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## ANALYSING THE IMPACT OF TRIBUNALISATION IN CONTEMPORARY ERA w.r.t NTT AND NCLT CASE

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### ABSTRACT

*The disruption of the administration of justice is one of the greatest obstacles to the establishment of tribunals. Owing to the pendency of litigation in various courts, domestic tribunals, and other tribunals, particular laws have been enacted to address the resulting issue. The 42<sup>nd</sup> Constitutional Amendment brought changes in the constitution and added two articles i.e., 323A and 323B, which stated about the administrative tribunals to be established. From a legal standpoint, a tribunal is distinct from a national tribunal. The term 'domestic tribunal' refers to administrative entities meant to regulate professional conduct and inflict discipline on members via the exercise of investigative and judicial authority. Tribunals, on the other hand, are quasi-judicial organisations established to decide disputes pertaining to defined issues exercising authority according to the legislation that creates them. Yet, while expressing concerns over the massive backlog of appeals against rulings by various tribunals in the nation, the Supreme Court had requested that the Law Commission investigate if Tribunalization impeded the proper operation of the supreme court.*

*This paper includes the constitutional validity of the tribunals and the brief about the two landmark cases i.e., NCLT & NCLAT and NTT for the validity of the tribunals to be formed for the jurisdiction of the company law cases. There are also drawbacks to the tribunals as they lack of independency of judiciary. This paper lastly concludes that as to ensure the integrity of the scheme of forming of Tribunalization, the Supreme Court must also be vigilant in accepting the appeals from the tribunals.*

**Keywords-** Administrative Law, Tribunal, Judicial Review, Constitutionality of Tribunals.

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## INTRODUCTION-

Tribunalization means that more and more disputes and legal decisions are being made by specialised courts, boards, or other bodies. Tribunalization is a big trend in many countries right now, especially in the areas of employment law, administrative law, and human rights. The use of tribunals is seen as a way to make the legal process easier, cut costs, and make the legal system more efficient and fairer. Accessibility is one of the most important benefits of Tribunalization. Tribunals are often faster, cheaper, and easier to use than traditional courts, which is why many people and businesses choose to use them instead. Also, tribunals have specialised knowledge in certain areas of the law, which can help people make better decisions. For example, employment tribunals are set up to handle disagreements between employees and employers, and human rights tribunals know how to make sure that the rights of the people are being respected.

The Income Tax Appellate Tribunal was set up in India before the country got its independence. This was the first step towards Tribunalization. When the country became independent, it became clear that administrative conflicts needed to be solved in a flexible and timely way. The main goal of Tribunalization was to help people to get justice quickly and by experts. After the adoption of the Indian Constitution, the Constitution guaranteed several rights to individuals. Due to an overabundance of cases and appeals, technicalities of practise, etc., the current court system could not guarantee the right to justice and swift trials. Therefore, the need of the establishment of the administrative tribunals could not be ignored.

In the *14th Law Commission Report of 1958* which was titled as “Reform of Judicial Administration”, the India’s Law Commission suggested for the establishment of a central and state appeals tribunal or tribunals to improve the judicial administration in the country to make it speedy and less expensive.<sup>2</sup> Later, in the *58th Report of Law*

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<sup>2</sup> The 14<sup>th</sup> Law Commission Report, 1958.

*Commission of 1974* which was titled as “Structure and Jurisdiction of the Higher Judiciary”, the Law Commission advised that a separate High-Powered Tribunal or Commission be established to deal with operational concerns, and the courts would be the last resort to be approached<sup>3</sup>.

Chapter XIV A, which established judicial competence with regard to the constitution in the form of tribunals of qualified adjudicatory bodies, was added into the Constitution by the Parliament in *1976 through the 42nd amendment*. By this amendment *Articles 323A<sup>4</sup> and 323B<sup>5</sup>* respectively were added which dealt with the judiciary and the other tribunals. The main objective behind the 42<sup>nd</sup> Amendment was to establish tribunals in order to provide justice more quickly and effectively. The bill stated that the “Chapter XIV A was inserted in the Constitution “to reduce the growing backlogs in the High Courts and to make sure that service matters, tax matters, and certain other matters of special importance in light of the socio-economic development are disposed off quickly”. So, while keeping the Supreme Court’s power under Article 136 of the Constitution, it tried to make sure that it tried to make sure that tribunals could handle these kinds of cases, amended the High Court’s power under Article 226 of the Constitution.

