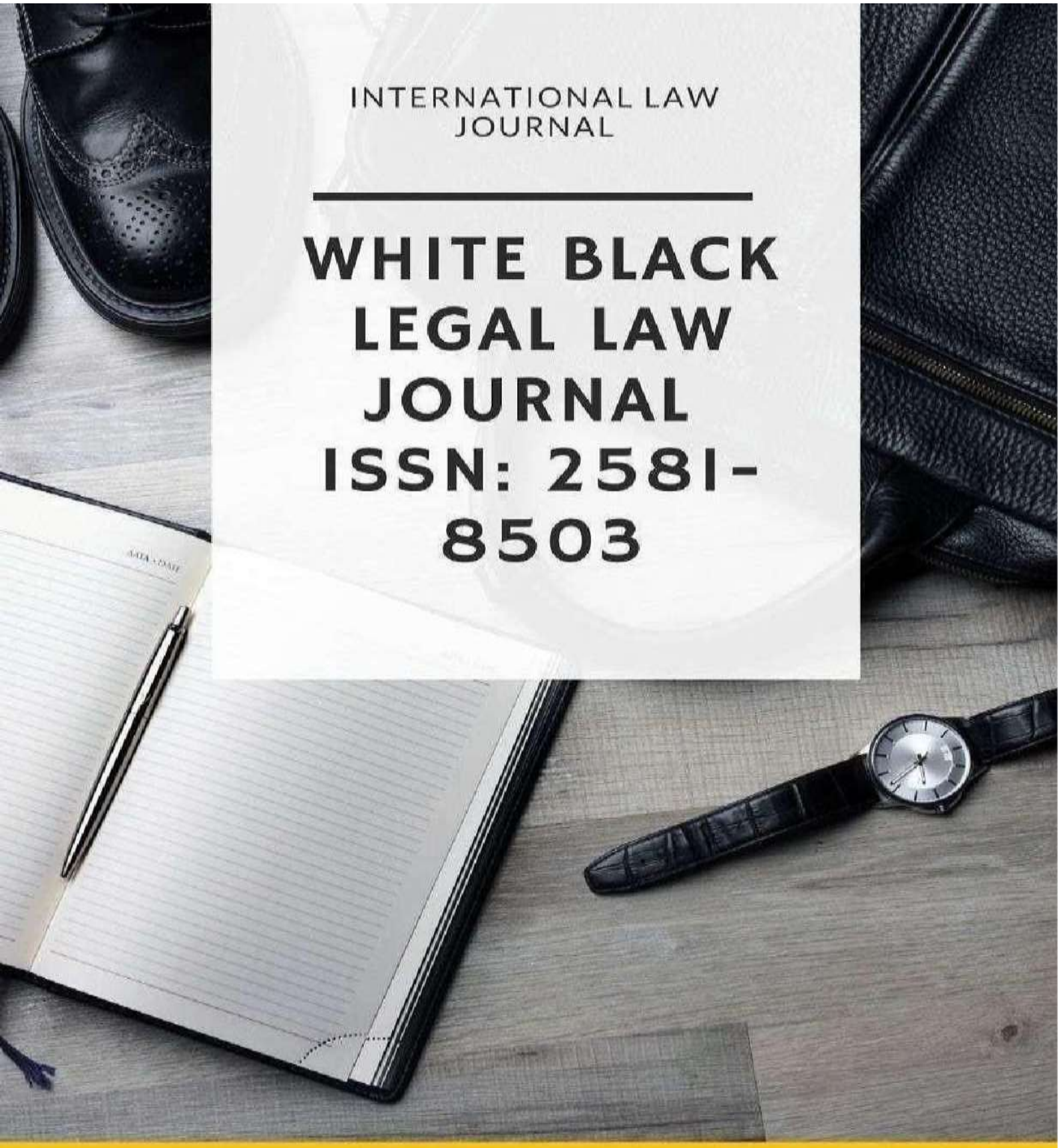

INTERNATIONAL LAW JOURNAL

WHITE BLACK LEGAL LAW JOURNAL

ISSN: 2581-8503

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

WWW.WHITEBLACKLEGAL.CO.IN

DISCLAIMER

EDITORIAL TEAM

Raju Narayana Swamy (IAS) Indian Administrative Service officer

Dr. Raju Narayana Swamy popularly known as Kerala's Anti Corruption Crusader is the All India Topper of the 1991 batch of the IAS and is currently posted as Principal Secretary to the Government of Kerala . He has earned many accolades as he hit against the political-bureaucrat corruption nexus in India. Dr Swamy holds a B.Tech in Computer Science and Engineering from the IIT Madras and a Ph. D. in Cyber Law from Gujarat National Law University . He also has an LLM (Pro) (with specialization in IPR) as well as three PG Diplomas from the National Law University, Delhi- one in Urban Environmental Management and Law, another in Environmental Law and Policy and a third one in Tourism and Environmental Law. He also holds a post-graduate diploma in IPR from the National Law School, Bengaluru and a professional diploma in Public Procurement from the World Bank.

Dr. R. K. Upadhyay

Dr. R. K. Upadhyay is Registrar, University of Kota (Raj.), Dr Upadhyay obtained LLB , LLM degrees from Banaras Hindu University & Phd from university of Kota.He has succesfully completed UGC sponsored M.R.P for the work in the ares of the various prisoners reforms in the state of the Rajasthan.

Senior Editor

Dr. Neha Mishra

Dr. Neha Mishra is Associate Professor & Associate Dean (Scholarships) in Jindal Global Law School, OP Jindal Global University. She was awarded both her PhD degree and Associate Professor & Associate Dean M.A.; LL.B. (University of Delhi); LL.M.; Ph.D. (NLSIU, Bangalore) LLM from National Law School of India University, Bengaluru; she did her LL.B. from Faculty of Law, Delhi University as well as M.A. and B.A. from Hindu College and DCAC from DU respectively. Neha has been a Visiting Fellow, School of Social Work, Michigan State University, 2016 and invited speaker Panelist at Global Conference, Whitney R. Harris World Law Institute, Washington University in St.Louis, 2015.

Ms. Sumiti Ahuja

Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi,

Ms. Sumiti Ahuja completed her LL.M. from the Indian Law Institute with specialization in Criminal Law and Corporate Law, and has over nine years of teaching experience. She has done her LL.B. from the Faculty of Law, University of Delhi. She is currently pursuing Ph.D. in the area of Forensics and Law. Prior to joining the teaching profession, she has worked as Research Assistant for projects funded by different agencies of Govt. of India. She has developed various audio-video teaching modules under UGC e-PG Pathshala programme in the area of Criminology, under the aegis of an MHRD Project. Her areas of interest are Criminal Law, Law of Evidence, Interpretation of Statutes, and Clinical Legal Education.

