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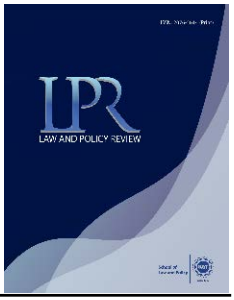

Title: **Tribalization in Indian Legal System: From Emergence to Extant Challenges**

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Tribalization in Indian Legal System: From Emergence to Extant Challenges

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Abstract

The current study attempts to explore the evolution and current state of the tribunal system in India. Tribunals were introduced to provide speedy justice and relieve the burden on the judiciary. However, they have been plagued by procedural and administrative issues. The recent court cases and recommendations have highlighted the need for structural reforms and independence for tribunals. The government has attempted to address these issues through mergers and uniform conditions of service; however, it must be ensured that changes do not compromise the constitutional morals or principles of separation of powers. The study concluded by emphasizing the importance of expert consultation and caution while implementing reforms.

***Keywords*:** Hierarchy of courts, judicial pendency, judicial reform, speedy justice, tribunals, tribalization

Introduction

The evolution of tribunals at domestic and international levels has been marked by a growing recognition of the need for a specialized judicial mechanism to address complex legal disputes. In past, several tribunals were introduced to resolve the international disputes. These tribunals include Alabama Claims Tribunal Bingham (2005), Permanent Court of Arbitration (Hudson, 1933), Permanent Court of International Justice (Hudson, 1957), International Labor Organization Administrative Tribunal (Gormley, 1966), International Criminal Tribunal for the former Yugoslavia (ICTY) (Shraga & Zacklin, 1994), International Criminal Tribunal for Rwanda (ICTR) (Akhavan, 1996), Court of Arbitration for Sport (Rawat, 2020), and International Tribunal for the Law of the Sea (Noyes, 1999). These tribunals were introduced to provide speedy and effective settlement of international disputes.

Since their inception, the tribunals in India have been regarded as a parallel court system at domestic level. Although, not bound by the

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procedural dominion as that of the traditional court system, they have been an equal when it came to their importance and legitimacy. When the country's judiciary was overwhelmed with the pendency of cases, the introduction of tribunal system was a thought-after and optimistic stop-gap arrangement. With an easier procedural approach and specialists' perceptions on the task of adjudicators, tribunals promised what Indian judiciary needed to come out of the backlog and further its democratic scope and ambit. The need for administrative tribunals was so high that it was legitimized through a constitutional amendment, thereby inserting new provisions of 323A and 323B that spoke about tribunals under the center and state, respectively. Soon when the need arose, tribunals were being set up under various departments and administrative offices to adjudicate on matters related to service and with the non-complex modus operandi of tribunals, matters would be adjudicated in less time.

History of Tribunals

India has had a total of 36 central tribunals set up under several acts. The Income Tax Appellate Tribunal (ITAT), which was established in January 1941 and focuses on handling appeals involving the Direct Taxation Acts, was the first tribunal established in India (Income Tax Appellate Tribunal, 2019).

The Income Tax Appellate Tribunal

The ITAT was constituted vide section 5A of the Income Tax Act, 1922. Initially, with 6 members constituting three benches – each at Delhi, Kolkata, and Mumbai, the number of benches has now reached a total of 63 benches, located at 27 stations, and covering almost all the cities having a seat of the High Court (Taxscan Team, 2019). With the exception of the required adjustments made as a result of the ITAT's enlargement and extension of its jurisdiction, its operation has remained mostly unchanged since its founding. The Income Tax Act of 1961 did not alter the tribunal's structure or operations in any significant way.

The ITAT's motto is "Nishpaksh Sulabh Satvar Nyay," which means "impartial, simple, and quick justice." It provides the litigants with justice through a low-cost and easily accessible forum that is devoid of complications and is respected for its expertise on the topic of direct taxes. Since it is the country's first tribunal, ITAT is frequently referred to as the "Mother Tribunal." It is important to note that the Government of India

created similar Appellate Tribunals for indirect taxes, such as the Customs, Excise, and Service Tax Appellate Tribunal (CESTAT), the Central Administrative Tribunal (CAT), the Railway Claims Tribunal, and the Foreign Exchange Appellate Board as a result of ITAT's success.

