TRIBUNALISATION OF JUSTICE: APPLICATION OF *DROIT ADMINISTRATIF* IN INDIA

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The Droit Administratif referred to a system of administrative courts in France that ran parallel to the civil courts. The intentions behind this system were to ease the civil courts from administrative matters while laying separate standards for administrative disputes. In India, the adjudication of Administrative disputes has been discussed by the judiciary and remains to be much debated. Apart from the Administrative tribunals, there are parallel courts in India as Tribunals for various matters including Company disputes, Tax matters, Railway Claims, Debt Recovery Claims and Army disputes. For the purpose of this article, the authors have restricted themselves to the Administrative tribunals and the extent of their independence from ordinary courts. The following paragraphs shall throw some light on the possibility of applying the principle of *Droit Administratif* in India, as regards independence of administrative Tribunals, and juxtapose it with the concept of Rule of Law as enshrined in the Indian Constitution.

History of Droit Administratif

Droit Administratif refers to the existence of parallel courts to deal with matters of administration. In the 16th Century, the *Consul du Roi* (King's Court) gained predominance with its growing jurisdiction taking cognisance of all cases where the government or its servants were involved. The jurisdiction of this tribunal gave rise to some challenges with the jurisdiction of the civil courts. In the 17th century the *Consul du Roi* came to be the *Conseil Prive'* (along the lines of the Privy Council in Britain), which, as opposed to the civil courts (the *Conseil Commun*), had jurisdiction over appeals in administrative matters. In this regard, the *Conseil du Roi*, the administrative court saw growing importance in the French legal system, even more so than the two other tribunals, the Court of Finance and the Judicial Court. After the Revolution, in 1799, Napoleon revived the *Consul du Roi* as the *Conseil d' Etat*. The *Conseil d'Etat*, in concurrence with the provision in the 1791 Constitution, excluding from ordinary courts the jurisdiction to

exercise administrative functions, was vested with the jurisdiction to adjudicate administrative disputes and required its authorization for proceeding against government agents[370].

The concept of *Droit Administratif* is in contradistinction to Dicey's '*Rule of Law'*, where everybody in a State everybody shall be subjected to some common law and no official irrespective of his status and authority shall be kept outside the purview of Rule of Law. To Dicey, it seemed strange, that when the injured individual sought protection against the administration he had to turn to an administrative body, the *Conseil d'Etat*, which was certainly closer to the administration than the judicial courts. It was this fact which unfavourably impressed Dicey and was visibly against this theory that the law be objective to all in each case[371]. Furthermore, the *Conseil d' Etat* was apart from being the administrative body itself was the appellate authority for cases pertaining to the government and its employees. Thus no further appeal lies with any authority for such matters[372].

Yet the administrative courts have justified the faith that was then reposed in them. This system seems to have circumvented problems of state liability that Common Law jurisdictions faced. The administrative courts, headed by the *Conseil d'Etat*, positively or normatively considered that the State had acted honestly and an executive agency would be held liable to a citizen for any harm caused as a consequence of a greater risk being imposed upon him by an executive action[373]. This conveniently sidestepped the problem of a citizen under common law approaching ordinary courts challenging state action and the subsequent possibility of application of the "*King can do no wrong*" doctrine.

Position of Tribunals in India

In India, the tribunalisation of justice begun even before the Constitution and has been seen with separate courts for consumer matters, company matters, civil matters, criminal matters, and in the

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[370] C.Sumner Lobingier, "Administrative Law and Droit Administratif: A Comparative Study with an Instructive Model" Pennsylvania Law Review, 1942, pg 36-58

[371] Edwin Borchard, Edwin, "French Administrative Law" (1933). *Faculty Scholarship Series.* Paper 3445

[372] George D. Brown. "*DeGaulle's Republic and the Rule of Law: Judicial Review and the Conseil d'Etat*." Boston University Law Review 46, (1966): 462-492

[373] **SPYRIDON FLOGAITIS, ADMINISTRATIVE LAW ET DROIT ADMINISTRATIF**, in J.F. Garner, *Administrative Law*, The American Journal of Comparative Law, Vol. 36, No. 3 (Summer, 1988), pp. 565-567

Armed forces Tribunal Act. Though the word "Tribunal" has not been statutorily defined, the test for a tribunal was held in *Jaswant Sugar Mills v. Lakshmi Chand*[374], to be whether it was invested with the trappings of a court, such as having the authority to determine matters, authority to compel the attendance of witnesses, the duty to follow the essential rules of evidence and the power to impose sanctions.