Dr. Navtika Singh Nautiyal

Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Intercountry adoption laws from Uttranchal University, Dehradun' and LLM from Indian Law Institute, New Delhi.

Dr. Rinu Saraswat

Associate Professor at School of Law, Apex University, Jaipur, M.A, LL.M, Ph.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM
Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.
More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.

Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and

refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

ADMINISTRATIVE JUSTICE AND ITS REFORM REPLACING ADMINISTRATIVE TRIBUNALS BY ADMINISTRATIVE COURTS

AUTHORED BY - R. NALINI

Introduction to the Common Law Perspective[1]:

The Common Law beginnings with the administrative law have been little cynical with the nature of the discipline. The doctrine of rule of law and judicial review have always been at the forefront of legal development in the Common Law World based on the precedents and interpretations by the Common Law courts. Certain doctrines like the doctrine of ultra vires became endemic to the Common Law legal world with the ever-increasing fascination of Common Law jurists with the doctrine. But the doctrine and based concept of judicial review does face serious challenges in the development of administrative law. Though Common Law is also developing and adapting to these challenges. One example could be the Anisminic decision that expanded the scope of judicial review. It shall be an interesting discussion based upon the experiences of selective Common Law setups, with core traditions facing adaptive relations with administrative law. The challenges and issues faced by them with the onset of administrative adjudication along with the traditional rulemaking function of the executive. Another interesting aspect would be to see the solutions to various legal tensions that arise due to administrative adjudication taking up space which was earlier occupied by the judicial branch. There have been four jurisdictions under the Study starting with Australia, the United Kingdom, the United States of America, and Canada. The Commonwealth of Australia has been chosen to be studied first due to certain peculiarities uncommon in the other Common Law jurisdictions. Like the system of "Merits Review" unlike "Judicial Review" allowing the adjudicator to go into the "non-legal" merits of the administrative decision.

