ROUNDTABLE DISCUSSION

SECOND ROUNDTABLE

ADMINISTRATIVE TRIBUNALS IN INDIA

सत्यमेव जयते

Can they deliver justice ?

CENTRE FOR THE STUDY OF LAW AND GOVERNANCE

JNU

On Tuesday
August 23, 2016

Venue:
JNU Convention Centre, JNU

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Panel 1: Administrative Tribunals In India (10am -12.30pm)

Speakers

- **M. P. Singh** (Central University of Haryana & NLU Delhi)
- **Ananth Padmanabhan** (Carnegie India)
- **Jaivir Singh** (CSLG, JNU)
- **P. Puneeth** (CSLG, JNU)

Lunch 12.30pm to 2.00pm

Panel 2: National Green Tribunal (2pm - 5.00pm)

Speakers

- **Gitanjali Nain Gill** (Northumbria University)
- **Geetanjoy Sahu** (TISS, Mumbai)
- **Leo Saldanha** (Environment Support Group)
- **Shibani Ghosh** (Centre for Policy Research)
- **Kumar Sambhav Shrivastava** (Hindustan Times)

Discussion Note1 **August 29, 2016**

Second CSLG Roundtable Administrative Tribunals in India: Can they deliver justice?

23 August, JNU Convention Centre

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Edited by Nupur Chowdhury (Faculty, CSLG).

PANEL 1 – ADMINISTRATIVE TRIBUNALS

Professor Niraja Gopal Jayal of CSLG was the chair for Panel 1. She spoke about the idea of CSLG and its contribution to research and training. She then introduced all the speakers of Panel 1. They included, Prof. M P Singh, Justice G. C Bharuka, Anant Padmanabhan, Dr. P Puneeth and Prof. Jaivir Singh.

Prof. M P Singh began the discussion by tracing India's discomfort with tribunals to Dicey's criticism of tribunals in the European Continent as violating the separation of powers. Administrative tribunals have been well entrenched within the continental Civil law traditions where they were established to address state-individual disputes as distinguished between disputes between two private citizens, which were the remit of civil courts. The difference in perceptions is also shaped by the monist and dualist legal systems that are in place in UK and Continental Europe respectively.

In the Indian scenario there have been few issues that have cropped up post the introduction of Articles 323A and 323B. The first issue to be settled was that tribunals can decide and appeals from tribunal decisions will lie with the Supreme Court (SC) under Article 136. In *R K Jain case* (1993 AIR 1769), the Supreme Court emphasized that the predominance of judicial members in the tribunals and that the Chairperson should be a retired or sitting judge of the High Court or Supreme Court. The government only half heartedly implemented the directions of the SC. Following this in the *L Chandrakumar case* (1997 (2) SCR 1186), the SC held that the power of judicial review was part of the basic structure of the Constitution and held that Article 323B was inconsistent to the extent that it excluded the writ jurisdiction of the High Court under Article 226, by denying the provision of appeal. The Court also suggested that a single ministry should coordinate all tribunals instead of tribunals operating under different parent ministries. The Ministry of Law and Justice was deemed most appropriate for this purpose.

Administrative Tribunals in the French system was in fact completely separate from the judicial system and is embedded within the executive and it has run quite well. In England, the discomfort with tribunals operating outside the formal judicial system was addressed by enacting the Tribunals, Courts and Enforcement Act 2007 in UK that brought all tribunals under a unified structure. This was also done in compliance with the treaty obligations of UK under the European Convention of Human Rights. This to an extent balances the need for expertise as well as the unity and uniformity in law. In Germany apart from the Constitutional and ordinary civil and criminal court system, there are four different kind of administrative courts with their own lower and appellate court system – administrative, finance, labour and social court. Administrative tribunals in India should be consistent with the best practices in the world.

Justice Bharuka emphasized that for rule of law to be ensured, effective mechanisms should be provided for adjudication of rights and disputes of the citizens. Various Law Commission Reports have stated that justice is delayed in this country. In 1956 amendments were introduced in the CPC to address this issue. Post the Constitution (Forty Second Amendment) Act 1976, till 1985 no tribunals were established. In 1985, the Administrative Tribunals Act 1985 was enacted to ease burden on civil courts and give speedy justice to citizens.

