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Administrative Tribunal's Act and 42nd Amendment of Constitution

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ABSTRACT

The preamble of the Constitution of India which is often attributed as an aspirational document which aspires India to be a Sovereign, Socialist, Secular, Democratic, Republic, which indeed are key elements of any welfare state. The concept of "Tribunalisation" is in favor of welfarism, established mainly for the purpose of reducing the burden of the traditional courts and to setup an independent forum, consisting of fairly experienced, knowledgeable technical persons mostly from executive background and members from legal background as well, in order to adjudge upon specific subject–matter. This concept was first introduced in our legal framework through 42nd amendment[2] which inserted Article 323-A and 323-B which empowered the Parliament for setting up independent tribunals one such tribunal established by the Parliament was Central Administrative Tribunal,(hereinafter CAT) especially established for adjudicating service related matters under the Administrative Tribunal Act of 1985, (hereinafter ATA,1985) , thereby creating an alternative for the High Courts and this issue of exclusion of the jurisdiction of traditional courts in the specified subject-matter turns into a great controversy as its constitutionality was questioned several times, not only of the Act, but that of certain provisions of the newly inserted articles as well . This research paper will try to analyze different phases of development in the concept of Tribunalisation in India with the help of various case-laws and in the end will propose some viable suggestions, addressing the limitations associated with the same.

Keywords: *Tribunalisation, Administrative.*

I. INTRODUCTION

The concept of "Tribunalisation" is in favor of welfarism, established mainly for the purpose of reducing the burden of the traditional courts and to setup an independent forum, consisting of fairly experienced, knowledgeable technical persons mostly from executive background and members from legal background as well, in order to adjudge upon specific subject–matter. This concept was first introduced in our legal framework through 42nd amendment which inserted

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[2] 42nd Constitution Amendment , 1977.

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Article 323-A and 323-B which empowered the Parliament for setting up independent tribunals one such tribunal established by the Parliament was Central Administrative Tribunal,(hereinafter CAT) especially established for adjudicating service related matters under the Administrative Tribunal Act of 1985, (hereinafter ATA,1985) , thereby creating an alternative for the High Courts and this issue of exclusion of the jurisdiction of traditional courts in the specified subject-matter turns into a great controversy as its constitutionality was questioned several times, not only of the Act, but that of certain provisions of the newly inserted articles as well.

II. LITERATURE REVIEW

The author in his article briefly covered the various aspects of a welfare state and had enunciated the importance, need ,characteristics of the tribunals very briefly and had unraveled the journey of development of the tribunalisation in India ,starting from the historical perspective to the 42nd amendment and then different phases of judicial interpretation of constitutionality of the aforesaid mentioned amendment specifically Articles 323-A and 323-B and also of the Administrative Tribunals Act ,1985 was discussed in light of various case laws propounded by the Apex Court starting from *K.K. Dutta v. Union of India*[3] (hereinafter *K.K. Dutta*) to *L. Chandra Kumar* v. *UOI*[4] (hereinafter *L.Chandra Kumar*). Apart from that, issues in regards to the significance of and the compliance of the rules of procedure and evidence *and* the principles of natural justice made use by the administrative tribunals in their working was also dealt briefly.[5]

The author further deliberated over the short-comings which came into being after *L. Chandra Kumar*[6] judgment, according to him the whole purpose of tribunalisation failed as appeals were regularly being made in higher forums against the decision of these tribunals, thereby diminishing the purpose behind establishing such institutions. Further the judgment itself was critically analyzed and it was argued that the obiter of judgment was flawed in a sense that the Supreme Court assumed to itself more powers which are impermissible in holding that no person can directly approach to them and should follow a hierarchy as laid down by them, however the impugned court being the supreme cannot excuse itself from their responsibility of delivering justice expediently. Moreover, the concern of indiscriminate tribunalisation was bought into light and the scope, extent of the power of the legislature was questioned in this

[3] (1980) 4 SCC 38.
[4] (1995) I SCC 400.
[5] Singh, B. K. (2014). Statutory Administrative Tribunals in India - The Constitutionality Issue. *SSRN Electronic Journal*. doi:10.2139/ssrn.2505817.
[6] *Supra* note -4

aspect. It was further emphasized that since the areas like tax law and intellectual property law have been the crucial parts of the subject-matter jurisdiction of the High Courts, tribunalisation of the same raises certain doubts, the author viewed the creation of National Tax Tribunal, the NCLT and the Intellectual Property Appellate Board as a result of rampant tribunalisation of judicial processes in the country.[7] In respect to the problems posed by limitations that exist with the tribunal system, firstly that it somehow abrogates the limits of separation of powers, second being the 'independence of these adjudicatory fora in its truest sense, for there exists a considerable involvement of the executive in the selection of the members.

