SOLPO RESEARCH

Briefing Note

'The Legal Ecosystem of Tribunals and Regulatory Bodies in India'

The Challenges and Issues presented by Tribunals and Regulatory Bodies

I. *Introduction*

Over the years, Tribunalisation has been taking place across the world as an effective alternative to traditional Courts for dispute resolution and justice dispensation. India has been no exception to this world-wide trend. In India, Tribunals[1] are conceptualized as quasi-judicial bodies established to adjudicate disputes related to specified matters, which exercise jurisdiction as per the statute establishing them. Such a body is required to have the 'trappings of a Court' yet it has many flexibilities devoid of technicalities of regular Court to ensure speedy and affordable justice.

The term `tribunal' has not been defined. However, Courts have laid down the requisites of tribunals such as in *Jaswant Sugar Mills Ltd., Meerut v. Lakshmichand*[2] where it was held that to determine whether an authority acting judicially was a tribunal or not, the principal test was whether it was vested 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. In *Union of India v. R. Gandhi, President, Madras Bar Association* with *Madras Bar Association, v. Union of India 2010*[3] ("*Madras Bar Association, v. Union of India 2010"),* the court pointed out the difference between Court and Tribunal

[1] By "Tribunals", it is meant those bodies which are appointed to decide disputes arising under certain special law. Some tribunals have both regulatory as well as adjudicatory roles. The term used here can include both Tribunal and Appellate Tribunal. By "Courts", it is meant Courts of Civil Judicature.
[2] *Jaswant Sugar Mills Ltd., Meerut v. Lakshmichand* AIR 1963 SC 677
[3] Madras Bar Association v. Union of India (2010) 11 SCC 1

> *"12. The term `Courts' refers to places where justice is administered or refers to Judges who exercise judicial functions. Courts are established by the state for administration of justice that is for exercise of the judicial power of the state to maintain and uphold the rights, to punish wrongs and to adjudicate upon disputes. Tribunals on the other hand are special alternative institutional mechanisms, usually brought into existence by or under a statute to decide disputes arising with reference to that particular statute, or to determine controversies arising out of any administrative law. Courts refer to Civil Courts, Criminal Courts and High Courts. Tribunals can be either private Tribunals (Arbitral Tribunals), or Tribunals constituted under the Constitution (Speaker or the Chairman acting under Para 6(1) of the Tenth Schedule) or Tribunals authorized by the Constitution (Administrative Tribunals under Article 323A and Tribunals for other matters under Article 323B) or Statutory Tribunals which are created under a statute (Motor Accident Claims Tribunal, Debt Recovery Tribunals and consumer fora). Some Tribunals are manned exclusively by Judicial Officers (Rent Tribunals, Motor Accidents Claims Tribunal, Labour Courts and Industrial Tribunals). Other statutory Tribunals have Judicial and Technical Members (Administrative Tribunals, TDSAT, Competition Appellate Tribunal, Consumer fora, Cyber Appellate Tribunal, etc)." (emphasis supplied)*

II. *Evolution of India's Tribunal framework*

The beginnings of Tribunalisation in India were made by the Constitution (42nd Amendment) Act 1976 that provided for the insertion of Articles 323-A and 323-B in the Constitution of India, which made possible the establishment of Administrative Tribunals by the Parliament as well as the State Legislatures, to adjudicate the matters specified in the sub-clauses. Though initially designed to discharge judicial or quasi-judicial functions, in some cases, Tribunals were also vested with in certain statutory powers that were special or necessary to deal with the subject in question. With the passage of time, the legislature has vested Tribunals operating in economic areas with the power to regulate certain sectors and, therefore, such Tribunals are no longer limited to mere adjudication of disputes or ability to fashion special remedies through a process of adjudication, as was seen earlier. The Supreme Court recognised this trend in *Cellular Operators Assn. of India v. Union of India, (2003),* when it held as follows:

> *"33. The regulatory bodies exercise wide jurisdiction. They lay down the law. They may prosecute. They may punish. Intrinsically, they act like an internal audit. They may fix the price, they may fix the area of operation and so on and so forth. While doing so, they may, as in the present case, interfere with the existing rights of the licensees."*