There are State and Central Administrative Tribunals (CAT), similar to the Administrative courts in France. Announced as the brainchild of former Prime Minister Rajiv Gandhi, the CAT was envisioned as the replacement of the High Court to the extent it pertained to the service disputes as between the Central Government employees and the Central Government as also the intra – departmental controversies. The Central Administrative Tribunals Act in 1985 had initially provided that orders of the CAT may only be challenged in the Supreme Court under Art.136 of the Constitution. After this, the High Court was empowered to entertain appeals against orders of the CAT under Art.226 of the Constitution. The finality of orders of the CAT may give rise to speedier disposal of cases. But this, while contradicting the concept of Rule of Law, also violates the basic structure of the Constitution.

The modern Indian Republic was born as a Welfare State and thus the burden on the government to provide a host of welfare services to the people were immense. The quasi-judicial powers acquired by the administration led to a huge number of cases with respect to the manner in which these administrative bodies arrived at their decisions. The Courts have held that these bodies must maintain procedural safeguards while arriving at their decisions and observe principles of natural justice and these opinions were substantiated by the 14th Law Commission Report[375]. The vast number of welfare legislations coupled with the right to judicial review was thought to be potentially burden the civil courts with more matters than they would be able to handle. Thus, various tribunals for income tax matters, railway rates, labour matters, and company courts were given statutory legitimacy to function parallel to ordinary civil courts.

The tribunal system in India for Administrative matters derives its legitimacy from Article 323A of the Constitution. Administrative dispute resolution through separate tribunals for service matters came about through the 42nd Constitutional Amendment Act, 1976 to insert Article 323A,

[374] A.I.R. 1963 S.C. 677

[375] **R. NAYAK, ADMINISTRATIVE JUSTICE IN INDIA** 38 (1989)

providing for adjudication of disputes relating to conditions of service of the public services of the Union and of the States from the hands of the civil courts and the High Courts and to place them in and Administrative Tribunal[376]. Like the intentions behind the *Conseil d'Etat*, the object of this experiment was to ease the burden of 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[377]. The relation between this amendment and the common law evolved *Droit Administratif* was observed as a positive change even by critics of the Amendment[378].

The civil courts are gripped with strict rules of pleadings and evidence, which are not necessary for the disposal of cases pertaining to the services[379]. It has been held that the constitution of Service Tribunals by State Governments with an apex Tribunal at the Centre, which, in the generality of cases, should be the final arbiter of controversies relating to conditions of service, including the vexed question of seniority, may save the courts from the avalanche of writ petitions and appeals in service matters. The proceedings of such tribunals can have the merit of informality and if they will not be tied down to strict rules of evidence, they might be able to produce solutions which will satisfy many and displease only a few[380].

Pursuant to the amendment of Article 323A, the enactment of the Administrative Tribunals Act and the Central Administrative Tribunal Act in 1985 was accordingly enabled. And Section 28 of the Administrative Tribunal Act, empowered through Article 323A(2)(d) of the Constitution, effectively excluded judicial review of decisions of the CAT by the High Courts. But a party aggrieved by the CAT order was left the option of challenging it in the Supreme Court only under Art.136 of the Constitution.

Thus, a complete adaptation of *Driot Administratif* is impossible in India because judicial review of tribunals' orders cannot fully be removed. Any law excluding the Supreme Court's jurisdiction is a prima facie denial of the fundamental right conferred under Art.32, and thus liable to be struck

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[376] **DR. DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA** 10,645 (8th ed., Lexis Nexis Butterworths Wadhwa 2011)

[377] See the Statement of Objects and Reasons, accompanying the Forty-fourth Amendment Bill (later renumbered as the Forty-Second Amendment Act of the Constitution.)

[378] Rajeev Dhavan, "*Amending the Amendment: The Constitution (Forty-fifth Amendment) Bill, 1978*", 20 J.I.L.I. (1978) 249-272 at p. 267

[379] Vatchirkavu Village Panchayat v. Deekshithulu Nori Venketarama, 1991 Supp. (2) S.C.C. 228

[380] Kamal Kanti Dutta v. Union of India, (1980) 4 SCC 38

down. The Supreme Court has taken the stand that the power of judicial review is an integral part of our constitutional system, and without it the rule of law would become illusory, unless an adequate alternative is brought forth[381]. However, a quasi-executive body could, to some extent be granted the exclusion of judicial review by High Courts before the ratio in *L. Chandra Kumar* case in 1997. The exclusion of the review of High Courts under Section 28 came up for discussion in *S.P. Sampath Kumar v. Union of India*[382]. Justice Bhagawati, echoing the decision of the Constitutional Bench and concurring with Justice Ranganath Mishra expressed that "*….the basic and essential feature of judicial review cannot be dispensed with but it would be within the competence of Parliament to amend the Constitution so as to substitute in place of the High Court, another alternative institutional mechanism or arrangement for judicial review, provided it is not less efficacious than the High Court*".