Therefore, keeping in view the current legal framework as existing in India an comprehensive restructuring of the whole tribunal set-up was suggested in lines of the several other models as being followed by various common law countries especially U.K. which had developed an innovative version of French "Droit Administratif" namely, 'Tribunal Judiciary', moreover arguments were proposed in favour of various Law Commission's recommendations aiming towards increasing efficacy of this institution ,so that it can stand on the same footing similar to that of High courts in status as well.[8]

III. PHASES OF DEVELOPMENT OF THE CONCEPT OF TRIBUNALISATION IN INDIA

The first call for development of the jurisprudence of tribunalisation in India was made back in 1958, when the Law Commission recommended for the establishment of tribunals consisting of judicial and administrative members to decide service matters, for the purposes of reducing excess burden on High Courts and Supreme Court.[9] Later in 1977 , by virtue of 42nd amendment the Parliament inserted Sec323-A and 323-B which empowered the Parliament to establish Administrative Tribunals for dealing exclusively with service matters of government servants, and also provides for exclusion of jurisdiction of all the courts including the jurisdiction of the High Courts under Articles 226 and 227 excepting the Supreme Court specifically under Art. 136 , the main object behind such exclusion was to lessen the backlog of cases pending before the High Courts and to provide an expert and expeditious forum for disposal of disputes of Government servants relating to service matters."

Further the idea of setting up the tribunal was also advocated by the Supreme Court in its judgment of *K.K. Dutta*[10] while answering the dilemma posed by the theory of separation of

[7] Swarup, Gautam. "Indiscriminate Tribunalisation And The Exclusive Judicial Domain: An Analysis Of The 42 ND Amendment. *National Law School of India Review*, vol. 23, no. 2, 2012, pp. 97–119. Retrieved September 9, 2020, from http://www.jstor.org/stable/44278807.

[8] P. Leelakrishnan , *Reviewing Decisions of Administrative Tribunal: Parentalistic Approach of the Indian Supreme Court and the need for Institutional Reform*, 54 JILI (2012).

[9] The Law Commission of India 14th *Report of Reform of Judicial Administration*, (1958)

[10] *Supra* note-3

powers, the court justified tribunalisation, to save the courts from avalanche of writ petitions and appeals in service matters and moreover emphasized the importance of the same in terms of the modern notions of the Welfare State.

It was exactly after 5 years when the Parliament produced ATA ,1985 which provides for establishment of CAT and was indeed a one of the important steps taken in the direction of development of Administrative Law in India. The Act has been passed by the Parliament in pursuance of Article 323-A of the Constitution.

Pursuant "to the provisions of the ATA 1985, the Central Administrative Tribunal (CAT) comprising of five Benches was established on 1 November 1985 in the case of *SP Sampath Kumar v. UOI*[11] (hereinafter *SP Sampath Kumar*) order to decide upon the constitutionality of the same, on the ground that as it excludes the jurisdiction of Supreme Court under Art.32 and that of High Court under Art.226 and 227, therefore violating the basic structure in light of Kesavananda Bharti v State of Kerala[12] . To this issue ,the majority answered negatively and upheld the validity of the same ,by the holding that even if the power of judicial review of the high-court is taken away and vested "in any other institutional mechanism or authority, it would not be violative of the basic structure doctrine, so long as the essential condition is fulfilled, i.e., the alternative institutional mechanism or authority set up by Parliamentary amendment is no less effective" than the high-court not only in 'de jure' aspect but also shall be effective in 'de facto' ,otherwise such may be proved to be in violation of the basic structure.

As a result of this Act was further amended in amended in 1987 to bring the same in line with the judgment.

However, the *Sampath Kumar* [13]judgment did examine the constitutional validity of ATA ,1985 but did not consider the Constitutional validity of the art. 323-A altogether, specifically its clause 2 (d). The decision of the court gave benefit of doubt in regards to efficacy of such administrative tribunals for barely 2 years had elapsed since the act came into force and the court rightly argued that it shall be premature to have any firm stand over the same issue as its implementation was in its initial stage, therefore it would be wrong to strike out the validity of anything before its proper implementation.

