may be offered the post of NHRC Chairperson; Ms. Indira Jaisingh says independence of judiciary undermined by post retirement benefits', 27th November, 2015 Livelaw, available at http://www.livelaw.in/cji-dattu-may-be-offered-the-post-of-nhrc-chairperson-ms-indira-jaisingsaysindependence-of-judiciary-undermined-by-post-retirement-benefits/

[20] Madhav S. Aney, Shubhankar Dam & Giovanni Ko, 'Jobs for Justice(s): Corruption in the Supreme Court of India' available at https://www.isid.ac.in/~epu/acegd2016/papers/MadhavSAney.pdf

[21] Law Commission of India, 272nd Report at para 3.35

[22] 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

[23] 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/,

3. **Vacancies in the Tribunal**

The problem of vacancies is not peculiar only to the judiciary in India. Tribunals also suffer from the same problem.. The 74th Parliamentary Standing Committee Report highlighted its concern over vacancy being a cause of the dysfunctional nature of tribunals. The report analysed a list of 13 tribunals wherein out of a sanctioned strength of 352 posts across these tribunals, 138 posts were lying vacant as of 31st December, 2014. More recently, vacancies in tribunals have come to the forefront of public discourse with the Supreme Court demanding an explanation for vacancies in the APTEL[24]. Senior advocate Mukul Rohtagi demanded the scrapping of the NGT for lack of judicial members to hear cases[25].The latest figures on the vacancies at the NGT is already pegged at 70%. The last time vacancy figures were compiled and made available publicly was when the 74th Parliamentary Standing Committee Report was released in 2015. However, such figures were compiled for only thirteen tribunals. There is therefore an urgent need to make a comprehensive compilation of the total number of vacancies in the tribunals and to resolve the issue.

4. **Practice and Procedure**

Another important concerning issue regarding the Tribunal System is their Practice and Procedure. The tribunals are not bound by the procedure laid down in Civil Procedure Code or Criminal Procedure Code and are left free to determine their own procedure regarding determination of the disputes. They work on the Principles of Natural Justice which unfortunately is a very vague and ambiguous concept. Thus, a very wide discretion is vested on the tribunals which they might abuse. Also, at times the parties are clueless as to the next stage/step that might happen in the proceedings, thus leading to uncertainty and unpredictability of the procedure which might hamper the proceedings.

CONCLUSION AND SUGGESTIONS

Though, no doubt, the Tribunals were established with the very pious objective of furthering "Access to Justice" by providing speedy and specialised adjudication of disputes but its working shows that it has failed to achieve the purpose due to above mentioned reasons. The solution to remedy the situation does not lie in scrapping them altogether but to bring institutional and structural changes in their working.

[24] Press Trust of India, "Govt. Creating Problems By Not Filing Vacancies in APTEL: Supreme Court", Livemint, June 28th, 2017, available at https://www.livemint.com/Politics/Mu76wqxMumBOni5XszUIcJ/Govt-creatingproblems-by-not-filing-vacancies-in-Aptel-Sup.html

[25] Press Trust of India, "No Single Judge Bench Can Hear Cases At NGT: Supreme Court" The Indian Express, January 31, 2018 http://indianexpress.com/article/india/no-single-judge-bench-can-hear-cases-at-ngtsupreme-court-5046408/

Some of the suggestions to make working of tribunals effective are :

1. Process of Appointment

In order to ensure Independence of Tribunals there is a dire need to amend the existing appointment process by selection committee. The process akin to appointments made in the judiciary should be adopted. There should be Examination at All India Level. It will ensure transparency and exclude the role of executive in the appointments.

2. Security of Tenure

The present system of appointing the members for fixed 5 years or re-appointment should be done away. As by the time the members become efficient in their respective areas by gaining practical experience their time for retirement arrives. Thus, instead of making Tribunals retirement place for the judicial and bureaucrats, the young people should serve the be Tribunal till their retirement age.

3. Nodal Ministry

In order to ensure independence of the Tribunal, an independent nodal ministry should be established to supervise the various tribunals established. The said agency would be responsible for conducting All India Examination, making appointments of the members, providing funds to the Tribunals etc in order to have no interference of the Executive in any manner.

4. Filling up of Vacancies

Immediate action should be taken to fill up the existing vacancies in the system in order to facilitate expedious disposal of cases. Moreover, six months before the retirement of any member appointment of his successor should be made so that there is no vacancy even for a single day and process of adjudication works smoothly.

5. Removal of the members

The grounds of the removal of the members of the tribunals should be uniform and transparent. The Nodal Agency should be made responsible for removal of the members with no role of the executive.

6. Speedy Justice

Speedy Justice can be ensured by the cooperation from tribunal members as well as litigants. As the present data reveals that much of the delay in the disposal of the cases is due to the abseentism of the tribunal members. Thus, a time frame should be fixed for the disposal of the cases and also members should be made

accountable for delay in the disposal of the cases by taking some stringent actions. Also, many a times parties are not deligient about their matters and take multiple number of adjournments which results in delay. Thus, apart from imposing costs for adjournments, the number of adjournments which the parties can seek should also be fixed after which their matter would be dismissed.

7. Practice and Procedure

A uniform and summary procedure should be made applicable for all the tribunals. Certainty and predictability in the procedure is the sine qua non of the fair administration of justice.