Hence, *Article 323A<sup>6</sup>* says that Administrative Tribunals can decide or try disputes about the hiring and terms of service of people who work for public services under the control of the Union of India or the Government of the State. *Clause 2<sup>7</sup>* of this Article talks about Parliament’s rights regarding the jurisdiction, powers, and authority that such tribunals, which are different from judicial tribunals, will have. In contrast, Article 323B was inserted for the creation of tribunals for other matters as mentioned under *Clause 2<sup>8</sup>* of the article. Based on these two provisions, tribunals have been set up all over the world for different reasons.

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<sup>3</sup> The 58<sup>th</sup> Law Commission Report, 1974.

<sup>4</sup> India Const. art. 323A.

<sup>5</sup> India Const. art. 323B.

<sup>6</sup> India Const. art. 323A.

<sup>7</sup> India Const. art. 323A. cl. 2.

<sup>8</sup> India Const. art. 323B. cl. 2.

At this point of time, there were two important issues which were raised. The first was whether Tribunalization affects the basic structure by breaking the principle of separation of powers and independence of the judiciary. The second was whether the constitution allows the transfer of judicial power or not.

### **CONSTITUTIONAL VALIDITY OF TRIBUNALS-**

Parliament passed the Administrative Tribunals Act, 1985, after the 42nd Amendment, so that government officials who were disrespected could get justice quickly and at a low cost. The first issue of the constitutional validity of the act came into question as soon as the Act was passed. There were several judgements which had governed the tribunal system after the incorporation of the Articles 323A and 323B. Also, there were many cases that challenged the validity of the Administrative Act, and the 42<sup>nd</sup> Amendment. In the case of *"S.P. Sampath Kumar v. Union of India"*<sup>9</sup>, the primary issue was the validity of the act and the amendment on the ground the ousted the scope of judicial review. The supreme court held that "the judicial review was a part of the basic structure of the Constitution of India. Further, it was also stated that even if there is a creation of alternative institutional structures such as Administrative Tribunals, as professional as High Court, then it would not infringe the basic structure of the Constitution i.e., Judicial Review.

In the case of *"Sakinala Harinath & Ors. v. State of Andhra Pradesh"*<sup>10</sup>, the High Court of Andhra Pradesh adopted a different approach and said that a clause removing the Supreme Court's and High Courts' capacity for judicial review would violate the doctrine of fundamental structure. After this case subsequently the Supreme court criticized the reasoning behind the case of Sampath Kumar case in the case of *"R.K Jain v. Union of India"*<sup>11</sup>, and reiterated that a constitutional amendment cannot even exclude the High Court's ability to conduct judicial review under Article 226.

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<sup>9</sup> S.P. Sampath Kumar v. Union of India, (1987) 1 SCC 124.

<sup>10</sup> Sakinala Harinath & Ors. v. State of Andhra Pradesh, 1993 (3) ALT 471.

<sup>11</sup> R.K Jain v. Union of India, AIR 1993 SC 1769.

Lastly, in the case of *"L. Chandra Kumar v. Union of India"*<sup>12</sup>, "The court reaffirmed that as judicial review is a basic component of the Constitution and that the High Court and Supreme Court's authority to conduct judicial reviews under Articles 226 and 32 ensures the independence of the judiciary. The "exclusion of jurisdiction" provision in every law passed in accordance with Articles 323A and 323B was declared invalid". Further it was held that the High Courts have the authority to supervise inferior courts that were within their purview. In terms of tribunals, it was held that they would provide prompt justice and serve as courts of first instance for any areas of law for which they had been constituted. The constitutional clause that guarantees the independence of the superior courts but not of tribunals was cited as the justification for the ruling. Therefore, tribunals can never completely replace superior courts, and as a result, the High Court and Supreme Court will always have the authority to conduct judicial reviews. The supreme court also covered concerns with appointments to administrative tribunals, highlighting the need for a well-balanced composition of special members and judges on the tribunals. In order to preserve the tribunals' independence, the court recommended that a Supreme Court judge be a part of the committee formed to nominate candidates for membership.