The Constitution of India, 1950

The original constitution did not speak about the formation of tribunals; rather only touched upon it incidentally in two different provisions which anticipate that the Supreme Court and the High Courts have the authority to review tribunal rulings, according to Articles 136 and 227, respectively. However, the escalation in backlog of cases in the traditional courts led the legislators, judges, and members of the government to take interest in the scheme of tribunals. Almost, 12,000 courts constitute the web of the Indian judicial system. India has 25 High Courts, 3150 district courts, 4816 magistrate courts, and 1964 class II magistrates and these courts function below the Supreme Court (Robinson, 2016).

Despite this wide network, the number of pending cases before the judiciary has been growing. In 1950, there were only 771 cases pending before the Supreme Court (Debroy, 2018). By 1978, it had grown to 23, 092 and crossed 100,000 in 1983 (Debroy, 2018). Upon the adoption of several measures, the pendency was brought down to 19806 in 1998, however, this effort couldn't be sustained, thereby soaring the pendency to 62791 in 2014. Today, the number stands at 68, 310 pending matters at the Supreme Court of India (Supreme Court of India, n.d.).

While, the handling of backlog is best done by the apex court, the status of pendency in the subordinate courts can easily be pictured. As it stands today, the total pendency in the District and Taluka Courts is 31323192, of which 368330 cases are between 20 and 30 years old and 13285893 are cases pending for a year alone (National Judicial Data Grid, 2020). The disproportionate numbers have seen several expert bodies coming up with the reports suggesting judicial reforms. One such permanent body has been the Law Commission of India. Here, the First Law Commission's Fourteenth Report, published in 1958, is extremely pertinent. This report, titled "Reforms of Administration of Justice," is recognized as one of the first and most thorough ones to have addressed the problems plaguing India's justice delivery system.

The Commission came to the conclusion that the establishment of a general administrative body similar to the Conseild'etat of France was not appropriate for India after comparing the comparative experiences in England, France, and America (Law Commission of India, 1958). However, the Law Commission validated the creation of a specific kind of tribunals to deal with the cases of service matters or in other words "another class of disputes…in which government servants seek redress for real or fancied violations of their constitutional safeguards or the breach of the rules regulating their conditions of service" (Law Commission of India, 1958). The Commission recommended that these tribunals, to which government employees may send memorials and appeals about disciplinary and other actions taken against them, be presided over by a legally qualified chairman and comprised of experienced civil servants (Law Commission of India, 1958). Another notable group echoed the Law Commission's Fourteenth Report's recommendations during the following fifteen years; this was the High Court Arrears Committee report, which was established by Honorable Justice J.C. Shah of the Supreme Court and issued its report in 1972 (Gormley, 1966).

Soon after, in 1974, the Sixth Law Commission, chaired by former Chief Justice of India Honorable P. B. Gajendragadkar, came with the opposite conclusion; it vetoed the creation of tribunals for adjudication of administrative/service law matters (Law Commission of India, 1974). Interestingly, the reason behind such a conclusion is important to emphasize upon. The Commission acknowledged that creating a separate body would aid in clearing the backlog. However, it also stated that such a move would only be beneficial if the Supreme Court's Special Leave Petition jurisdiction under Article 136 and the High Courts' writ jurisdiction under Article 226 were reduced, which the Commission was unwilling to do. Given that, the judiciary would later argue about how to strike a balance between a distinct system of tribunals and the specific powers of the superior courts. The Commission's foresight in identifying this disadvantage in the 1970s was impressive.

The 42nd Constitution Amendment Act, 1976

Until then, tribunals were being set up under specific laws only; however, over the years, lawmakers decided to consolidate the idea of the formation of tribunals by incorporating it in the Constitution. Resultantly, the 42nd Constitution Amendment Act, 1976 legitimized the tribunals by introducing

an exclusively new chapter viz. Part XIV-A titled 'Tribunals', containing Article 323A and 323B. While, the former covers 'administrative tribunals', the latter takes into consideration '*tribunals for other matters'*. The fifth paragraph of the Declaration of Objectives and Reasons annexed to the Constitution (Forty-second Amendment) Act, 1976, contains the formal justification for this which provides that:

To reduce the mounting arrears in High Courts and to secure the speedy disposal of service matters, revenue matters, and certain matters of special importance in the context of the socio-economic development and progress, it is considered expedient to provide for administrative and other tribunals for dealing with such matters while preserving the jurisdiction of the Supreme Court in regard to such matters under article 136 of the Constitution. It is also necessary to make certain modifications in the writ jurisdiction of the High Court under article 226.

