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REVISITING TRIBUNALISATION OF JUSTICE IN INDIA

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ABSTRACT

The proliferation of tribunals in the country, caused by the 42nd constitutional amendment, is mostly seen as a deliberate attempt by the executive to take over the judicial functioning. This tussle of power between the two organs has led to a catena of cases wherein important questions of independence of judiciary, separation of powers and extent of judicial review have surfaced. Following the Introduction in Chapter I, Chapter II begins with developing an understanding of the tribunal system in India and analysing the same with specific administrative law understanding (Dicey's Rule of Law and possibility of incorporation of the Droit Administratif system in India). In Chapter III, the holistic development of the jurisprudence regarding the tribunal system has been traced right from Sampath Kumar case to R. Gandhi case. Important questions of exclusion of the High Court's Jurisdiction in matters transferred to the tribunals have been tackled along with understanding the issue in the broader context of separation of powers. Chapter IV juxtaposes the contrasting ruling of the Supreme Court in matters of the constitutionality of the NTT and NCLT & NCLAT and tries to understand the shortcoming of both the cases. Chapter V examines the situation wherein different tribunals are in conflict with each other and where the High courts are in conflict with the tribunals. Chapter VI concludes the paper by understanding how the foundational arguments in favour of the creation of the tribunals have been defeated by the evolving judicial jurisprudence and by the introduction of the 2017 Finance Bill.

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CHAPTER I: INTRODUCTION

The Doctrine of Separation of Powers is enshrined in Article 50 of the Constitution of India. However, starting from Bela Banerjee's case [2]right after the Independence, there exists a perpetual tussle between the political branch (which claims to be the representative of the "popular will" i.e. the direct will of the people) and the Judiciary (which is the enforcement agency and claims to the representative of the "general will" i.e. the rational and logical will of people) over the true guardianship of the constitutions and its principles. The separation of powers doctrine which has been conclusively held to be a facet of the basic structure of the constitution[3] draws a fine line of distinction between the working of these organs. Despite being a very fine line of division, what can necessarily be inferred is that the functioning of these organs must be independent of each other and neither the liberty of one of the organs should not be encroached upon by the others nor the duties and functions of one of the organs be assigned or transferred to some other (against the constitutional will).

The abovementioned tussle between the organs has witnessed the standard prototype that the first legislature makes certain laws which are then declared ultra vires or unconstitutional by the judiciary. After this, the legislature takes recourse to an amendment to again incorporate comparable provisions. However, very soon the legislature and executive developed a new technique whereby they began introducing autonomous quasi-judicial regulatory bodies into the present structure of governance. Traditionally the judicial power was and must be in the vested in the judiciary itself but the legislature, via this medium, attempted at transferring this judicial power to bodies which were under the aegis of the executive branch of the government. The first major attempt by the government in this direction was through the 42nd amendment. The Indira Gandhi Government was determined to limit the powers of the Judiciary as its independence was hindering their working. The entire conceptual understanding of quasi-judicial tribunals was practically injected into the scheme and

[2] The State of West Bengal vs Mrs. Bela Banerjee And Others; AIR 1954 SC 170
[3] KesavanandaBharati v. State of Kerala, AIR 1973 SC 1461

substantial changes were made into the language of Articles 226[4] and 227[5]. After this, the Janta party government tried to restore the position and even the apex court did hold certain sections of the 42nd amendment unconstitutional but somehow certain articles (viz. 323A and 323B) escaped the axe. Inserted by section 46 of the amendment, they added part XIVA to the Constitution of India and thereby authorised the parliament to make laws that enable the creation of specialized dispute resolution tribunals under the garb of providing fast and swift disposal of matters. The parliament's primary motive was, however, the creation of a "parallel justice system" wherein the jurisdiction of the High Courts could be ousted. This lead to what is called the "*Tribunalization of Justice*" in our country wherein the judicial power is transferred from the judiciary (guardian of the general will) to the executive.

It should be noted that how one views the institution of tribunals will have a direct correlation with the fact that how much trust does one repose in the government. Consequently, for someone critical of the government, he/she will be extremely distrustful and suspicious of the governmental interference in the functions of the judiciary and therefore wary of the very institution of tribunals itself. On the contrary, for someone who has faith in the government, he/she will view the institution of tribunals as innocuous and pertinent for the efficient and speedy resolution of technical disputes.

CHAPTER II: UNDERSTANDING TRIBUNALS VIS-À-VIS ADMINISTRATIVE LAW: CAN DROIT ADMINISTRATIF BE INCORPORATED IN INDIA?

Notable Jurist A.V. Dicey was specifically against the idea of creation of administrative tribunals and he believed that normal courts should administer the normal law of the land. His perspective could be traced back to the more classical notion of rule of law and separation of powers doctrine whereby only separate and distinct branch (the judiciary), which is independent in itself, must be allowed to adjudicate upon matters.[6] Dicey goes on to the extent of saying that such separation of power between the judiciary and the executive is more essential that the separation required between the State and the Church!