Finally, it said that the tribunals supported India's high courts and supreme court rather than acting in a "substituting" capacity. Early tribunal disputes centred on whether the establishment of tribunals was constitutional without going against the supreme court's and high courts' inherent authority. Therefore, the case of *L. Chandra Kumar*, was marked as the end of this process, by upholding the constitutional validity of the tribunals under specific circumstances. The most important of these condition was the writ jurisdiction of the High court and Supreme Court under Article 226 and 32 under the Constitution of India should not be removed.

Despite the Supreme Court's distinct rulings, there are still a number of issues that need to be resolved.

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<sup>12</sup> L. Chandra Kumar v. Union of India, AIR (1997) SC 1125.

- The sole purpose behind the establishment of tribunals was to ensure speedy justice, but however: subjecting the tribunals judgement to judicial reviews of High court and Supreme court is going to make the process more complicated and lengthier.
- The second issue was whether the tribunals can remain independent if the majority of its members are appointed either by executive or are a part of the executives.
- The last issue was that as number of tribunals are increasing the uniformity in administration of tribunals is decreasing and the functioning of most of the tribunals is not in a proper state.

### **OVERVIEW ON NCLT AND THE NTT CASE-**

The emphasis now is on the efficient and successful functioning of the administrative tribunals as a result of the legality of tribunals in India with the help of different case laws and opinion of the Supreme court. As the tribunals have the same degree of independence that the tribunals do since they have been recognised as a parallel adjudication system. After L. Chandra Kumar case, the two principals have continued throughout every case. Therefore, two cases are particularly relevant i.e. The NCLT case of 2010 and The NTT case of 2014.

#### **1. NATIONAL TAX TRIBUNAL-**

The court in the case of "*Madras Bar Association v. Union of India*"<sup>13</sup>, had struck down the NTT as unconstitutional. Prior to the constitutionality of the NTT, NTT was challenged on various grounds as all the appeals related to income tax disputes were to be heard only by this tribunal. It was argued that the issue in the question was problematic because this tribunal was only established to consider legal matters since the court is seen of as having a basic role that cannot be delegated to an outside organisation. Additionally, it was claimed that certain sections of the legislation violated the rule of law, independence of the judiciary, and separation of powers. It was also argued by the parties that the definite portions of the act were also in

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<sup>13</sup> Madras Bar Association v. Union of India, (2010) 11 SCC 67.

contravention of the independence of judiciary, rule of law, and the separation of power. The criteria for the appointment of judges have also been criticized for being incompatible with the idea of judicial independence. This is a clear instance of the judiciary's rights being directly violated by the legislature and the executive branch's illegal interference.

The court relied on these arguments and essentially relied on the case of *"Sampath Kumar and L. Chandra Kumar"*, to maintain that the idea of judicial review is an essential component of the rule of law and the theory of separation of powers. The court also determined that the National Tax Tribunal would not be held as constitutionally valid because it excluded the supervisory powers of the High court's in determining the income tax matters and this power of high court's is of supreme importance over courts and tribunals under its jurisdiction, therefore, it cannot be jeopardized by the other courts. Hence, the court ruled that the legislature cannot take away the inherent authority of judicial review by giving it to other quasi-judicial entities.