[1] IP Massey, Compulsions and Constraints of Administrative Justice Against the Backdrop of the Swaran Singh Committee Report, (1976) 3 SCC J-9,14. Far back and during the time of the paradigm shift in administrative justice in India i.e. in 1976, Professor Massey recommended APA [USA] or the Tribunal and Enquiries Act, 1958 [United Kingdom] like code in India for ensuring the minimum standards in administrative procedure and particularly in Administrative Justice

The Separation of Powers and the Merits Review:

The answer to the query raised above could be answered by understanding the demands of the doctrine of SoP by understanding the true nature and meaning of the power that it vests with the particular organ. Though attempts have been made in the Australian context to define the „Judicial Power" by attempting to define its scope and nature. Still, it has been considered an exercise in futility by some legal scholars unless the attempt is made rather to gain an understanding of the aspects for which the need and requirement of judicial power could be justified. The entrenchment of the judicial power of the High Court through Section 75(v) in the Commonwealth"s Constitution makes judicial power and resultant jurisdiction to review administrative action vested with the High Court as inviolably immune to the exclusion by statutes without a referendum[2].

The SoP doctrine demands that the judicial power be vested with the organ designed to perform the function of the judiciary. Thus, prohibits the vesting of the judicial power of the state in any other organ other than the judiciary. On similar lines, the doctrine also demands that the interpretation of, discretionary power and its exercise by the executive, could be provided by the judiciary but it cannot undertake the capacity to use that discretionary power by itself replacing the executive.

Following the same restraint as above, the courts in Australia were not vested with the power of „Merits Review". The power is considered as part of Chapter II that defines "the Executive Government" and not as a part of Chapter III that defines "the Judicature" under the Australian Constitution. This indicates that the AAT"s jurisdiction is under the authority ordained to the Executive as per the Commonwealth Constitution. Hence strict adherence to the principle of „Rule of Law" is claimed in the setting of the authorities like AAT that came into existence as part of the reform proposal. In the Indian set up the jurisdiction erstwhile vested in the traditional courts had and is being shifted to the tribunals thus creating the legal tensions owing to the doctrine of SoP.

The jurisdiction of the AAT or the other tribunals is not shifted from the traditional judiciary

[2] Supra note 413, Hitoshi Ushijima at 95. Here Hitoshi refers Jody Freeman"s work citing the trend of covenant based self-regulation arbitrable in nature and other similar techniques being adopted.; See also, Jody Freeman, Private Parties, Public Functions and New Administrative Law, 52(3) ADMINISTRATIVE LAW REVIEW 813 (2000).

rather they act in the exercise of the Executive power of the state reviewing the administrative decisions. The tribunal apparatus have emerged from the modern reform proposals proposed by the reform committees like Kerr, Bland, and Ellicott Committees. There have been questions regarding the independence of bodies that are part of the executive and them still exercising the review of executive actions. But the answer to such questions could only be suggestive as the legal irritations regarding such aspects persist throughout the legal systems in the world. Though such a setup of „Merit Review" could be preferred for establishing these administrative adjudicatory bodies as the fourth branch of the government. The proposed „new separation of powers" thus opens a way out for resolving the administrative adjudication crisis persisting across major jurisdictions.

The Composition and Appointments process to the Tribunals[3]:

The provisions regarding the composition and appointments could be analysed from the vantage point of the most prominent tribunal in the Commonwealth i.e. AAT. The reason for such analysis is that the AAT is the lead tribunal and the 1975 statute that created the AAT acts as the foremost guiding light in setting up other tribunals across the Commonwealth. Another reason for the analysis is the understanding of the structure of AAT shall aid in assimilating the institutional functioning of the AAT. The factors like the design of an institution pertains salience as this determines the structure, functioning as well as the independence of the body.

The comparing ground for the discussion shall be the provisions ensuring the independence and competence of the persons manning the AAT. The need for independence from the executive arises from the doctrine of Separation of Powers. Independence from the private parties or the third persons is required so that the decision-maker could not be influenced and remain impartial. The need for competence arises to protect the rights of the persons seeking to secure justice from the AAT. Competence ensures the ability of the decision-maker to properly weigh the balance of facts in the proceedings according to the principles of law. The AAT consists of four categories of persons to be appointed as the position holders i.e. the President, Deputy Presidents, Senior members, and other members[4].