[4] The Constitution of India
[5] *Ibid.*
[6] See: C.K. Takwani, Lectures on Administrative Law, Eastern Book Company, Fourth Edition, Lecture VII-Administrative Tribunals, p.242

The roots of his arguments can be backtracked to the fact that he was inherently suspicious of even the remotest form of governmental control or intervention into the process of dispensation of justice, or for that matter, even in the general lives of people.[7] This suspicion arose in him because of the notorious reputation that the French Administrative System had for discretionary abuse of power in their parallel justice delivery system. Therefore, Dicey (an ardent Red light Theorist) was never in favour of the normal courts relinquishing their judicial jurisdiction over specific matters and letting the same flow in the hands of the government or the aristocracy. However, the problems which the traditional justice delivery system poses in modern times have made it difficult to incline towards the beliefs of Dicey. Such problems include excessive pendency of cases in the normal courts and swift development of certain technical fields of law like taxation, Environment, corporate law etc. which require a certain amount of specialized knowledge to adjudicate matters concerning these issues. And therefore, qualities like cheap, effective, flexible and technically equipped make the existence of tribunals a viable option given the inefficient and pending nature of the existing judicial system.

But can this principle of *Droit Administratif* be fully applied in India given the requirements of independence of tribunals and concepts of separation of power and rule of law? "The concept of Droit Administratif is in contradistinction to Dicey's 'Rule of Law', where everybody in a State shall be subjected to same common law and no official person, irrespective of his status and authority shall be kept outside the purview of Rule of Law. To Dicey, it seemed strange, that when the injured individual sought protection against the administration he had to turn to an administrative body, the Conseild'Etat, which was certainly closer to the administration than the judicial courts. It was this fact which unfavourably impressed Dicey and was visibly against this theory that the law be objective to all in each case"[8] Moreover, the same administrative body also served as the appellate authority for the cases which involved the government or its employees and there lies no further appeal with any authority whatsoever in such matters. Henceforth when we juxtapose this way of disposing of matters with the process adopted in our constitution, it becomes

[7] See: Dr. Ashok K. Jain, Administrative Law- Supplement 2010, Ascent Publications, Ch.8 – Tribunals, p. S- 117
[8] Edwin Borchard, Edwin, "French Administrative Law" (1933). Faculty Scholarship Series. Paper 3445

evident that comprehensive incorporation of the Droit Administratif system is not possible in our context because we cannot allow the orders of such tribunals to be completely immune from the purview of judicial review of our courts. Providing such immunity would be against the fundamental right granted under Article 32 whereby the exclusion of the Supreme Court's jurisdiction would be held unconstitutional. Moreover, the Supreme Court has emphatically held that "the power of judicial review is an integral part of our constitutional system, and without it, the rule of law would become illusory, unless an adequate alternative is brought forth"[9]. The jurisprudential development in this regard from Sampath Kumar case to L. Chandra Kumar case will be discussed in the forthcoming sections and henceforth is omitted in this chapter for the sake of avoiding repetition.

CHAPTER III: DEVELOPMENT OF JURISPRUDENCE FROM SAMPATH KUMAR TO R. GANDHI: UNDERSTANDING IT IN CONTEXT OF SEPARATION OF POWER AND JUDICIAL REVIEW

There have been three seminal judgements which have governed the development of the tribunal system in India after the incorporation of article 323A & 323B into the constitution of India. There were a plethora of cases that challenged the validity of the Administrative tribunals' Act and the 42nd amendment because section 28 of the former and article 323A, which was inserted by the latter, specifically excluded the jurisdictions of every court except for the Supreme Court of India. The leading judgement in this regard was that of *S.P. Sampath Kumar v. Union of India*[10]. The primary question that was being looked at in this case was the validity of the act and the amendment on the ground the ousted the scope of judicial review. Though the court in this matter held reiterated the fact of judicial review is an important facet of the basic structure of our constitution, they went on to hold that "if the constitutional amendment did not leave a void by excluding the jurisdiction of the High Court but if it set up another effective institutional mechanism wherein the power of judicial review was vested, then the Administrative Tribunal would pass the test of constitutionality".