Articles 323A and 323B ousted the jurisdiction of the High Court, and made administrative tribunals established by States and the Centre at par with High Courts. In the *L Chandrakumar case* both these articles were reviewed on

three issues –judicial independence, judicial superintendence (Article 227) and separation of powers. It was held that the High Court's jurisdiction cannot be restricted by the Parliament and that appeals from tribunals shall also lie with the High Court. This ratio was reiterated *Madras Bar Association case* (2010] 11 SCC 1). Although the Court upheld the constitutional validity of the tax tribunals, it stated that tribunals are not retirement havens for retired civil servants. Civil servants are neither judicial members nor technical members. The independence of these tribunals is suspect because for every penny they are being arm twisted by their parent ministry. Further the eligibility of members cannot be decided by the parent ministry. Increasing tribunalization – the process of proliferation of tribunals – is in the vested interest of the bureaucracy.

Mr. Anant Padmanabhan stated that there are two parts to this debate – timeline of which can be divided into Pre *Chandrakumar* and Post *Chandrkumar* phase. In the first phase, the primary issue is whether tribunals supplant or supplement the jurisdiction of the HC. It was decided that tribunals can only supplement High Courts. This was a principled debate that was fuelled by concerns relating to how to secure separation of powers and independence of the judiciary. The second phase witnesses a marked shift, and the primary issue that has emerged is of bureaucratic entrenchment. The proliferation of tribunals in specialized areas means we are confronted by the question - whether tribunalization is going to slowly chip away the jurisdiction of High Courts? The High Courts will then be reduced to shells with only constitutional jurisdiction.

In the post liberalization phase, the state has emerged as a regulatory state, and in sectors like banking, insurance, telecom, there are specialized tribunals operating. The imperative here is to balance the interests of consumer, service providers and the government. We need to recognize that regulatory law is a multidisciplinary space and it needs infusions from many disciplines and not just restricted to law. In this context training of specific skill sets judges and lawyers are critical in these areas. Further we need to look at citizens as consumers reorient dispute settlement procedures especially in these specialized tribunals to ensure faster and more effective redress of grievances.

Dr. P Puneeth underlined that the original Indian constitution contemplated tribunals, however proliferation occurred post the introduction of the Constitutional (Forty Second Amendment) Act 1976, to secure speedy access to justice and clear the case pendency in Courts. The amendment has failed to fulfill its original purpose. The reason for this is the decision of the SC in *L Chandrakumar* case. The outcome of the case was that the tribunals could stay but it could not substitute the HC. Under Articles 226 and 227 the HC has review and supervisory jurisdiction. However unlike the SC, whose appellate jurisdiction is constitutionally protected, HC's appellate jurisdiction is not derived from constitutional provisions but is provided under different statutes. In such a case, the 42nd Amendment Act, that provided for direct appeal to SC cannot be said to have violated any constitutional provision. In reality, due to SC's dicta in *L Chandrakumar,* litigants are appealing tribunal judgements to both HC and SC. The status of tribunals have been degraded as they are subordinate to High Courts but their jurisdiction has been expanded to include constitutional validity of legislations (with the exception of their constituent act), as was not envisaged under the 42nd Amendment Act. Further it was held that tribunals should have judicial and non-judicial members, but non-judicial members can also be included in benches that decide on legislations as long as the judicial members are in majority.

The 215th Report of the Law Commission underlined the need to revisit *L Chandrakumar* judgement. With articles 226 and 227, it is difficult to curtail the power of the High Court. Justice is defeated in the process of review, appeal and revision. Formation of specialized benches of the HC where an appeal can be made, should be explored as an alternative solution instead of establishment of new tribunals.