The government closely followed the recommendations of the Swaran Singh Committee Report while making this significant decision. The Report also supported the removal of all courts' jurisdiction under Article 136 of the Constitution, with the exception of the Supreme Court.

The Administrative Tribunals Act, 1985

The creation of tribunals as brought about by the 42nd Constitution Amendment Act, 1976 was halted for long (as it was implemented after 10 years) and was revived years later in 1985 with the Parliament enacting the Administrative Tribunals Act in pursuance to Article 323A of the Constitution. However, all didn't go well and this was met with a series of writ petitions at the High Courts and the Supreme Court challenging the constitutional validity of the provision, legitimizing the formation of tribunals. The Supreme Court and High Court's respective exclusions from jurisdiction under Articles 32 and 226 served as the main justification for defiance. The Supreme Court addressed this unconstitutionality in the case of S.P Sampath Kumar v. Union of India (1987).

S.P Sampath Kumar v Union of India

The Administrative Tribunals (Amendment) Act, 1986, which contains the provisions in this case, was amended the following year to save the Supreme Court's jurisdiction under Article 32 in respect of original jurisdiction and to maintain the availability of jurisdiction under Article 136. In S.P Sampath Kumar case, the complainant approached the Court

with constitutional objections to the law of tribunals since it did not grant the High Courts and the Supreme Court the ability to review decisions made by lower tribunals. Resultantly, it went against the public's right to judicial review. Heard by a constitution bench of five judges including Honorable Chief Justice P. N. Bhagwati, the bench delivered its judgment on 09/12/1986. Though, all the questions/issues raised in the petition were addressed, what is unforgettable about the judgment is the way the Court appeared "unduly sympathetic" (Gormley, 1966) to the impugned law.

The judgment began with the statement that the Administrative Tribunal was supplanting the High Court. It went on to add that the chairman of the tribunal was to be equated with the Chief Justice of a High Court. Moreover, as such emphasized that for qualifying for the post of chairman, the person "should have been a Judge of the High Court or he should have for at least two years held office as Vice-Chairman" (Debroy, 2018). In accordance with this claim, the Court invalidated Clause (c) of Section 6(1) of the Act which allowed someone who had previously held the office of Secretary to the Government of India to be eligible for the position of chairman of a tribunal.

Coming to the question of the right to judicial review having been taken away, Justice Bhagwati, citing his judgment in the case of Minerva Mills v Union of India (1987) stated that though, the basic feature of judicial review couldn't be taken away, the Parliament could, however, substitute the High Court by an alternative institutional mechanism that would be open for judicial review, thereby keeping intact the basic structure doctrine of judicial review. He went on to state that "Administrative Tribunals were created in substitution of the High Court"; hence it itself was functioning as a High Court and, therefore there was no question of the right to judicial review having been taken away. He emphasized on the position that in order to ensure that the principle of judicial review is not violated, it was necessary that the alternate institutional authority, thus created, should be as effective as the High Court. In other words, when it came to using the judicial review authority over service matters, the tribunals in this case should have been effective enough.

Justice Bhagwati, however, taking notice of the selection procedure of the chairman, vice-chairman, and members as laid down in the act concluded that it was buried in administrative discretion. Nonetheless, a tribunal that stands in for the High Court, should be independent of the

executive branch. He decreed that the Chief Justice of India must be consulted meaningfully and effectively before the concerned Government may designate someone to these positions (Debroy, 2018).

Additionally, Justice Bhagwati also outlined in detail how a tribunal must avoid having a disproportionate number of administrative members on any given bench. He observed that since service matters would very often involve questions relating to Articles 14, 15, and 16, therefore bench needed to have experts trained in the complexes of the judiciary. He emphasized the fact that not giving enough weightage to legal input would fail a tribunal to reach up to the point of the High Courts.

Justice Ranganath Misra, in his separate (but concurring) judgment, penned down that the Act of 1985 (The Administrative Tribunals Act, 1985) has been created as a substitute and not as a supplement to the High Courts. In doing so, he drew attention to sections 14 and 15 of the act that vests the tribunals with powers relating to service matters, hitherto vested in the courts except the Supreme Court; and hence accepting the jurisdiction of High Courts under Article 226 that could not be said to be ultra vires the constitution. Expressing his thoughts on 'rights' being vested to the tribunals, he added that the tribunals should not only have a de jure power to act as a substitute of High Courts, however, all necessary and ancillary rights should be advanced to them de facto. This is the only condition when tribunals would be able to act as a substitute of High Courts and do justice to the very idea behind their creation. Anything else would at best cause a step-back against what was desired, viz. to relieve the High Courts of the backlog of cases. Therefore, for the tribunals to become lawful successors of High Courts in dealing with service matters, they would have to be equipped with all the power, quality, expertise, and competence of a High Court; only then would a tribunal, in merit, would conform to become the 'alternate' institution as enunciated in Minerva Mills case (1980).