[3] Kawai Yoshikazu, A Gulf Between Constitutional and Administrative Law in Japan, 43(2) ADMINISTRATIVE LAW REVIEW 247 (1991).

[4] Substituting the S.89 of the Code of Civil Procedure, 1908 with a completely new section through S.7 of the Civil Procedure Code (Amendment) Act, 1999 (Act 46 of 1999, having effect from 1st July 2002).; See also, Salem Advocates Bar Association v. Union of India, (2005) 6 SCC 344, 371. Court called the ADR or the Alternative Dispute Resolution mechanisms prescribed through the abovementioned amendment as mandatory requirement. Reconciling S.89 with Order 10 Rule 1A.

The President is appointed amongst the sitting judges of the Federal Court of Australia with the guarantee of the preservation of their tenure and service conditions as judges. The status of the Federal Court could be understood from the fact that appeal from the decisions of the Court could only be at the High Court of Australia. The Deputies are appointed amongst the judges of the Federal Court or the legal practitioners with certain specific standing at the bar or amongst the persons having requisite specialized knowledge or the skills. Though the „skills and knowledge" part is the one that opens a subjective window to be decided by the Governor-General with the advice of the Council. Also, the political interferences in the appointment process cannot be denied, as such allegations tend to affect justice delivery by these bodies. Allegations of favoured appointment of members with known sympathy to the government policies do raise questions on the impartiality of their decisions. Like India, there have been recommendations for unifying the tribunal structure with the judiciary for better independence and improving the public faith in the impartiality of decisions. The tribunals in the Commonwealth are broadly accepted to retain the public trust regarding their impartiality and independent decision-making.

Since all the appointments are to be made by the Governor-General with the advice of the Council either as full-time or as part-time, the decision rests with the executive wing with no interference in the appointment process from the federal judiciary. Though the protocol for such appointments is devised that largely revolves around the Attorney General and the office. But the Attorney General herself/himself is the political appointee as per the Commonwealth setup. Thus, the possibility of executive picking persons of their choice could not be denied. This distinguishes the Australian appointments from the counterparts in India where the judiciary plays a prominent role for sake of ensuring independence and maintaining the Separation of Powers.

Another important aspect is the reappointment eligibility of the members of AAT after their tenure of seven years is over. The sitting judges shall hold office until the expiry of their term of seven years or until they remain as judges. The members can resign from their position through their written resignations submitted to the office of Governor-General.

The accountability features such as the disclosure of interests by the members that could affect the work that they perform; their recreational leaves and the conditions thereon to be determined by the Remuneration Tribunal; termination of their appointments in case of

established misbehaviour, inability to perform duties on account of any mental or physical disability, indulgence in corrupt activities and certain other conditions as mentioned; partial restriction on acquiring any gainful conflicting employment unrelated to the duties to be performed as a member without permission of the President in case of full-time member and complete restriction in case of part-time member; etc. exists in the setup so that the members could not take advantage of the positions that they are holding.

The support staff and the Registrar to the AAT are appointed through the mechanism established under the Public Service Act of 1999[5] and not under the AAT Act thus distinguishing the nature of their appointments from the members of AAT. Though the Registrar can engage other persons for seeking their services to the AAT. The role of the Registrar has been made pivotal through statutory means in administratively managing the AAT though she/he has to perform those functions in consultation with the President. The Registrar is aided by Registries at Central as well as at the District levels. Such Registries exist in each Commonwealth State‟s Capital as well at Canberra.

The Procedural Standards before the Tribunal:

Since the vantage point of the discussion has been AAT hence the procedural aspect shall be seen in contrast with the procedure adopted before AAT. As already discussed, the majority of the tribunals in the Commonwealth follow AAT in the most significant forms of their structure and functioning. Another significance of AAT could be assessed from the fact that its formation, structure, jurisdiction, powers as well as functioning, make it one of the most interesting tribunals in Common Law systems. The AAT‟s Merits Review and the standards adopted for the same are not visible in any other jurisdictions of the Common Law world.

The redressal procedure adopted by AAT is equally interesting as once a party apply for the redressal, except the cases related to security division, AAT provides a time limit of twenty-eight days to the decision-maker to reply on the reasoning aspects of the decision with pertaining documentation to be supplied to AAT. The tribunal then assesses the matter and the possibility of Alternative Dispute Resolution (ADR) through a discussion with the party. In case a solution is not reached the tribunal then conducts the hearing and renders a decision.