[9] Minerva Mills Ltd. and Ors. v. Union of India and Ors, [1981] 1 S.C.R. 206.
[10] S.P. Sampath Kumar v. Union of India AIR 1987 SC 386

Scholars have held that such an amendment alters an area of law that belongs to the basic structure of the constitution and therefore must be held to be constitutionally invalid.[11]

The court further went on to trace the source of the power of judicial review for the tribunals to the provisions of the 42nd amendment. The primary argument was that because an alternate effective mechanism is being provided via the institution of the tribunals, therefore the judicial review is not being barred but just being excluded (of the High Courts) so that an efficient and effective alternate dispute resolution mechanism could help in dealing with the huge amount of pendency that exists in the traditional courts and provide for speedy disposal of backlog cases. However, what is pertinent to note at this juncture is that in this entire proceeding, the issue of the constitutionality of Article 323B(3)(d) (which is analogous to Article 323A(2)(d)) was not brought up in the court.

The ruling of Sampath Kumar did not have a very long life. The Supreme Court in 1997 overruled it on the crucial point of the exclusion of the judicial review of the High courts in the case of *L. Chandra Kumar Vs Union of India*[12]. A larger bench than the Sampath Kumar case gave this judgement and this remains the law of the land till now. One of the reasons for its importance in the development of the jurisprudence is that this was the first case where the issue of the constitutionality of Article 323B(3)(d) was discussed. The question that whether articles 323B(3)(d) and 323A(2)(d) were in contravention of the power of judicial review that was conferred upon the High Courts via articles 226 & 227 assumed greater importance in this regard along with the inquiry regarding whether or not the power of the High Court of supervision upon the tribunals that fall under their territorial jurisdiction forms a part of the basic structure of the constitution? Another issue regarding the clause for the requirement of a technical member on board would have any effect on deciding the constitutionality of the constitution of the tribunals. While deciding the first question, the Supreme Court held that "the power of judicial review was vested with the Supreme Court and the High Court under Art. 226 and under Art. 32 as the constitutional safeguards which ensured the independence of the higher judiciary were not available to the lower judiciary and reiterated that judicial

[11] D.D. Basu, COMMENTARY ON THE CONSTITUTION OF INDIA, VOL. 9, 5540 (8thedn., 2011).
[12] L. Chandra Kumar Vs Union of IndiaAIR 1997 SC 1125

review was a part of the inviolable basic structure doctrine"[13] Moreover, the court went on to hold that the provision regarding the "exclusion of jurisdiction" that is provided by articles 323B(3)(d) and 323A(2)(d) is against the constitutional values and principles and is henceforth liable to be struck off. On the second inquiry regarding the supervisory powers of the High courts, the Supreme Court answered the question in the affirmative and went on to hold that it does form a part of the basic structure of the constitution. as regards to the third question, the Supreme Court held that "the setting-up of tribunals was founded on the premise that those with judicial experience and grass-roots experience would best serve the purpose of dispensing speedy justice and therefore the tribunals would continue to act as courts of the first instance in respect of the areas of the law for which they have been constituted"[14]

The primary reason for this judgement was the fact that the court realized that the constitutional protections that safeguarded the autonomous nature and independence of the judiciary were missing in the context of an administrative tribunal. Therefore, the persons who presiding over such tribunals could not be compared to a judge of the High Court it is because of this that he/she cannot be considered an effective and complete replacement of higher judiciary judge vis-à-vis adjudication of matters requiring constitutional interpretation or even normal application of the statues and henceforth the proposition that the power of judicial review must be ousted from the High Courts does not hold any water.However, what must be critically noted here is that the court has only set out specific parameters against which they judged the independence of the judiciary viz. salaries, appointment, retirement age, other allowances etc. and nowhere did they talk about the fact that whether or not the presence of technical and administrative members (retired civil servants) would amount to a certain degree of executive interference in the justice delivery process.

However, very soon a three-judge bench of the Supreme Court while hearing certain civil appeals realized that Chandra Kumar judgement failed to shed light on certain key issues like what is the scope of the transfer of the powers of the High Court to the tribunals (except the judicial review) and what is the line of demarcation if at all, that stops the parliament from

[13]KesavanandaBharati v. State of Kerala, AIR 1973 SC 1461 KihotoHollohan v. Zachilhu, AIR 1993 SC 412.
[14]*Ibid*. n11

conferring certain essential and inherent judicial functions that were ordinarily performed by the courts to the newly created tribunals. It was in this backdrop that the bench made way for a five-judge bench to hear this case viz. *Union of India v. R Gandhi*[15]. The Constitutional bench held that "the Constitution contemplates judicial power being exercised by both courts and tribunals (in light of Art. 32, Art. 247, Art. 323A and Art. 323B) and hence if jurisdiction of High Courts could be created by providing for appeals, revisions and references to be heard by the High Courts, jurisdiction can also be taken away by deleting the provisions for appeals, revisions or references and it also followed that the legislature has the power to create tribunals with reference to specific enactments and confer jurisdiction on them to decide disputes in regard to matters arising from such special enactments."[16]Moreover, the Supreme Court on the question of appointment of certain members held that "while the legislature could make a law providing for constitution of tribunals and prescribing the eligibility criteria and qualifications for being appointed as members, the superior courts in the country could, in exercise of the power of judicial review, examine whether the qualifications and eligibility criteria provided for selection of members is proper and adequate to enable them to discharge judicial functions and inspire confidence."[17]