With these and a few other observations made by the Supreme Court in this case, it can be said that it was a rare kind of judgment by a constitution bench where not many changes were decided. The court instead closed the case hoping that the impugned law would be reworked upon to bring the essential changes in order to establish tribunals as a true substitute of the High Courts. Resultantly, the issue of tribunals was resolved, however, the trouble kept coming to the courts even three decades down the line.

R. K Jain v Union of India (1993)

In this case, the court faced questions regarding the functioning of a tribunal. The bench held that tribunals formed under Article 323A and 323B could not be held as substitutes to the High Courts. After having closely observed the functioning of tribunals for years, the court was satisfied that the tribunals had failed to judiciously exercise the power of judicial review. It also noted that keeping only one window of review vide Article 136 open proved to be inconvenient, inexpedient, and ineffective. The court had recommended that an expert committee, such as the Law Commission, inquired if the creation of a two-judge bench of every High Court takes appeals from tribunals within its geographical limits would be workable or not. It additionally left it open for exploration if the introduction of members from the bar would help tribunals to function better. It would be germane to mention here that the Law Commission had taken up a study on the recommendations made in the case of R. K Jain v Union of India (1993). However, when the division bench delivered its order, it was quite evident that the decision in the Sampath Kumar case needed a review by a larger bench (the original bench comprised of five judges), the study was halted forthwith.

L. Chandra Kumar Vs Union of India (1997)

Faced with similar questions regarding the tribunals and tribunalization, the Supreme Court this time, constituted a bench of seven judges to hear the matter. Upon analyzing the points of law, the Supreme Court held that the surmise drawn in Sampath Kumar case that, the High Courts be barred from judicial review of tribunal decisions, was based on a wrong premise. It held that all decisions of tribunals, whether instituted under Article 323A or 323B, would be open for judicial review by a division bench of the respective High Court, vide Article 226/227 of the Constitution. The hitherto standing rule of the appeal being allowed only to the Supreme Court under Article 136 was modified; the window of appeal under judicial review to High Courts was let open. The court made a detailed observation that letting only the Supreme Court be the first court of appeal would not only be costlier, moreover ineffective as well. Additionally, it would lead to the court being overwhelmed with service matters that are most often challenged on considerably shallow grounds.

Much to the surprise of the common expectation prevailing about the decision of the court, in this case, it did not strike down the very provision authorizing the creation of tribunals. Instead, it reinforced the long-held importance and necessity of an alternate body, such as the tribunals, to rescue the judiciary. It opined that striking down the constitutional provision would not bring much goodness to the already ailing position of the justice delivery system of the country. However, it noted that holding the tribunals, as they exist today in consonance to the Administrative Tribunals Act establishing it as the alternate administrative mechanism would not be correct. Thus, the decision in Sampath Kumar case holding them as a substitute of the High Courts was unsustainable on several grounds.

According to the court, everyday rise in litigation, coupled with the already accumulated arrears called for some potent solution. The courts require functional answers to this long-held problem of arrears. Additionally, one such handy solution could be the strengthening of the act to make tribunals a good alternative to High Courts. Drawing from the earlier judgments of Supreme Court on judicial review, being part of the basic structure and also the constitutional ideal of separation of powers, it elaborated that what the court meant was that the power of judicial review should only be in the hands of the judiciary and cannot be delegated to any other organ of the government- applying both at the Center and the States. Thus, the conferment of power to the Supreme Court of judicial review of tribunal decisions under Article 136 was justified under the constitution. However, the delegation of the same power to a body outside the judiciary was unconstitutional. Moreover, since tribunals were a true judicial body, therefore, the conferment of judicial power to a non-judicial body was violative of the basic structure of the constitution. The court also distinctly drew the attention of the parties to the lacunae of the tribunals wherein devoid of constitutional safeguards they could not become true substitutes of High Courts. They could continue functioning as supplementary to the constitutional courts.

