THE RISE AND FALL OF ADMINISTRATIVE TRIBUNALS: ADMINISTRATIVE TRIBUNALS AS AN ANTITHESIS TO THE DOCTRINE OF SEPARATION OF POWERS

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ABSTRACT

"*Power tends to corrupt and absolute power corrupts absolutely*"[1]

This essay aims to analyse the administrative tribunals *vis-à-vis* the doctrine of separation of powers as enshrined in the Constitution of India. The Supreme Court of India has through a series of judgements pronounced that separation of powers forms a part of the basic structure of the Constitution. Separation of powers in a State considers the idea that governmental functions must be based on a tripartite division of legislature, executive and judiciary. In simple words, the three branches of any democratic government should be separate, distinct and sovereign in its own sphere with the aim that one does not trespass the territory of another.[2]

This essay explores the changes in the status of Administrative Tribunals through the doctrine of basic structure enshrined in the Constitution while also relying on landmark judgements that helped do so. Administrative Tribunals were primarily evolved to help ease the burden off courts and establish a system of speedy justice when it came to service matters related to government officials.

[1] Quote by Lord Acton to Bishop Creighton in a letter dated 1887

[2] Nidhi Singh and Anurag Vijay, "Separation of Powers: Plan and Practice", International Journal of Scientific and Research Publications, Volume 3, Issue 11, November 2013 1 ISSN 2250-3153

I. INTRODUCTION

The origin of the doctrine of separation of powers can be traced back to 4th century B.C, where Aristotle in his treatise entitled '*Politics'* defined the three agencies of government as the general assembly, the public officials and the judiciary[3]. Later, theorists like Montesquieu, John Locke, and James Harrington, among many others, further conceptualised these functions as legislative, executive and judicial. The driving force for the formation of these theories relied heavily on the rulers and kings of those times. Political minds wanted to theorise a society and State where people and their liberties were safeguarded from tyrants and despots, especially since in those time the sovereign was responsible for the exercise of all governmental functions.

Montesquieu's doctrine of separation of powers and checks and balances divides the government into three branches – the Executive, the Legislature and the Judiciary. In the past few decades, India has been seeing a growth of autonomous regulatory bodies as a result of globalisation. [4] The doctrine of separation of powers is an inseparable aspect in the development of democracy. Democracy prescribes a system where every individual can, without fear of retribution, express themselves and live on their own terms. It enables them to live their life in any way they like, as long as their methods and lifestyle do not encroach upon the rights of other people. This context allows one to theorise that a system of balances and checks needs to exist among the three branches of the government to ensure a durable and fair democratic system.[5]

The doctrine of separation of powers has not been given constitutional status in India. While the directive principle under Article 50 does ask for the separation of functions and powers of the Judiciary and Executive by the State in case of public services, there is no rigid codification of the same. The Supreme Court in *Ram Jawaya Kapur v. State of Punjab*[6] shed light on the flexibility of separation of powers in India while establishing that the different organs of the Government have their own set of functions allocated to them. However, in *Kesavananda Bharati v. State of Kerala*[7], Beg J. added that separation of powers is a part of the doctrine of basic structure; it cannot be changed even under Article 368 of the Constitution. In light of this,

[3] Aristotle, Politics, book IV, ch. 14. *See*: Ervin, Sam J. "Separation of Powers: Judicial Independence." *Law and Contemporary Problems*, vol. 35, no. 1, 1970, pp. 108–127. *JSTOR*, www.jstor.org/stable/1191032.
[4] Sheela Rai, "India's Tryst with Independent Tribunals And Regulatory Bodies And The Role Of The Judiciary", *Journal of the Indian Law Institute*, vol. 55, no. 2, 2013, pp. 215–227. *JSTOR*
[5] *Supra* at 2
[6] AIR 1955 SC 549
[7] (1973) 4 SCC 225

can we imply that, unless mentioned otherwise in the Constitution, the Executive and Legislature have no authority to discharge functions that are the core responsibility of the Judiciary?