Thus, Tribunals operating in economic areas or 'Sector Regulators' are an exception to the strict separation of powers doctrine[4] because they have the power to issue subordinate laws, have executive powers to grant licenses and permits, regulatory powers of regulating contracts and fixing tariffs, and also judicial and law-making powers. Such *enhanced jurisdiction* and sectoral expanse of Tribunals operating in economic areas is linked to the increased private participation in the economy which necessitated a regulatory mechanism to maintain the fine balance between state control, public benefit and reasonable returns on private capital. As India moved from the command and control economy to a liberal and competitive economic model, the adjudication of disputes pertaining to diverse aspects of economic regulation too moved from the traditional Courts system to the adjudicatory Tribunals or Regulatory bodies.

III. *Issues affecting the functioning of Tribunals*

The basic and the fundamental feature which is common to both the Courts and the Tribunals is that they discharge judicial functions and exercise judicial powers which inherently vest in a sovereign State. If Tribunals are to be vested with judicial power hitherto vested in or exercised by Courts, such Tribunals should possess the independence, security and capacity associated with Courts.

Over the years, Courts have made various observations on legislative deficiencies that compromise both the independence and competence of Tribunals. In *Union of India v. Madras Bar Association, 2010 (supra)* the Supreme Court has observed,

> *"70. But in India, unfortunately tribunals have not achieved full independence. The Secretary of the "sponsoring department" concerned sits in the Selection Committee for appointment. When the tribunals are formed, they are mostly dependent on their sponsoring department for funding, infrastructure and even space for functioning. The statutes constituting tribunals routinely provide for members of civil services from the sponsoring departments becoming members of the tribunal and continuing their lien with their parent cadre. Unless wide ranging reforms as were implemented in United Kingdom and as were suggested by L.*

[4] (2004) 8 SCC 524 Clariant International Ltd. v. Securities & Exchange Board of India, (2004) 8 SCC 524

> *"76. Our Constitution although does not incorporate the doctrine of separation of powers in its full rigour but it does make horizontal division of powers between the legislature, executive and judiciary. (See Rai Sahib Ram Jawaya Kapur v. State of Punjab [AIR 1955 SC 549 : (1955) 2 SCR 225].)"*

> *Chandra Kumar [(1997) 3 SCC 261 : 1997 SCC (L&S) 577] are brought about, tribunals in India will not be considered as independent."* (emphasis supplied)

In *Madras Bar Association v. Union of India (2014)*[5], the Supreme Court had held that since the Tribunal is to replace the High Court, they "must be no less independent or judicious in its composition". In *Rojer Mathew v. South Indian Bank Ltd. (2019)*[6] *("Rojer Mathew case"),* where the Supreme Court was called upon to decide issues, inter alia, relating to rules for appointments of members of tribunals, the Court has observed what would constitute independence of Tribunals,

> "154. Independence of a quasi-judicial authority like the tribunal highlighted in the above decisions would be, therefore, read as the policy and guideline applicable. Principle of independence of judiciary/tribunal has within its fold two broad concepts, as held in Supreme Court Advocates-On-Record Association v. Union of India40 (See paragraph 714), (i) independence of an individual judge, that is, decisional independence; and (ii) independence of the judiciary or the Tribunal as an institution or an organ of the State, that is, functional independence. Individual independence has various facets which include security of tenure, procedure for renewal, terms and conditions of service like salary, allowances, etc. which should be fair and just and which should be protected and not varied to his/her disadvantage after appointment. Independence of the institution refers to sufficient degree of separation from other branches of the government, especially when the branch is a litigant or one of the parties before the tribunal. Functional independence would include method of selection and qualifications prescribed, as independence begins with appointment of persons of calibre, ability and integrity. Protection from interference and independence from the executive pressure, fearlessness from other power centres – economic and political, and freedom from prejudices acquired and nurtured by the class to which the adjudicator belongs, are important attributes of institutional independence." (emphasis supplied)

It can be seen from the Court's observations in the *Rojer Mathew case(supra)* that there are numerous challenges associated with the independence and competence of Tribunals in India, such as,

- *Lack of functional independence:* Tribunals are dependent on the relevant Government Ministries for funds, budgets, physical space, infrastructure, recruitment of staff, and perquisites and other facilities admissible to the members. Tribunal staff are often transferred on deputation from the parent Ministry to the Tribunal, thus creating a back-channel flow of information to the parent Ministry or the Department

[5] Madras Bar Association v. Union of India (2014) 10 SCC 1
[6] Rojer Mathew v. South Indian Bank Ltd.& Ors.(Civil Appeal No. 8588 of 2019) dated 13-11- 2019;

concerned whose decisions are being reviewed by the Tribunal even before the relevant orders are issued by the Tribunal.