The Administrative Tribunal was thus seen to be an appellate authority along the lines of the High Court but only for service matters on appeal from the SATs to the CAT. In this, the Tribunals were held to have the same powers as the High Court under Articles 226 and 227 of the Constitution. In addition to this, they have the same powers and follow the same procedures as the Civil Courts, insofar as they can review their own decisions[383]. However, while having such powers, they are not bound by the procedural shackles of the Civil Courts[384].

While holding that judicial review was an integral part of our Constitution under the Rule of Law, the exclusion of the High Courts' jurisdiction by way of Section 28 and Article 323A(2)(d) was thus justified. Judicial review not wholly undone by holding this as the Supreme Court still retained its jurisdiction. However, there was substantial consideration of the possibility of a body set up as an executive authority and acting as a judge in its own matters, which challenges the separation of powers under the Constitution. In this regard, both Justice Mishra and Justice Bhagawati agreed that the possibility of preponderance of administrative members in the tribunal must be attenuated and thus laid the following four conditions:

[381] Minerva Mills Ltd. and Ors. v. Union of India and Ors, [1981] 1 S.C.R. 206.
[382] (1987) 1 S.C.C. 124
[383] State of West Bengal v. Kamal Sengupta, (2008) 8 S.C.C. 612
[384] Id.

(i) the Tribunal shall have as its Chairman a legally trained person who is equal to the Chief Justice of a High Court with respect to qualifications; (ii) the Tribunal has benches at the seat of all the High Courts; (iii) a bench of the Tribunal should consist of at least one judicial member and one administrative member; (iv) the appointments to the Tribunal should be fair and objective so that the impartiality of its Chairman, Vice-Chairman, and members is assured.

Despite the holding in *Sampath Kumar*, the powers of Administrative Tribunal were still under criticism. Firstly, in equating the powers of the Administrative tribunals to those of High Courts, the judgement did not address whether the tribunal could strike down a law or statute as being constitutionally invalid. This question came up in *J.B.Chopra v. Union of India*[385], where the Supreme Court ruled that such a power was the direct and logical consequence of the reasoning in Sampath Kumar. Secondly, that the Tribunal did not have the jurisdiction to decide on the constitutionality of orders relating to service matters, such as orders issued by the President under Article 309 of the Constitution[386].

However in *Union of India v. Parma Nanda*[387], the Supreme Court upheld the authority of the Administrative Tribunals to decide the constitutionality of service rules. The Sampath Kumar case also did not consider the possibility of statutory interference by a State Government in an SAT order. This question was clarified in *Sambamurthy and Ors. v. State of Andhra Pradesh and Anr.*,[388] where the Supreme Court, while concurring with the ratio in *Sampath Kumar* held that any interference by the administration in an administrative dispute is violative of the basic structure and Rule of Law.

The equation of the Administrative tribunals with High Courts also raised the question of whether the members of the tribunal were entitled to equal pay. This was later clarified in *M.B.Majumdar v. Union of India*[389]. It was held that as regards pay and superannuation, the equation of members of the Tribunal with judges of High Court was not justified; however, the Administrative tribunals Act itself lays a basis for classification between the Chairman of the Tribunal and the Vice-

[385] (1987) 1 S.C.C. 422
[386] Dr M.L. Upadhyay, '*Administrative Tribunals : No Alternative Mechanism for Judicial Review*', Central India Law Quarterly, Vol. 2 (1989) 433
[387] A.I.R. 1989 S.C. 1185
[388] 1987 S.C.R. (1) 879
[389] 1990 S.C.R. (3) 946

Chairman. Insofar as the statute itself lays a distinction, the standards for the post of Chairman and Vice-Chairman of the Tribunal cannot be the same.

In 1997, the holding in *L. Chandra Kumar v. Union of India*[390] overruled the ratio in the *Sampath Kumar* case. It was held that the Tribunals were competent to hear matters where the vires of statutory provisions were in question. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under the constitutional set-up, been specifically entrusted with such an obligation. The Tribunals while continuing to act as the only courts of first instance in respect of the areas of law for which they have been constituted, it will be open to litigants to challenge the order of the Tribunal before a Division Bench of a High Court. As regards the exclusion of judicial review of the High Courts, the basic structure doctrine as evolved from the *Keshavananda Bharti*[391] case and the *Indira Gandhi*[392] case included the power of judicial review by the High Courts under Articles 226 and 227. This power over legislative action vested in the High Courts under Article 226 and under Article 32 of the Constitution has been interpreted as an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded. Furthermore, the High Courts had judicial superintendence over all tribunals and Courts in their respective jurisdictions and this too was a part of the basic structure. In this light, Article 323A(2)(d), Article 323B(3)(d), and Section 28 of the Administrative Tribunals Act, insofar as they excluded the judicial review of the High Courts, were held to be unconstitutional.