Also, the court stated that there must be evident demarcating line between the three organs, viz., Executive, Legislature, and judiciary as the constitution of our country can be traced back to the Westminster model. Hence, there some problems with the institution of the tribunals as they somewhat emerge as a hybrid between the judiciary and the executive and also they lack the capacity of being categorized as forming the part of one organ. As for any health functioning of the democracy the independence of the judicial organ is must. What can be argued here is that, the only scenario in which such a transfer of a court's judicial responsibilities can be permissible is when the court/tribunal/body gaining such authority likewise possesses all of the prominent trappings of a constitutional court. As now the normal courts have the power to decide the question of fact as well as the question of law, as the legislature cannot create a quasi-judicial body which only decides the question of law, as this would be practical infringement on the exclusive domain of the executive. The court once again relied on the judgement of L. Chandra Kumar to categorically hold that the



judgements of the High Courts cannot be substituted although they can be supplemented.<sup>14</sup>

## **2. NATIONAL COMPANY LAW TRIBUNAL & NATIONAL COMPANY LAW APPELLATE TRIBUNAL-**

In accordance with the Eradi committee's recommendations, the 2002 amendment replaced the old company law boards with these business law tribunals. The Madras Bas Association contested the precise amendments made to the Companies Act of 1956 to include these tribunals into the current framework. Identical problems were addressed in this case, such as the transfer of jurisdiction from courts to tribunals, the independence of the judiciary, the separation of powers, and the nomination of members (technical vs judicial), among others. The court in its decision held that by declaring explicitly that the legislature has the authority to establish such tribunals. On the question of appointments, the court established precise boundaries, including the fact that only judges and attorneys can be appointed to the board of the tribunal as judicial members, while bureaucrats and corporate legal services cannot be appointed as judicial members.

Further the court stated that, the judges must preside over the selection committee which signifies that either the Chief Justice of India himself or (one of his nominees) has the last, binding word over who can be appointed to these tribunals. "Likewise, under no circumstances may the number of technical members on a bench surpass the number of judicial members. For example, if there is a two-member division bench, there must be at least one judge present. Likewise, if the bench consists of three members, at least two judges must preside over the bench, and so on."

The Supreme Court held that the NCLT and & NCLAT as unconstitutional because the court was not satisfied with the optimum amount existence of features such as the independence of the judiciary, separation of powers, and trappings of conventional courts. The main point to be noted here is that the court, on a fundamental level,

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<sup>14</sup> Ayush Mishra, "Revisiting Tribunalization of Justice in India", Vol. 1, International Journal of Advanced Legal Research.

affirmed the legislative authority to legitimately establish such tribunals. The pertinent chapters were eliminated from the Companies Act, 1956. Then again, in 2013, a new Companies Act was established that had similar provisions for the establishment of the NCLT and NCLAT; thus, the Madras Bar Association once again filed a petition in 2015.

In this case, a five-judge bench found both tribunals to be constitutional in 2015. Very formal in its approach, the court attempted to distinguish this ruling from that of the NTT. It decided that, unlike the NTT, the tribunals in this matter were to consider in both the factual and legal concerns. In this regard, the court stated that the major argument which was presented in the NTT case, that the tax tribunal infringes on the exclusive realm of the judiciary, fails. Yet, the court failed to examine the fact that, regardless of the questions decided by the tribunal, it still removes the High Court's authority to decide on these issues. In this instance, the court avoided considering the legality of the NCLT and NCLAT by reaffirming that the 2010 ruling had, in principle, upholding the validity of founding of these courts. It is particularly remarkable to observe that the landmark L Chandra Kumar case was never mentioned in this decision.

### **UNDERSTANDING THE JUXTAPOSITION-**

After discussing the problematic decisions concerning the validity of tax and company law tribunals, as it is impossible not to compare the former to the latter. In the original NCLT and NCLAT case, even though the court declared the tribunals to be unconstitutional, the existence of tribunals was protected, and the court therefore provided an extensive checklist of recommendations and suggestions that would serve as the benchmark for determining the constitutionality of a tribunal, as any tribunal that does not incorporate the court's suggestions would be automatically deemed unconstitutional. Here it is important to note at this juncture is that the court in the case of the NTT did not take such a liberal approach, but instead applied the strict test of the basic structure doctrine and directly ruled the NTT unconstitutional for violating the same, without even considering whether the structure could be

protected by certain structural improvements. It wouldn't be unreasonable. To argue that if such a considerate scope was provided to the company law tribunal, the same could have been extended to the NTT because, in the current scheme of things, the narrative is that the very existence of a National Tax Tribunal will remain unconstitutional unless a larger bench of the Supreme Court overturns the previous judgement and extends the in principle justification of the company law tribunal.