Another question of law regarding power of the CAT as established under ATA,1985 to strike out the rules framed by the President of India, as being violative of Art. 14 and 16(1) came before the Division Bench of the Supreme Court in the same year, in the case of *J.B. Chopra*

[11] (1987) SCR (3) 233.
[12] AIR 1973 SC 1461
[13] *Supra* note-12

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and Ors v. UOI.[14] The bench thought it best to answer it once the decision in *Sampaht Kumar* [15]will be pronounced, now since the constitutional bench made themselves clear that the administrative tribunal is at par with High courts, rather an alternate to them and vests in them the jurisdiction of the High Court, therefore the bench in this case came to conclusion that by necessary implication these tribunals have power to deal with the questions of constitutional validity of any or every law, rules, regulations, offending any article of the constitution.

Later in time, an Arrear Committee[16] (1989-1990) was constituted to study the efficiency of these tribunals as a valid alternative for the High Courts or not and also to tests that whether they are only at par with the 'de jure' jurisdiction of the latter or 'de facto' equally efficient in status as well. However, the reports revealed that the tribunalization of justice in our country is neither efficient nor encouraging. The reports further revealed that the members of the tribunals are lazy and have less concern towards ensuring delivery of justice, one of the reasons being a shorter span of their services and lack of motivation. Another drawback of such a system is that there is no strict obligation to follow complex procedural requirement as a result of which at times certain legal compliances are ignored, thereby causing injustice to the parties concerned.

The 3-judge bench in *RK Jain v. UOI*[17] ,held that given the benefit of 5 years to these tribunals as an alternative, the outcome is not good and anguish was expressed over their ineffectiveness, moreover it was argued that the sole remedy available is under Art.136 which is costlier and more inconvenient, moreover it is a discretionary power of the court unlike Art. 226 and 227 which is a matter of right. The court concluded that the tribunals set-up under 323-A and 323-B cannot put at par with the High Courts for the purposes of the purpose of exercising jurisdiction under Articles 226 and 227 of the Constitution.

It was finally in the case of *L. Chandra Kumar I*[18] where the Supreme Court felt a need to comprehensively reconsider the issues raised and law laid down in *Sampath Kumar* [19]and therefore a 7-Judge Bench was constituted to adjudicate over the same matter and held that –

1. The power of Judicial Review, be it of Supreme Court under Art. 32 or of the High Court under Art.226 and 227 is a part of basic structure of our constitution and therefore the not only Section 28 of the ATA, 1985 along with Clause 2 (d) of Article 323-A and

[14] (1987) I SCC 422.
[15] *Supra* note-12
[16] Report of the Arrears Committee- 1989-1990, available at: http://dakshindia.org/wp-content/uploads/2016/08/16 Malimath-89-90.pdf.
[17] (1990) 4 SCC 119.
[18] *Supr*a note-4
[19] *Supra* note-12.

Clause 3 (d) of Article 323-B as amended by the 42nd amendment was ultra-vies and unconstitutional.

2. The tribunals "constituted under Part XIV- A of the Constitution are possessed of the competence to examine the constitutional validity of statutory provisions and rules except statutes establishing these tribunals."

3. The tribunals will be the first adjudicatory authority in the subject matter for which they were constituted and the person cannot move to the High Court directly, further without exhausting this remedy the person cannot directly approach Supreme Court under Article 136.

The consequence after *L. Chandra Kumar*[20] was that the decisions of the tribunals were being routinely challenged before the High Courts, whereas this was not the position before and the tribunals were no longer at par to the high court but rather is subject to the scrutiny of the latter[21]. The decision not only affected tribunals under ATA, 1985, but to every other species of the tribunals.

In this view, the Supreme Court proposed for a study of CAT and other tribunals for ensuring their independence and enhancing the quality of their performance in the early 1993. In this respect the Law Commission in its report felt the need for establishing a balance between the interests of the state and that of the individuals and proposed that sufficient leeway shall be provided to the government to determine the administrative matter in the very first instance and that the interference of the judiciary in tribunal jurisdiction shall only be to an extent to which "science of administrative law" permits.[22] Later in 2008 The Law Commission further had raised its doubts and suggested the reconsideration of judgment in L. Chandra Kumar by a larger bench of the Supreme Court.[23]

Furthermore various other suggestions were provided by authorities to do away with the ambiguity which prevailed after the decision of *L. Chandra Kumar* [24], some major ones are , setting up of permanent service benches of the high courts, although such advise will do no good for ,that will increase the high courts dockets instead of reducing them ,which is exactly for what the tribunals came into existence ,therefore such recommendation holds a little value