The *L.Chandra Kumar* ruling took a step back from the original intentions behind the 42nd Amendment. Like the intentions behind the *Droit Administratif* to ease the burden of civil courts, the Amendment sought to create Tribunals to ease the burden of the High Courts, by ousting the jurisdiction of the latter. The motivation of the Amendment to set up the Tribunals were threefold; to provide for specialization, to lessen the burden of already burdened High Courts and Supreme Court, and to quicken the decision making process[393].

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[390] A.I.R. 1997 S.C. 1125
[391] Keshavanada Bharati v. State of Kerala, (1973) 4 S.C.C. 225
[392] State of Uttar Pradesh v. Raj Narain, 1975 S.C.R. (3) 333
[393] **M.P. JAIN & S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW**, Vol.1 668 (6th ed., Lexis Nexis Butterworths Wadhwa 2007)

The First Law Commission in its 14th Report in 1958 had suggested the setting up of various tribunals providing the advantages of speed and procedural simplicity. But at the same time, the Commission warned that the Tribunal system should be supplementary to the ordinary courts and should not supplant them. On the same grounds, the Eighteenth Law Commission in its 215th report in 2008 suggested that the *L.Chandra Kumar* case be revisited by a larger bench of the Supreme Court. The Report delves into the objectives of the Amendment as well as those of the Administrative Tribunals Act. With reference to a number of previous reports of the Commission, the report concludes by favoring the position as laid down in the *Sampath Kumar* case and recommending reconsideration of the *L.Chandra Kumar* case, which in the Commissions view undid the objectives of the Administrative Tribunals Act.

It is uncertain whether the Administrative Tribunals in India, if modelled along the French *Droit Administratif*, would lead to more efficiency in disposal of cases. H.M. Seervai has expressed reservations about adopting this system absolutely in India simply because it was seen to work smoothly in France. While all praise for the system, he observes that the French Government was prepared to pay the price of subjecting public administration to the rule of law by an independent tribunal of its own officials[394].

The conditions that were prevalent when the *Conseil d'Etat* was established in France do not exist in India. A tribunal that is subject to its own unquestioned discretion would fail the basic structure's requirement of judicial review by the Supreme Court. The position today is that orders of the CAT are subject to judicial scrutiny by a division bench of the High Courts. This, as has already been discussed, is contrary to the intentions of the 42nd Amendment which sought, as much as possible, to espouse in principle the *Droit Administratif*. The Administrative Tribunal is neither a completely judicial body nor a completely administrative body. In *Sambamurthy*[395], the question related to over-interference of the administration itself which was struck down. In *L. Chandra Kumar*, the over- interference of the judiciary was upheld, which has been criticised by the Law Commission in its report discussed above.

[394] **H.M SEERVAI, CONSTITUTIONAL LAW OF INDIA** 3059 (4th ed., Universal Law Publishing Co. 2008)
[395] Sambamurthy and Ors. v. State of Andhra Pradesh and Anr., 1987 S.C.R. (1) 879

Considering the oscillating reins of control over the tribunal, it may become necessary to have an altogether independent body overlooking the Administrative Tribunals. The *L. Chandra Kumar* judgement, at paragraph 97, briefly discussed the necessity of bringing the Administrative tribunal system under an umbrella that may possibly do away with the ills of the present system. Speaking for the Bench, Justice Ahmadi has observed that Tribunals, such as Administrative tribunals must be under a single nodal ministry, ideally the Law Ministry. The Law Ministry may in turn delegate this responsibility to an independent nodal agency. This would ensure that if the heads of the tribunal were to fault in their discretion, the entire system would not languish in the uncertainty of a judicial body or an administrative body to correct those ills. The original intent of Tribunals as seen even in Britain, through the Franks Committee report, which led to the Tribunals Act of 1948, shows that there is an urgent need for the overhauling of the tribunal system.

Conclusion

In the *Delhi Bar Association*[396] case, it was argued that the legislative competence of the Parliament to create tribunals could not be questioned. The argument on the part of the Union of India was that vesting jurisdiction with tribunals would leave the High Courts with no cases but this was negated by the Court. Tribunals should not be seen as departments of ministries as part of the administration nor must they seem to be so independent as to be excluded from jurisdiction of ordinary courts. Thus the best way is the adoption of *Droit Administratif* system in India.

The jurisdiction of the Supreme Court can never be ousted. The High Courts' jurisdiction may be ousted without affecting the jurisdiction of the Supreme Court as held in *Sampath Kumar* and suggested by the Law Commission, but must be accountable to an independent body which is neither an arm of the administration nor an ordinary court. The Supreme Court too must be cautious in admitting appeals from order of tribunals to ensure the efficacy of this system. A partial adoption of the Droit Administratif, coupled with an overlooking independent nodal agency, both free from over-interference from the administration or the ordinary courts is one way by which the present ills of the system may be removed.

[396] Union of India v. Delhi bar Association, (2002) 4 S.C.C. 275