[55] See, S.19 of the Contempt of Court Act, 1981 [United Kingdom]. The legislation can be accessed at, (Last accessed 20th September 2020)

The hearing process before AAT is inquisitorial in nature. Though like AAT most of the tribunals in the Commonwealth adopt informal redressal procedures. This nature stems from the powers ordained to the tribunals. Though the degree of digression from the ordinary procedural rules of law pertaining to evidence depends on the adherence to the merits of the case as well as the procedural fairness adhered by the tribunal[6].

The flexibility in the procedural standards provides such tribunals with a leeway to adopt different but fair procedure on case and need basis. Since the tribunal vires come from the executive‟s power in the Commonwealth Constitution the decisions rendered by the tribunal are binding on the government in the same fashion as the decisions of the government itself. Hence the determination-making body becomes the final decision maker on the executive side. This type of setup aids in a visible sense of justice for the affected stakeholders as the decision gets reviewed with an obligation on the reviewing body to act fairly. Also, the decisions do not remain a closed secret and the person/s affected could seek review on the merits of the decision. Though the body is part of the executive arm of the government still the statute under which it has been constituted provides sufficient safeguards as the prominent decision-makers remain part of the judicial wing[7].

For example, in case the decision of the tribunal considers inter alia the evidence which would have been ordinarily inadmissible before the court of law then the legality of such admission would largely depend on whether in the conduct of such „inquiry‟ the tribunal adhered to fairness, equity, and principles of natural justice. And also, on the probative force of the evidence considered. Contrastingly when the Courts decide a case based on statutory principles then they sometimes might also entail the exclusion of some natural justice principles that are to be strictly followed by these tribunals and no divergence therefrom is allowed.

Whether the procedure adopted by a body is adversarial or inquisitorial or investigatory or some other has to be inferred from the functions and the powers ordained to the tribunal by the document through which it derives its authority. Hence AAT while conducting a conference hearing cannot be said to be following the adversarial model as there is no confrontation of

[6] M.P. Singh, Administrative Justice in India: The Urgency of Reforms, (2013) 1 SCC J-65, 80.
[7] Rojer Mathew v. South Indian Bank, (2018) 16 SCC 341 (Order dated 24th October 2017) The SC formed an issue regarding the creation of regular cadre for tribunals.; But the issue did not find redress in Order dated 7th May 2018 (supra note 100) or the final judgment (supra note 7) dated 13th November 2019.

parties or their lawyers, rather an opportunity is given to the decision-maker to represent his viewpoint and then the matter is tried to be resolved through the conference with the aggrieved party.

Though it is to be made clear that the nature of proceedings being inquisitorial does not shift the burden of proof on the tribunal for investigating or finding the truth by searching the facts.The Common Law dual standards of rigor, regarding proof, is based on the notions of the nature of proceeding being criminal or civil. Under the Common Law generally observing, the evidentiary burden of being beyond a reasonable doubt in criminal and based on the preponderance of probabilities in civil proceeds, is followed. Out of this duality, the latter civil standards generally apply to the proceedings before these tribunals though proper weightage is given to the seriousness of each matter and the facts involved. These dual standards might prove short of the requirements needed for Merits Review as it sometimes entails assessment of the future consequences of a decision or action taken by the decision-maker leaving discretion with the tribunal.

Nature of Decision and Extent of Intervention by Courts:

The appeals from the decisions of AAT arise only on the questions of law before the Federal Court of Australia. Thus, the appeals are permitted only on such „questions of law" not involving any issue regarding facts or mixed issues of facts and law. The route of appeal opened from the decision of AAT is very narrow. The appeal could be preferred only on limited statutory terms and in case it is available. As commonly known that in Common Law there is no inherent right to appeal. Similarly, from every decision of the AAT or the other tribunals in the hierarchy, there is no right to appeal unless the statute under which the matter was decided, provided such right.Though certain state tribunals have an alternative to the judicial review in the form of an additional tier to their hierarchical structure within the tribunal setup[8].

The judgment of Drake marked an important point at the initial stages about the nature of review that tribunals offer in policy matters as after the provision providing for „Merits Review", „policy matters" did not remain a pious-no-touch category where lawyers cannot challenge the decision simply based on the reasoning until it doesn"t follow the law. Though certain states in Commonwealth tried to bind the state tribunals with the policy and based

[8] Supra note 79, AIR 1969 SC 78.

decisions but in vain.