[20] *Supra* note -4
[21] Samarendra Das v. State of W.B.,(2004) 2 SCC 274 (India).
[22] The Law Commission of India , *162 nd Report on Review and Functioning of Central Administrative Tribunal* (1998),para 2.1 at 11.
[23] The Law Commission of India , *215th Report on L. Chandra Kumar be revisited by a Larger Benchof the Supreme Court (*2008).
[24] *Supra* note-4

in the present scenario. Another recommendation was for establishing National Appellate Administrative Tribunal who shall have the power to hear appeal on substantive question of law[25] and also for constitution of Zonal benches, for hearing intra-tribunal appeal from various state benches with a scope for special leave appeal to the Supreme Court.[26] However, no deliberation had been done over the suggestion of establishment of either of the two forums of appeal by the Indian Government.

IV. SUGGESTIONS AND CONCLUSION

It is an undeniable truth that while the various other common law countries are far ahead with the progressive legislation for a tribunal system, India is still skeptical about it although majorly the idea of tribunalisation had gained a wider acceptance still the faith of the people as reposed in judiciary is more in contrast to the independently set-up tribunals ,one of the main reason behind that is the possibility of existence of bias for India didn't really have any independent authorities in its truest sense like in other countries , for instance U.K.

U.K. has restructured their tribunal system in a very comprehensive manner and has adopted a two-tier tribunal system with 'First –Tier Tribunal' and the appellate 'Upper Tribunal' which is presided by the Judge of Court of Appeal and consists of members from high courts or courts of appeal, and the final appellate forum is UK Supreme Court, thereby guaranteeing both institutional and procedural judicial independence. Unlike in U.K., there exist a very nominal institutional link between the tribunals and the judges and is not effective as that in U.K. As revealed by the Reports of Arrears Committee[27] that since the retired judges are usually appointed as the chairman of the committee and that too be for a short period of time, they seldom care and shows a little or no concern to ensure that the justice is delivered or not. One way to overcome such hurdle can be to provide such retired judges with more opportunities and more time.

Further, if the practice of appointing sitting judges is inculcated than that will have a positive effect over enhancing the position of tribunals to the levels of High Court. In addition to this appointing the experienced lawyers between the age of 45and 50 will definitely help in improving quality, status and tenure of the judicial members as suggested by the Law Commission.[28]

Establishment of a single nodal agency for the purpose of monitoring the working of tribunals will increase, transparency, accountability, and fairness, as it helps in creating uniformity in

[25] *Supra* note- 23.
[26] Supra note- 24.
[27] *Supra* note -17.
[28] *Supra* note-23.

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the constitution, structure, and procedure both at centre and state level just like the one existing in UK namely, UK Administrative Justice and Tribunal Council whose main function is to keep tribunals in review and to bring out accessibility and efficiency. Therefore, it is high time to adopt the concept of 'Tribunal Judiciary.'

Therefore to conclude ,it can be said that an efficient mechanism for settling service disputes is necessary for maintaining a well-organized and resourceful bureaucracy and for that just the existing mechanism is not viable enough , therefore it is of much importance to upgrade the status of these institutions and make them as impactful as any other court for that matter in the public interest ,so that a cheap , efficient , viable , accessible forum can be brought into existence ,for faster disposal of cases and at a considerable rate ,for justice delayed is justice denied.

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V. REFERENCES

1. P. Leelakrishnan , *Reviewing Decisions of Administrative Tribunal : Parentalistic Approach of the Indian Supreme Court and the need for Institutional Reform*, 54 JILI (2012).
2. Report of the Arrears Committee- 1989-1990, available at: http://dakshindia.org/wp-content/uploads/2016/08/ 16 Malimath-89-90.pdf.
3. Singh, B. K. (2014). Statutory Administrative Tribunals in India - The Constitutionality Issue. *SSRN Electronic Journal*. Doi:10.2139/ssrn.2505817.
4. Swarup, Gautam. "Indiscriminate Tribunalisation And The Exclusive Judicial Domain: An Analysis Of The 42 ND. *National Law School of India Review*, vol. 23, no. 2, 2012, pp. 97–119. Retrieved September 9, 2020, from http://www.jstor.org/stable/44278807.
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6. The Law Commission of India , *215th Report on L. Chandra Kumar be revisited by a Larger Benchof the Supreme Court (*2008).
7. The Law Commission of India 14th *Report of Reform of Judicial Administration*, (1958).

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