The court endorsed that the introduction of tribunals as a device to substitute High Courts had failed to achieve its objectives in more than one way, however, at the same time closed its judgment with orders that could help the judiciary function better. It held that the tribunals would continue working only on the lines for which it was created, viz. as courts of the first

instance in service-related matters and barred it from taking on any question related to its parent statute; the reason that a body which is formed by a parent statute cannot itself adjudicate on whether the statute was constitutional or vice versa.

Keeping with its decision on continuing the body of tribunals, the court made the most fitting observation regarding leaving its remarks on the given suggestion- that of ridding the tribunals of members from the administration. The court noted that if tribunals were to be made a judicial body by inducting members only from the judiciary, then the very idea of the creation of tribunals would be frustrated. The court reminded that tribunals sought for a thoughtful combination of persons trained in judiciary and those trained in administration. It was on this conjecture that speedy and effective justice was expected to be delivered by a body of experts named 'tribunals'. The court also contributed its mind and time to the erroneous proposition often made to it that High Courts should be made supervisors of tribunals falling under its jurisdiction. To this, the court stated that if the idea was to save the High Courts of their exceeding burden then entrusting it with supervisory functions would in no way alleviate it of its long withstanding burden.

Lastly, the court observed that tribunals could work better under an umbrella which would help to develop a uniform body of administration. It added that until the Ministry of Law came up with an independent body, it could act as the administrative body. It, thus entrusted the Government of India with the task of creating a nodal body to take up the work of a supervisor to all tribunals across the country.

Conclusion

Several cases have been coming to the courts; along with quite a few judicial committees publishing their recommendations for effective functioning of the tribunal system, is an evidence of the truth about tribunals. The quasi-judicial adjudicating body has been caught in turbulence since its inception; this is proof of another fact that its very creation was not backed by enough research and consultation. Tribunals were introduced at a time when the judiciary was in rough waters. However, the current pendency within the tribunal system, with some having close to one lakh cases pending (within less than 25 years of their formation) reveals that they have failed to achieve

what was proactively desired from them. (Customs, Excise and Service Tax Appeal Tribunal had around 91000 cases pending by 2017.

Wrapped in procedural infirmities, habitual infractions, administrative trespassing, and a growing drive of office-bearers against earnestness, have left tribunals caught in severe red-tapism. For instance, courts have faced cases challenging the framework and operation of tribunals, such as the National Green Tribunal and the Intellectual Property Appellate Tribunal. These have led the courts to arrive at findings that are causing changes in the very notion of tribunals. Recently, the Supreme Court in the Union of India VS Gandhi case (2010) underlined the necessity of tribunals fulfilling the structural requirements of a High Court. It prompted the nation to appreciate that when the body is substituting/supplementing a High Court and is a body of adjudication, it is only pertinent that its constitution is done as closely as possible to equate with High Courts in terms of expertise and dexterity.

Former Madras High Court Judge and Chairman of the Intellectual Property Appellate Board Prabha Sridevan expressed her dismay in saying that due to an ineffective system, the High Courts and the Supreme Court wind up hearing cases through appeals, writ petitions, and special leave petitions, exercising the jurisdiction that was intended to be relieved of it (Sridevan, 2013). Taking notice of all these developments, the current Prime Minister of India in 2015 announced that it was time for the government to find if the tribunals were helping the country in providing speedy delivery of justice or were deterring their achievement. He was also thoughtful in causing to find if the budgetary allocation made to tribunals should rather be diverted to the courts to strengthen them for an effective justice delivery system (Nair, 2017). As a result, the government in 2017 attempted ridding the tribunal system of some of its potential problems by merging a few central tribunals and bringing it down from 36 to 18 (Ghosh et al., 2018). The government has also been working towards drafting uniform conditions of service, as advised by the Law Commission Report and reiterated by the Court in L Chandra Kumar. Thus, steps like these when taken in consonance with the expert committee reports and after consultation with persons of expertise, can have the potential of rejuvenating the tribunals. It would, however, be crucial for the government to ensure that in bringing about revolutionary changes it does not end up causing more harm than good. It would have to be wary of the obligation

that it has to keep up with the constitutional morals as laid down in the earlier judgments; in ensuring the tribunals to be a special body of adjudication having the presence of experts from government departments, it can never be forgotten that it is primarily, an adjudicatory body working as a helping hand to the constitutional courts. Thus, the necessary independence required for a judicial body to come up with a neutral and unbiased decision has to be ensured to tribunals as well. This would, at the same time, ensure that the principle of separation of powers is maintained.

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