The decisions by the tribunals do not operate as binding precedents though the earlier decisions are looked at for consistency. This again distinguishes the tribunal from the Common Law courts where the doctrine of precedent acts as the primary creature and developer of the legal system. The decisions rendered operate with a persuasive value in similar kinds of policy and factual issues. Though the tribunal like AAT is capable to punish up to twelve months for its contempt. Though as seen in India many state tribunals are not only financially connected and dependent on the parent body whose decisions are reviewed by them. Some of them like India are also geographically located within the same place as the parent body itself.

The judicial review of the tribunal decisions exists but as already discussed on very limited aspects.

The Amalgamation and Service Body Aspect:

From May to July 2015 as part of the „Smaller Government Reforms" the Migration Review Tribunal (MRT), Refugee Review Tribunal (RRT), and Social Security Appeals Tribunal (SSAT) were merged with the Administrative Appeals Tribunal (AAT). This was also done as part of budget, like the finance bill route taken in India to bring better value for money for the exchequer. Reforms also disbanded Administrative Review Council (ARCu) a policy recommending body and one of the key recommendations of the Kerr Committee. The functions performed by ARCu were vested within the Attorney General"s Department. The Council was proposed as a major reform so that a permanent body could be established that could review the functioning of the AAT as well as the Administrative bodies and the procedures involved for suggesting organic continuing reforms for the betterment of the system. With this budget-cutting reform, the „proposed reforms structure" by various reform committees and the idea of research about them shall remain at the mercy of the already very busy Attorney General"s Department.

In 2014 Australian State of Victoria developed a body called Court Services Victoria (CSV) through the statute. Unlike the AAT that is generally managed through the Registrar and the support staff, the CSV acts as a common setup for administratively aiding all the Tribunals in the state of Victoria. The CSV run by executive-appointed officer who facilitates administrative

needs and services of certain administrative adjudicatory bodies in Victoria. Thus, making these bodies free from the administration, of rulemaking and other administrative tasks that they earlier carried with the help of the executive. This could be taken as an illustration, for setting up combined assistance service for cluster of different bodies that need similar administrative aids. This combined assistance service could work better for tribunals instead of establishing separate registry and the staff below for each tribunal. This shall also reduce the cost as well as provide efficient vacancy filling and budget management.[9]

Commonwealth‟s AAT is part of the executive as discussed and not the judiciary, unlike England where the legislation passed in the first decade of the twenty-first Century (i.e., the Tribunals, Courts, and Enforcement Act of 2007), has made Tribunals part of the combined judicial hierarchy. The discussion on thus constituted combined tribunals and courts service pertains salience for understanding the modern English administrative adjudication mechanism.

The doctrine of Separation of Powers enunciates the judicial wing‟s separation from the executive‟s interference so that the independence and proper functioning of the former is maintained. But certain new developments have happened within the structure of the doctrine. Also, the traditional doctrine falls short in recognising the modalities of modern institutions within the traditional structure. The widely popularised merits of the tribunals linked with the efficiency aspects also require scrutiny. Further, the phenomena like Globalisation and Privatisation have posed certain serious issues before the public institutions including courts and administration they need to be discussed in light of the theme of the current discussion.

The concepts like judicialization as well as juridification are becoming buzzwords within the administrative law scholarly community. The salience of these concepts and their application need some analysis. Lastly, an analysis shall be made about the privative clauses excluding the jurisdiction of the civil courts as well as the alternatives that India could adopt to deal with the burgeoning Tribunalization in its legal setup. The focus shall remain on presenting the structured arguments against keeping the „Administrative Tribunals‟ and „Civil Courts‟ as separate entities. Presenting a case for the inclusion of the “Administrative” wing within the

[9] See, the discussion on various directions suggested by the Apex Court of India in this regard in the Chapter-2 on„ Background ‘as part of this work.; See also, the discussion on “Service Conditions” of these tribunals supra in this Chapter-5.

existing Court setup and preserving the independence of these adjudicators keeping the salient features of the tribunals intact. This type of setup further makes sense with the Supreme Court applying the same standards of judicial independence to these administrative tribunals as applicable to the judiciary.