Prof. Jaivir Singh, urged the audience that in a liberal economy, separation of powers should not only be looked at from a political theory or legal perspective but also from Adam Smith's ideas of specialization by ensuring separation of powers. Justice Eradi Committee on Insolvency recognized that the executive process information quite differently from the judiciary and that there was a need to evolve tribunals that included both judicial and technical members with the predominance of former. However there are certain social costs attached to the creation of tribunals. The most important challenge is the issue of fragmentation and disrespect of the rule of law or derogation of separation of powers is because of under-delegating and over-delegating between institutions.

Prof. Niraja Jayal opened the Q&A session by flagging two issues. The concern about the bureaucratization of justice in tribunals is at least partly a function of the generalist civil service that India has, and the deficit of specialized knowledge has also affected areas of economic policy making and international negotiations on climate change. She also contended that the expertization of regulatory bodies and judicial bodies through tribunalization may also have an implication for democracy.

Panel 2 – NATIONAL GREEN TRIBUNAL

Dr. Nupur Chowdhury of CSLG was the chair for Panel 2. She spoke about why Panel 2 chose to focus on NGT. The NGT's orders and decisions have been regularly and widely reported in public media and have captured the public imagination in a manner quite unlike any other tribunals. This is not surprising given that it deals with critical governance challenges related to environmental safety and public health. As a tribunal, the NGT is characterized by many of the structural challenges that face tribunals in India. Given,

that its jurisdiction is statutorily limited, it still went ahead to declare an office memorandum of the MOEF as null and void. The NGT has said that the power of judicial review would have to be read into the provisions of the NGT Act.

Further there is also statutory recognition of the historical antecedents of the PIL movement on environmental issues, by allowing for an expanded definition of the term "aggrieved person" – who can approach the tribunal. The tribunal has through its jurisprudence in cases like *Wilfred J. Anr.* (M.A. No. 182 of 2014 & M.A. No. 239 of 2014) has also supported an expansive interpretation. This is in many ways path breaking, given that historically pollution control legislations like Water Act and Air Act and the also the Environment Protection Act, have made civil access to remedies inordinately difficult. These difficulties also explain the excessive use of the writ remedy by citizens to address environmental issues. In this context the NGT Act has made a good beginning.

Dr. Gitanjali Nain Gill focused her remarks on the role of expert members in NGT. Her remarks were based on the findings of the field study of the NGT that she recently completed. She found that the technical members in the NGT are part of an epistemic community whose expertise has been peer reviewed and they are not necessarily drawn from bureaucracy. Interestingly the findings reveal that the role of technical experts is not secondary to judicial members and in fact they are central to the functioning of the NGT. NGT judgements are often criticized for not reflecting the viewpoints of the expert members, but this does not reflect the true picture, since the principle of collegiality has worked in the case of NGT. Technical and judicial members are actively working together in a problem solving approach and therefore dissents are minuscule. Procedural innovations adopted by the NGT include fact finding by expert members that undertake on field inspection to analyze and establish the truth in face of contradictory claims by various parties. It has also established a consultative procedure for bringing together all stakeholders rather than engaging in an adversarial blame game. This is of course an exceptional mechanism used in cases such as the Yamuna – cleanup plan or the Ganga case. The

presence of experts has expanded the legal lens by bringing in more technical and scientific inputs such as expert suggestion on translocation of trees rather than cutting them. NGT's functioning has made regulators accountable. But the NGT can also become a victim of its own success. There have been jurisdictional turf wars with the high court as well as the executive. The TSR Subramanian Committee was in response to the Executive's perception of the threat posed by NGT. The Committee made specific comments upon NGT which was beyond its original mandate.