- *Executive control in matters of appointment:* The manner of appointment of members of the Appellate Tribunals (which was seen as a substitute of High Courts) and departure from practices generally followed in relation to appointments in the case of superior Courts, continues to be a matter of concern. In *Gujarat Urja Vikas Nigam Ltd v. Essar Power Ltd* (2016)(supra), the Supreme Court had observed the need to review the composition of Tribunals under the Electricity Act or corresponding statutes where appeals were directly provided to Supreme Court thereby, bypassing the High Courts. The Court observed that such Tribunals were practically substitute for the High Courts and hence the process of selection and appointment of Chairperson and members of such Tribunals could not be different from the manner of selection of the High Court Judges.

  Executive control of Tribunals in matters of appointment has the potential of affecting the independent functioning of this judicial branch, besides being an affront to the doctrine of separation of power. In the *Rojer Mathew case(supra)*, the Supreme Court had observed that the lack of judicial dominance in the Search-cum-Selection Committee as formulated under the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017, ("the Rules") is in direct contravention of the doctrine of separation of powers and is an encroachment on the judicial domain. The Court also observed that the composition of the Search-cum-Selection Committees under the Rules amounts to excessive interference of the Executive in appointment of members and presiding officers of statutory Tribunals. The Court cited judgement of the Supreme Court in the *Supreme Court Advocates-on-Record Association. v. Union of India (2016)*[7] *("Fourth Judges Case")* where it was held that primacy of judiciary is imperative in selection and appointment of judicial officers including Judges of High Court and Supreme Court. In

[7] (2016) 5 SCC 1.

the same judgement, the Court observed that in many Tribunals like the NGT, the role of the Judiciary in appointment of non-judicial members has entirely been taken away.

- *Dominance of retired judges and bureaucrats:* Statutory Tribunals that are required to have Judicial and Technical Members, are mostly, if not entirely, run by retired judges and retired civil servants[8]. Tribunals have created a new post-retirement employment opportunity for judges and bureaucrats alike, as each legislation that provides for the appointment of a retired bureaucrat (as non-judicial/technical member of the Tribunal) often ensures that the other seat in the Tribunal is reserved for a retired judge. The institutional integrity of the Tribunal and the impartiality of individual members also comes under cloud when a member is a retired bureaucrat whose administrative decisions in his earlier capacity are being challenged before the same Tribunal, leading to a situation of conflict of interest.

- *Dilution of judicial character in adjudicatory positions in Tribunals:* It has been observed that the rules of appointment of Tribunals tend to have an effect of dilution of the judicial character in adjudicatory positions in Tribunals. On matters of qualification, in the *Madras Bar Association. v. Union of India, 2014(supra)*, the Supreme Court had observed that the members of Tribunals having replaced courts, including the High Court must be no less independent or judicious in its composition and must possess expertise in law and have appropriate legal experience[9]. The Court also expressed concern regarding the gradual erosion of the independence of the

[8] This issue was articulated by Late Arun Jaitley (as the Leader of the Opposition) during a debate on a judicial appointments commission in the Rajya Sabha on 5th September 2013