II. ESTABLISHMENT OF ADMINISTRATIVE TRIBUNALS

In the past few decades, the government has had an increase in the functions it performs, leading to more litigation, restrictions on freedom of the individuals and friction between the public and authority. The friction that was created due to the change in scenario of governmental duties in India lead to rise of legal matters as well as matters which affect the society at large.[8].

The primary encumbrance in dispute resolution in India is the fact that procedural difficulties in the judicial system have made the process of disposing of cases tedious and onerous, which then leads to piling of cases in an already overburdened system. As a response to this, the Executive felt the need to discharge certain quasi-legislative and quasi-judicial functions by creating special tribunals that would deal with administrative issues which the current courts were not well-equipped to deal with, thus blurring the delineation of the functions discharged by the Legislature, Executive and Judiciary, contrary to what is propagated by the doctrine of separation of powers.

Articles 323A and 323B of the Constitution gave power to the Parliament to enact the Administrative Tribunals Act, 1985. This Act provided for adjudication by administrative tribunals of complaints relating to public servants under the Union or State governments or of any local or other authority,[9] as defined in Article 323A.

III. PROVISION FOR ADMINISTRATIVE TRIBUNALS IN THE CONSTITUTION OF INDIA

While India doesn't strictly follow separation of powers, it still does follow its basic principles. Separation of powers allows checks and balances between the three branches of government in order to prevent arbitrariness exercised by one branch; however this doesn't permit one branch to encroach upon another branch's essential functions. Dispute resolution is considered the core function of the Judiciary, however, the establishment of Administrative Tribunals allowed members of the Executive handle matters related to service, which are presided over by government officials. While the Judiciary isn't permitted to sit in judgement over matters of

[8] Abhishek Jha, "Administrative Tribunals of India – A Study In The Light Of Decided Cases", (January 22, 2012). Available at SSRN: https://ssrn.com/abstract=1989780 or http://dx.doi.org/10.2139/ssrn.1989780
[9] Art.323-A(1), Constitution of India

economic policy[10] since that is a core function of the other branches of Government, the power of dispute resolution should remain with the Judiciary, and not Government officials.

When India was declared a Welfare State by the Constitution, the government was bestowed with the duty of performing welfare services to accommodate its citizens. Certain quasi-judicial powers of adjudication were given to these administrative bodies, but instead the courts saw an influx of a number of cases regarding the methods of how these bodies reached decisions. To relieve the courts of these overstraining cases, Administrative Tribunals were set up as a way to affect speedy, cheap and specialised justice. The tribunals were meant to be presided over by government officials, who had a better understanding of the workings of economic and social processes followed by government officials.

The Administrative Reforms Commission in 1967 was set up by the Government to tackle the problem of backlog of cases. It was meant to examine the problem, suggest solutions and to recommend suitable areas in which tribunals could be set up.[11] In its report it gave the reasons for growth of administrative tribunals as follows[12]:

1. Inadequacy of the traditional Judiciary to effectively decide administration-related matter especially when it came to technicalities.
2. The traditional Judiciary was seen to be slow, costly and excessively procedural.
3. Administrative authorities can take preventive measures and unlike regular courts, they don't have to wait for parties to appear before them with disputes.
4. Administrative tribunals can take effective steps for enforcement of these preventive measures which regular courts cannot usually do.

When India became a liberal market, autonomous regulatory bodies became a necessity in order to inspire confidence in foreign investors and private organisations to invest in the country. The establishment of regulatory bodies like Securities Exchange Board of India in 1992, Telecom Regulatory Body in 1997, Central and State Electricity Commissions in 1998, Tariff Authority for Major Ports in 1997, Competition Commission of India in 2003, came up as a result of this liberalisation.[13]

[10] *Prag Ice & Oil Mills v. Union of India*, AIR 1978 SC 1296
[11] *Supra* at 10
[12] Goel, Shivam, Administrative Tribunals in India (August 12, 2014). Available at SSRN: https://ssrn.com/abstract=2479241 or http://dx.doi.org/10.2139/ssrn.2479241
[13] *Supra* at 5

When India liberalised government control over the economy, its need for speedy justice was realised, along with the need for specialised skills in the sphere of administrative law. The Parliament realised that people with special skills were required to adjudicate disputes with reference to matters of administrative process in India. The Parliament introduced the 42nd Amendment to the Constitution which empowered the Parliament to constitute special administrative tribunals for adjudication of matters related to services under the government under Article 323A. Article 323B gave the appropriate Legislature to constitute tribunals for matters enumerated in clause (2) of that article.