Dr. Geetanjoy Sahu focused his remarks on the decision making process of the NGT and implementation of their orders. He posed the question, what environmental values does the NGT uphold? In contrast to High Courts and Supreme Courts, the NGT decision making has been very flexible. It has substantively expanded the definition of "aggrieved individual", thereby allowing for an expanded *locus standi.* In the *Ramdas Janardan Koli v MOEF* (Application No. 19/2013), the NGT (Pune Bench) of the NGT awarded one of the highest compensation to the fisherman community against the unauthorized activities of JNPT and ONGC. The NGT has worked hard to reduce the impact of resource inequality of petitioners on the final judgment. This is in contrast with the approach of the HC and especially the SC. It is possible to discern three kinds of judicial approaches. In environmental pollution cases, the courts favoured the environment. However in conflicts between community and environmental interests, they took a regressive position (e.g. eviction of slum dwellers for city beautification) and in infrastructure versus environmental interests, they have again regressively allowed infrastructure projects at the cost of environment. NGT decisions have questioned EIA reports; it has entertained cases even when they have been filed late. In the *Vanashakti Public Trust v. Maharashtra Coastal Zone Management Authority*(Appeal No 1 of 2013), it reiterated the *Ratlam case* dictum that financial limitations cannot be a ground for allowing environmental violations. However the NGT is facing many challenges. Some of its judgements have been questioned in the Supreme Court and the bigger concern is to what extent they are being implemented. He identified appointment of experts, their short tenure, and appointment of experts on new areas such as nuclear plants and expansion of number of benches, as future challenges.

Mr. Leo Saldanha identified risk assessment in environmental judgements as an important aspect that is currently not very well understood by the Indian judiciary. Environmental pollution matters are not technical in nature but largely interdisciplinary. It was difficult to access the NGT as compared to High Courts largely due to the poor state of infrastructure. The PILs brought before the courts argue for the implementation of environmental laws but there is very little jurisprudence on environmental law – for instance the pollution control legislations. He elucidated on Environment Support Group has now started filing notices under Section 49 of the Water Act, which then galvanized the State Pollution Control Board to pursue violations. He concluded by reading out a quote from Justice Krishna Iyer's lecture titled – "From Ratlam to Ramakrishna" –which underlined the importance of the role of subordinate judiciary in providing a fast and accessible remedy against environmental violations.

Ms. Shibani Ghosh,contented that despite its promise, NGT is not as procedurally flexible (although relatively better than SC). The allocation of benches is a draw of lots and there is no transparency as to how benches are formed and the same case may come up for hearing in completely different benches. The NGT has adopted an approach of continuing mandamus and issuing interim orders in some cases. However as this process gets prolonged, the view of judges may change over time. In the principal bench there is a trend towards appointment of committees with technical members and they are often required to submit reports within unrealistic time deadlines and this ends up as a superfluous exercise in postponement of justice. The pendency of cases in the NGT is slowly rising and it has not been filled up to its sanctioned strength.

Mr. Kumar Sambhav Shrivastva stated that post liberalization the EIA has become an important part of the environmental clearance process. With the establishment of the NGT, the affected stakeholders have an important forum for being heard. The NGT's decisions have also exposed the executive to greater scrutiny and forced it to become transparent. For the past two years, no new appointments have been made and the MOEF has attempted to curtail the powers of the NGT. MOEF has repeatedly brought subsidiary legislations (office memorandums) to dilute the environmental regulations. The object is to put a wide variety of activities outside the purview of the NGT. The MOEF is regularizing illegally constructed projects that were earlier quashed by NGT by bringing in new notifications, and now there is also discussion on amending the EPA – which is the parent Act for environmental impact assessment – to further dilute environmental obligations.

Dr. Nupur Chowdhury opened the Q&A by commenting on the need to appreciate the material difference between the different NGT benches. Further the substantive jurisprudence should be reviewed to see whether there is inordinate stress on polluter pays principle instead of developing disciplines on the precautionary principle and sustainable development.

This was followed by the valedictory address by Hon'ble Justice Swatanter Kumar, Chairperson NGT. He emphasized that the NGT as a body has a *sui generis* structure, which is very different from the Environment Courts in Australia and New Zealand. Participation of expert members in decision-making

has been outstanding. Collective wisdom of the bench comprising of judicial and expert members have been able to work effectively to give qualitatively better judgements in terms of problem solving. The NGT has introduced a system of stakeholder consultations to improve the adjudication process especially in cases such as in cleaning up Ganga. Three basic challenges that are confronting the NGT, is the jurisdictional conflict with the High Court, ensuring implementation of its decisions and computation of damages for environmental loss.