[9] Madras Bar Association v. Union of India (2010) 11 SCC 1

> "108. *An independent judiciary can exist only when persons with competence, ability and independence with impeccable character man the judicial institutions. When the legislature proposes to substitute a Tribunal in place of the High Court to exercise the jurisdiction which the High Court is exercising, it goes without saying that the standards expected from the Judicial Members of the Tribunal and standards applied for appointing such members, should be as nearly as possible as applicable to High Court Judges, which are apart from a basic degree in law, rich experience in the practice of law, independent outlook, integrity, character and good reputation. It is also implied that only men of standing who have special expertise in the field to which the Tribunal relates, will be eligible for appointment as Technical members. Therefore, only persons with a judicial background, that is, those who have been or are Judges of the High Court and lawyers with the prescribed experience, who are eligible for appointment as High Court Judges, can be considered for appointment of Judicial Members.*
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> *112. What is a matter of concern is the gradual erosion of the independence of the judiciary, and shrinking of the space occupied by the Judiciary and gradual increase in the number of persons belonging to the civil service discharging functions and exercising jurisdiction which was previously exercised by the High Court. There is also a gradual dilution of the standards and qualification prescribed for persons to decide cases which were earlier being decided by the High Courts. Let us take stock."*

judiciary, and shrinking of the space occupied by the Judiciary and gradual increase in the number of persons belonging to the civil service discharging functions and exercising jurisdiction which was previously exercised by the High Court. In *Roger Mathew case(supra)*, the Supreme Court had observed that adjudication of disputes which was originally vested in Judges of Courts, if done by technical or non-judicial member, is clearly a dilution and encroachment on judicial domain. The Court further observed that Parliament cannot divest judicial functions upon technical members, devoid of the either adjudicatory experience or legal knowledge.

In *L. Chandrakumar* case (supra), the Court observed that different Tribunals constituted under different enactments are administered by the Central and the State Governments, yet there was no uniformity in administration. The Court had expressed that until a wholly independent agency for such Tribunals can be set up, it is desirable that all such Tribunals should be, as far as possible, under a single nodal Ministry, preferably the Ministry of Law. The Ministry of Law in turn was required to appoint an independent supervisory body to oversee the working of Tribunals. Tribunals also lack uniformity in the appointment scheme having wide-ranging qualifications and methods of appointment, tenure and age of retirement, procedure of removal, across different Tribunals.

Tribunals operating in economic areas ('sector regulators') raise several public law concerns as such sector regulators have executive, judicial and law-making powers accorded to the same body. The integration of powers of the separate organs of the State in a single body undermines the legal integrity of such Tribunals and raises questions as to their independence.

Tribunals formed under several statutes such as Electricity Act, Consumer Protection Act, Companies Act, Competition Act, SEBI Act amongst others, confer a direct right of appeal to the Supreme Court from the Tribunals, effectively replacing High Courts. In *Gujarat Urja Vikas Nigam Ltd v. Essar Power Ltd (2016)*[10], the Supreme Court while hearing an appeal from the Appellate Tribunal for Electricity (APTEL) had directed the Law Commission to examine if it is permissible and advisable to provide appeals routinely to the Supreme Court only on a question of law or substantial question of law which is not of national or public importance

[10] Gujarat Urja Vikas Nigam Ltd v. Essar Power Ltd 2016 SCC (9) 103

without affecting the constitutional role assigned to the Supreme Court having regard to the desirability of decision being rendered within reasonable time. Additionally, as a consequence of the direct statutory appeals to the Supreme Court from such Tribunals, thereby bypassing the High Courts, judges who are elevated to the Supreme Court from the High Courts would have limited experience in adjudicating disputes under these specialised areas of law. Furthermore, such a scheme also has the effect of reducing access to justice to litigants in remote areas of the country.

IV. *Way Forward*

Tribunalisation has been accorded constitutional legitimacy by the Courts in India[11] and there is no doubt that Tribunals as an alternative to Courts, have come to stay. Hence, the main issue today is how to ensure that Tribunals function effectively, fearlessly and efficiently.[12] The need of the hour is to assess and address the legislative, procedural and institutional flaws that exist in the overall architecture of the Tribunal system in India so as to honour and strengthen the independence and standards of this parallel branch of the judiciary.

[11] Madras Bar Association v. Union of India (2010) 11 SCC 1

> *"87. The Constitution contemplates judicial power being exercised by both courts and tribunals. … Therefore it cannot be said that legislature has no power to transfer judicial functions traditionally performed by courts to tribunals"*

[12] Deepak Gupta, J. in Rojer Mathew v. South Indian Bank Ltd.& Ors.(Civil Appeal No. 8588 of 2019) dated 13-11- 2019;