IV. ADMINISTRATIVE TRIBUNALS AS A THREAT TO HIGH COURTS

Article 227 of the Constitution gives High Courts the power of superintendence over all of the relevant lower courts. [14] Appeals from lower courts go to the High Courts and then to the Supreme Court of India. The Parliament is not permitted to establish a separate hierarchy of courts parallel to the one that already exists, as enshrined in the Constitution. However, Article 323A[15] excluded administrative tribunals from the jurisdiction of High Courts and created its own separate set of courts, contrary to Article 227. This issue was brought up in the case of *S.P. Sampath Kumar v. Union of India*[16]. This case examined the validity of Section 28 of the Administrative Tribunals Act, 1985 which excluded the jurisdiction of High Courts under Articles 226 and 227 of judicial review in matters of service, however keeping jurisdiction of Supreme Court under Articles 32 and 136 open.[17] P. N. Bhagwati, C.J. held in his concurring opinion that:

"*It is now well settled as a result of the decision of this Court in Minerva Mills Ltd. v. Union of India*[18] *that judicial review is a basic and essential feature of the Constitution and no law passed by the Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is abrogated or taken away the Constitution will cease to be what it is. It is a fundamental principle of our constitutional scheme that every organ of the State, every authority of the Constitution derives its power from the Constitution and has to act within the limits of such power*."

[14] Art. 227(1) - "*Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction."*
[15] Art. 323A(2)(d)- "*A law made under clause (1) may exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Article 136, with respect to the disputes or complaints referred to in clause (1*)."
[16] (1987) 1 SCC 124
[17] *S.P. Sampath Kumar v. Union of India*, (1987) 1 SCC 124
[18] (1980) 3 SCC 625

"*We have already seen that judicial review by this Court is left wholly unaffected and thus there is a forum where matters of importance and grave injustice can be brought for determination or rectification. Thus, exclusion of the jurisdiction of the High Court does not totally bar judicial review. This Court in Minerva Mills*[19] *case did point out that "effective alternative institutional mechanisms or arrangements for judicial review" can be made by Parliament. Thus, it is possible to set up an alternative institution in place of the High Court for providing judicial review*."[20]

Another issue addressed in the *S. P. Sampath Kumar* case was the validity of Section 4 of the Administrative Tribunals Act, 1985 which dealt with the appointment of the Chairman, Vice-Chairmen and other members of the Administrative Tribunal. P. N. Bhagwati, C.J. in his opinion said:

"*But so far as the appointment of Chairman, Vice Chairmen and administrative members is concerned, the sole and exclusive power to make such appointment is conferred on the government under the impugned Act. There is no obligation cast of the government to consult the Chief Justice of India or to follow any particular selection procedure in this behalf. The result is that it is left to the absolute unfettered discretion of the government to appoint such person or persons as it likes as Chairman, Vice-Chairmen and administrative members of the Tribunal*."[21]

Here lies the question of judicial independence and the risks of appointments made by the Executive. Since most of the service matters would be against the Government or its officers, one can assume that a person wanting to be in the Executive's good graces would have to satisfy the Executive for the same, therefore creating a bias in the minds of the members of the tribunal. This would compromise the sanctity of the appointments made by the Executive and could make them partial in nature.

The Court in *S.P. Sampath Kumar's* case held that Section 4 of the Act should be amended so that the appointments made to the Administrative Tribunals do not solely depend upon the Government, and that the Chief Justice of India's opinion would also be taken into consideration.