The aspects or objectives like administrative adjudicatory bodies (be known by whatever name) being quick in disposals, fair and just, economical in operations, and less formal in procedures, etc. form part of much of discussions about them. The single factor that remains silent in such discussions is regarding the order of precedence that each of these aspects shall receive from the members or adjudicators or judges of such bodies. Hence, justification of Tribunals being economical with compromise, if any, upon the fairness or independence aspect needs to be critically analysed. Or can the procedures be compromised or twisted a little for attaining quick disposals? What shall be the effect on justness in such disposals? Such questions largely remain unanswered and take a back seat while these bodies increasingly occupying the adjudicatory space worldwide. An attempt shall be made to delve into such arguments with the aid of logical reasoning and practical illustrations.

Towards More Robust System All the civil courts in India have been rendered with very wide jurisdiction that is open unless it is impliedly or expressly curtailed by some law or its interpretation by the puisne courts.[10]

Thus, the civil courts exercise umbrella jurisdiction in a wide variety of matters. Though the power of judicial review is exclusively exercised by the puisne judiciary i.e. High Courts as well as the Supreme Court of India being the supervisory courts of records. The basis of the power of judicial review is well known and rooted within the constitutional mandate. The power of judicial review needs to be discussed more to discuss the modalities of the nature of review that is required for administrative adjudication. The issues like the judiciary‟s domain over the judicial review and the legislative attempts in creating executive institutions or the institutions managed by the executive need to be discussed to understand deeper issues with the tribunal system. The limits and exercise of civil jurisdiction or civil review of the matters commonly entrusted with the ordinary civil courts need to be examined. As increasingly such

[10] H. W. R. Wade, The Basis of Legal Sovereignty, 13 CAMBRIDGE L.J. 172 (1955). Professor Wade argues a clear case of "Parliamentary Sovereignty" of the British Parliament to the limit of any delegation without the same to be accountable to the courts under review jurisdiction.

jurisdiction is being exercised by executively managed Tribunals through statutory means and ouster clauses.

It has long been argued by the critics of the present tribunal system that the system creates an additional layer of litigation. This argument particularly rises from the decision of the seven-judge bench of the Supreme Court of India in the L. Chandra Kumar Case where the judicial review was mandatorily held to be part of the Basic Structure to the Constitution of India. Critics argue that this creates another chance for the litigants to challenge the decision of the Tribunals established, first before the High Courts, then as well as at the Supreme Court level. Thus, defeating the purpose of tribunals as an „alternative institutional mechanism" according to the critics. The theory of „alternative institutional mechanism" gets more force from the decision of SP Sampath Kumar Case where the court allowed these institutions to function as a substitute to the review jurisdiction of the High Court referring minority decision in Minerva Mills Case.

The picture becomes much clearer when a singular noun i.e. Justice is used in place of the common noun i.e. the court. It was the separate and partly dissenting opinion of Bhagwati, J (as he then was) in Minerva Mills Case that became the keystone of the edifice of the majority judgment in Sampath Kumar Case. The minority opinion ignored various binding precedents in putting forward the theory of "alternative institutional mechanisms" for judicial review. Interestingly, legal scholars may often find many instances where minority or separate opinions like of Bhagwati, J (as he then was) in Minerva Mills decision got translated into majority upon holding the Chief Justice"s position. Though such instances may form part of a separate research study on the dissents and their fruitful conversion into majority opinions. As the Chief Justice of India is the master of the roster there remains a possibility of a constitution of benches having justices with similar opinions. The fact of the foundation of the theory of "alternative institutional mechanism" based on separate and minority decision of Bhagwati, J (as he then was) in Minerva Mills Case ignoring various constitutional precedents holding otherwise has been duly noted by scholars as well. The encroachment of tribunals in the sphere of judicial review set the ball rolling for persisting legal tensions. The limits of the doctrine of judicial review, its relation with Separation of Power, alternatives to the doctrine, independence of the judiciary, and overall concept of Rule of Law became the grounds of attack against the

Tribunals[11].

The doctrine of judicial review is not as wide as to include the fact-based review of a policy as in the case of Merits review. The limitations of judicial review unlike merits review lie in the fact that the factual merits of the decision are neither reviewed nor revisited. It is only the substantive or procedural ultra vires based on the legislative intent and competence on the touchstone of constitutional provisions that are reviewed by the supervisory puisne courts. The process may sometimes necessarily deal with intertwined factual-legal issues but the grounds of review even in those cases are strictly legal. Though Anisminic decision opened an opportunity for the Common Law courts to review the jurisdictional error of the decisions that were earlier ousted using the ouster or privative clauses.