### **CONFLICT BETWEEN HIGH COURTS AND TRIBUNALS-**

The Madras High Court upheld L. Chandra Kumar case, in which it was determined that judicial review is an integral component of the Basic Structure concept. As in any scenario, the High Courts' authority of judicial review would extend to tribunals. It is now reasonable to say that High Courts have priority over Tribunals in terms of the award of powers and review authority. In *Shiv Kant Sharma*<sup>15</sup>, a division bench of Supreme court ruled that although while High Courts had the power of judicial review, they could not be used against Tribunals. In the preceding case, it was contested whether the Armed Forces Tribunal Act provided a redress or review procedure for AFT orders. In its 2015 ruling, the Supreme Court advocated for the exclusion of the High Courts' authority in favour of the AFTs, which were statutorily mandated judicial venues.

Consequently, the same legal argument may be applied to other Tribunals, such as the NGT, DRT, etc., where the High Court continues to exercise its jurisdiction of judicial review. In addition, a fundamental factor in the Supreme Court's decision to strike down the National Tax Tribunal's constitution was that it could never be a viable alternative to the High Courts.

If we look into the current judicial tendencies they cannot form a firm legal stance, particularly in an environment where the composition of Tribunals is determined by the whims and fancies of judges, which is very unhelpful. The direct effect of the L. Chandra Kumar decision is that it reaffirmed the High Courts' authority of judicial

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<sup>15</sup> Union of India & Ors. v. Major General Shri Kant Sharma, (2015) 6 SCC 773.

review. In current situation very few have grasped that the true solution rests in bolstering existing courts and limiting tribunals to a few of specialised areas. Equally crucial is ensuring that specialised tribunals are not staffed by generalist public officials or judges". Even if the following proposition sounds too extreme, the current structure and operation of the tribunals must be improved.

In its 272nd report titled "Assessment of Statutory Frameworks of Tribunals in India", the Law Commission of India issued several recommendations in 2017 that target all aspects of the framework, ranging from the transfer of jurisdiction to the tribunals to the appointment of members as tribunal judges. In addition, scholars such as M.P. Jain and Wade urge that the institution of tribunals be better connected with the court and separated from the executive branch.<sup>16</sup> Moreover, in order to eliminate the arbitrariness of the courts in validating one tribunal and invalidating another, either the government should propose a constitutional amendment outlining the prerequisites that a tribunal must meet, or the court should, via a larger bench than in the L. Chandra Kumar case, eliminate any doubts and outline the minimum standards that must be met for a tribunal to be deemed constitutionally valid.<sup>17</sup>

### **DRAWBACKS OF TRIBUNALS-**

Despite the fact that tribunals play a crucial part in the well-being of contemporary society, it has several shortcomings. Among the most significant issues associated with the tribunals are-

1. **LACK OF INDEPENDENCE-** The principle of judicial independence originates from the concept of the separation of powers. Often, ministries are parties before the very tribunals whose employees, finances, and administration they manage. This is further complicated by a revolving door between government bureaucracy

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<sup>16</sup> The 272<sup>nd</sup> Law Commission Report, 2017.

<sup>17</sup> Nithya S Nair, "Tribunalization of Justice in India- A challenge to the Judicial or not", Vol. 6, Journal of Emerging Technologies and Innovative Research, 263, 263-270 (2019).

and judicial positions. It is thus essential to evaluate the tribunal's independence based on the following criteria: (a) the election of members; (b) the removal of members; (c) the selection of members; (d) the recruitment of judges/bureaucrats; and (e) the pourability of appointment.