[19] (1980) 3 SCC 628
[20] *S.P. Sampath Kumar v. Union of India*, (1987) 1 SCC 128
[21] *S.P. Sampath Kumar v. Union of India*, (1987) 1 SCC 132

After *S.P. Sampath Kumar's* case, the position was that Administrative Tribunals were held to validly supplant High Courts in disputes relating to service matters. This position stayed till the case of *L. Chandra Kumar v. Union of India*[22], where a seven-Judge bench of the Supreme Court held that:

"*All decisions of Tribunals, whether created pursuant to Article 323A or Article 323B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls*."[23]

V. CURRENT POSITION OF ADMINISTRATIVE TRIBUNALS

The safeguards given to judges of the High Courts and Supreme Court are there to ensure independence of the Judiciary so that the judges can interpret statutes without worrying about scrutiny from the Parliament or public. But the members of Administrative Tribunals do not get any such safeguards so they cannot be considered as effective substitutes for High Courts. In fact, it was believed that the power of the tribunals in interpreting Articles 14, 15 and 16 of the Constitution in service matters endows High Court with the benefit of filtering frivolous claims and getting reasoned decisions on merits while it decides cases under Articles 226 and 227. [24]Thus, in *L. Chandra Kumar's* case it was decided that Administrative Tribunals can supplement the High Courts but not supplant them. Therefore, Section 28 of the Administrative Tribunals Act, 1985 was held unconstitutional for excluding the jurisdiction of High Courts. Clause 2(d) of Article 323-A[25] and Clause 3(d) of Article 323-B[26] were also held unconstitutional for violating the basic structure of the Constitution. The tribunals still have original jurisdiction as to matters of service and the litigants cannot directly move the High Court. No appeal will lie under Article 136 to the Supreme Court directly from the decisions of these tribunals. Special Leave Petitions will lie from the decision of the High Court. [27]

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[22] (1997) 3 SCC 589

[23] *L. Chandra Kumar v. Union of India*, (1997) JT (3) SCC 589

[24] P. Leelakrishnan, "Reviewing Decisions of Administrative Tribunals: Paternalistic Approach of the Indian Supreme Court", *Journal of the Indian Law Institute*, vol. 54, no. 1, 2012, pp. 1–26. *JSTOR*, www.jstor.org/stable/43953523.

[25] "*A law made under clause (1) may exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Article 136, with respect to the disputes or complaints referred to in clause (1)"*

[26] *"A law made under clause (1) may exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Article 136, with respect to all or any of the matters falling within the jurisdiction of the said tribunals*"

[27] *Kendriya Vidyalaya Sangathan v. Subhash Sharma*, (2002) 4 SCC 145

The point of these tribunals was to ease the burden off the Supreme Court and have a system supplementary to the High Courts with people that have the required specialised knowledge. But instead, the Supreme Court needs to keep reminding these tribunals to act within the powers assigned to them. The Supreme Court held that despite the punishment being harsh, excessive and disproportionate to the misconduct, the tribunal has no power to interfere with the punishment, provided it is already based of any evidence and is not arbitrary, mala fide or perverse.[28]

VI. CONCLUSION

Administrative Tribunals were established to reduce the burden of the High Courts and Supreme Court but have instead increased their work load. Administrative Tribunals are widely considered to be incompetent and give erroneous decisions. After the case of *L. Chandra Kumar* restored the power of superintendence of the High Courts, almost every matter in the tribunals has been appealed. Administrative Tribunals were instituted for the purpose of "speedy justice" but the people appointed lacked the expertise required in giving correct decisions. The appointments to these tribunals are made by the Government which is against the Montesquieu's doctrine of separation of powers. Since Administrative Tribunals don't necessarily need to follow the same procedures followed by ordinary courts, they can potentially violate the principles of natural justice.

These inconsistencies between the already established rules of basic structure of the Constitution and the working of Administrative Tribunals help one see how Administrative Tribunals are truly an antithesis to the separation of powers, which is an indestructible part of the Constitution as has been established through judgements by the Supreme Court of India.

[28] *State Bank of India v. Surendra Kishore Endow*, (1994) 2 SCC 537