The position in India is quite interesting even with regards to the review of the administrative action as the power of such review unlike many Common Law jurisdictions for example the United Kingdom, is derived from the written constitutional principles and not from the unwritten rules based upon judicial precedents. Here it becomes necessary to discuss the doctrine of Separation of Powers so that the limits of judicial power to review the actions of other organs of the state could be demarcated.

Conclusion:

The administrative tribunals do not and cannot have branches at all the local levels of governance. As it will also not be financially viable to make local branches available for every such tribunal at the District level creating another parallel infrastructure to the Courts. Thus, making the geographical accessibility to administrative justice through them difficult. In case the Anisminic ratio is followed and applied then the local Civil Courts at the District level may also be empowered to review the decisions of these bodies with the enhanced scope of error of law, making justice more accessible. But the cost of accessibility in creating the tribunals as a forum for administrative dispute resolution would cause more chaos and financial loss. This in turn may also limit the burgeoning Tribunalization and cause a rethink on their numbers and financial rationality as an institution. This would certainly require holistic judicial reforms but

[11] The statement of Object and reasons to the Constitution (Forty-Second Amendment) Act, 1976 read inter-alia: ―….5. To reduce the mounting arrears in High Courts and to secure the speedy disposal ….it is considered expedient to provide for administrative and other tribunals‖. The object sought to protect the Constitutional jurisdiction of the Supreme Court (Article 136) but not of the High Courts (Articles 226 & 227) while creating tribunals as substitutes to the High Courts with respect to matters the tribunals were to be created.

as an interim arrangement, it appears, Indian courts have accepted the idea of the National Tribunals Commission without the integrated Tribunals Service.

But NTC alternative could not be called as the solution in the real sense to the problem of geographical difficulty of access to the tribunals. Rather a combined system of Courts and administrative adjudicatory wing of these Courts, established at the District level could serve the purpose of administrative justice well. The judges of the tribunals could be part of the combined higher judicial service. As discussed, the specialization issue is resolved by seeking a time-bound opinion from a locally designated panel of experts who continue to operate in their respective fields gaining further experience in that field. But them could assist the adjudicatory body with their time-bound written opinion on the facts of the matter.

Such panel of experts could be drawn through the process and rules decided by the Full Court of the High Court with the approval of the Governor in case of State subject tribunal and by the Supreme Court with the approval of the President of India in case of the centrally established tribunal. The issue of administrative assistance to these courts could be provided as like the current system i.e. by the Department of Justice of the Ministry of Law, Government of India by creating an „Administrative Adjudication" Division with a separate Joint Secretary heading that branch with a dedicated staff. The branch could function on a similar line as the British HMCTS (Her Majesty Courts and Tribunal Service). This in turn would preserve the independence of the judiciary and also serve the independence of governance of the executive by providing it with the broad discretion to lay rules and eligibility conditions and invite names for the specialist panel amongst whom the final selection will be made by the judiciary through its rules so approved.

The case for the integration of Courts and Tribunals in India combining into an integrated judicial cadre is further strengthened by the uniformity as well as financial benefits that it brings along. The creation of a single ministry managing the judicial and administrative adjudicatory judicial cadre, as against the separate agency like NTC managing the administrative functioning of these tribunals, could function better. Considering the proposition that the judiciary is disproportionately overburdened but the reasons for the same do not justify the creation of non-independent adjudicators against the doctrine of rule of law. The pace with which the Tribunalization of justice has come within the judicial scrutiny and the extraordinary circumstances of emergency that brought it in existence requires the fresh look to give to the

entire structure of the administrative adjudication that it offers. With the existing structure, the tribunals shall keep facing the judicial scrutiny as recurred in,, MBA 4‟ as they are not independent from the executive who is also a major litigant before them. Thus, it is suggested that the integration of the “administrative wing” within the Judicial Setup with an integrated judicial and tribunal service shall offer a better solution to the persisting issues with these bodies. In case the adjudication is to be based upon the qualitative legal reasoning and not upon extraneous non-legal considerations the requirement of technical experts as part of the bench can be done away with. The requirement of extraneous non-legal considerations for the factual understandings could also be achieved through the suggested panel of experts. The separate administrative procedural code for the administrative division as well as regulators could also be established for guiding the requisite and desired procedures leeway as available with tribunals.