2. **ADMINISTRATIVE CONCERNS-** There is non-uniformity with the regulation, Administration encompasses two categories of apprehensions: (a) Inconsistencies in qualifications, tenure, and retirement age; and (b) Nodal Ministries.
3. **PENDENCY AND VACANCY IN TRIBUNALS-** Tribunal member absence is one of the leading reasons of delays. Presiding officers are overworked, and as there is often no spare capacity available, as is the case with the CAT, which causes delays to dispose off the legal proceedings. The issue of vacancies within the Indian judiciary is not new nor exclusive to the courts. In reality, tribunals face the same staffing scarcity challenges as other government agencies. The 74th Parliamentary Standing Committee Report expressed concern that vacancies contributed to the instability of tribunals.
4. **JURISDICTION OF THE HIGH COURT-** The validity of tribunal formation has traditionally centred around the issue of how to establish them without interfering with the inherent powers of the constitutional courts, i.e., the High Courts and the Supreme Court. In many instances, the court has examined provisions mandating direct appeals to the Supreme Court while bypassing the High Court's authority. In *L. Chandra Kumar*, a seven-judge court lays out the law with respect to the validity of the tribunal formation.

When discussing the validity of the exclusion of High Court jurisdiction in service cases against the CAT's directives, the court recognised two key difficulties involving direct legislative appeals to the Supreme Court. Firstly, a direct appeal to the Supreme Court was too expensive and inaccessible to claimants, and secondly, such a provision would clog the Supreme Court's docket. To remedy this issue, the court declared that, according to Article 226, an aggrieved party should be permitted to appeal to the High Court before a division bench from the judgements of all tribunals. It further argued that under Article 136 of the

Constitution, the Supreme Court should not hear appeals from tribunal decisions. In a recent case, *Gujarat Urja Vikas Nigam Ltd. v. Essar Power Company*<sup>18</sup>, the Supreme Court ruled that direct appeals to it from tribunals result in denial of admission to the High Court, hence necessitating a replacement for them.

### **WAY FORWARD/SOLUTIONS-**

1. **QUALIFICATIONS-** In *Union of India v. R. Gandhi*<sup>19</sup>, the Supreme Court thoroughly examined the operation of tribunals. It was stated that when the current jurisdiction of a court is transferred to a tribunal, its members shall have a rank, competence, and standing that is as close as feasible to that of the court.
2. **INDEPENDENCE-** All Tribunals should get administrative assistance from the Ministry of Law and Justice. The Tribunals and its members are not permitted to request or receive facilities from the relevant sponsoring or parent Ministry or concerned Department.
3. **ACCESSIBILITY-** Tribunals must have benches in different parts so that they are easily accessible.
4. **APPOINTMENTS TO MEMBERS-** The members of the tribunals must be appointed by an impartial and independent committee.

### **CONCLUSION-**

As separation of powers and judicial independence are two foundations of a democratic state and also they are intrinsic to a nation governed by the rule of law. The Supreme Court of India has determined that judicial independence and separation of powers are fundamental elements of the Indian Constitution. It has often been asserted that excessive Tribunalization undermines judicial independence and the separation of powers. As a result of excessive Tribunalization, more and more authority is transferred to the executive branch, which contradicts the entire concept of separation of powers. In the Delhi Bar Association case<sup>20</sup>, it was contended that

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<sup>18</sup> Gujarat Urja Vikas Nigam Ltd. v. Essar Power Company, (2016) 9 SCC 103.

<sup>19</sup> Union of India v. R. Gandhi, (2007) 2 SCC (CRI) 298.

<sup>20</sup> Union of India v. Delhi Bar Asso., (2002) SCC 275.

Parliament's legislative authority to establish tribunals could not be questioned. The Court rejected the argument that vesting power with tribunals would leave the High Courts without jurisdiction in certain instances. Tribunals must be considered as departments of ministries as part of the administration, as well as so autonomous that they are outside the reach of regular courts. Thus, Droit Administratif should be implemented in India.

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