We see that how the Sampath Kumar case saw the Separation of power as merely functional, thereby meaning that there has to be some amount of check and it does not matter who keeps that check. So whether the judiciary keeps judicial review powers to keep the check or the executive keeps it (via the administrative tribunals), this is of little significance. However, PratapBhanu Mehta has argued that the correct understanding of separation of power is that when we understand the judiciary in a specific context of performing a specific role. And therefore, it the correct articulation, the specified role of the judiciary must be performed by the judiciary itself and it ought not to be transferred to any other body. He concludes that the real idea of separation of power means that a particular branch performs a particular action and none encroached upon the domain of the other. He cements his arguments by providing an example that how in an ideal separation of power context, the judiciary of the state must

[15]Union of India v. R Gandhi (2010) 6 SCR 857
[16] *Ibid.*
[17] *Supra. n14*

refrain itself from answering political questions which is the exclusive domain of the executive.

CHAPTER IV: CONSTITUTIONALITY OF TRIBUNALS: NTT AND NCLT & NCLAT

The present chapter would be dealing with the entire controversy around the constitutionality of the National Tax Tribunal (NTT), National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT).

I. NATIONAL TAX TRIBUNAL

The court in *Madras Bar Association v. Union of India*[18]struck down the NTT as unconstitutional. Before the NTT constitutionality of the NTT Was challenged on various grounds, all the appeals in matters of income tax disputes were to be heard by this tribunal only. It was contended that the fact that this tribunal was created only to look into questions of law was problematic as the same is regarded as a core function of the judiciary itself, which can not be outsourced to any external body. It was also argued that definite portions of the act were also in contravention of separation of power, independence of judiciary and rule of law. The standard of appointment for judicial posts of the tribunals was also challenged and argued to be lenient and antithetical to the concept of judicial independence and a capital case of direct infringement on the judiciary by unlawful intrusion by the legislature and the executive.

The court yielded to these arguments and fundamentally placed reliance on *Sampath Kumar* and *L. Chandra Kumar* to hold that the concept of judicial review is an intrinsic part of the doctrine of separation of powers and the rule of law itself. The could held that the NTT would not be held constitutionally valid as it excludes the supervisory powers of the High Court in the matter of hearing income tax matters and because this superintending power of the High Court over courts and tribunals under its territorial jurisdiction is of supreme

[18]Madras Bar Association v. Union of India AIR 2015 SC 1571.

importance and cannot be, in no matter whatsoever, jeopardized. The court held that the legislature must not encroach upon the judicial freedom by transferring the intrinsic power of judicial review to other quasi-judicial bodies.

There must exist an evident demarcating line between the three organs viz. Executive, legislature and the Judiciary as the constitution of our country can be traced back to the Westminster model. However, the institution of the tribunals poses a problem here as they emerge as somewhat of a hybrid between the judiciary and the executive and thereby lack the capacity of being categorized as forming part of one of the organ. Given the proposition that for any healthy functioning of a democracy, the independence of the judicial organ of the same is must, what can be argued here is that the only situation where such transfer of the judicial functions of a court can be justified is when the court/tribunal/body receiving the power to carry on such functions also has all the salient trappings of a constitutional court. Now the normal courts have the power to decide both the questions of fact as well as the questions of law, the legislature (in conjunctions with the executive) cannot embark to create a quasi-judicial body which only decides matters of questions of law as that would be a practical infringement on the exclusive domain of the judiciary. The court once again placed emphatic reliance on the L. Chandra Kumar judgement to categorically hold that though the jurisdiction of the High courts can be supplemented, they cannot be substituted.

II. NATIONAL COMPANY LAW TRIBUNAL & NATIONAL COMPANY LAW APPELLATE TRIBUNAL

Acting on the recommendations of the Eradi committee, the amendment in 2002 replaced the existing company law boards with these company law tribunals. The Madras Bas Association challenged the specific changes in the companies act, 1956 that were made for the incorporation of these tribunals into the existing scheme. Similar issues were raised in this case also, namely, an issue regarding the transfer of jurisdiction from courts to tribunals, problem of independence of the judiciary, concerns of separation of powers, issues regarding the appointment of members (technical vs judicial) etc.

The curt stared its judgement by firstly categorically holding the legislature competent to establish such tribunals. as regards to the appointments query, the court laid down specific parameters like only judges and lawyers can be brought on the board of the tribunal as judicial members and persons from the bureaucracy or Corporate law services cannot be made judicial members. The court held that "the selection committee must be chaired by the judiciary. It means that either the Chief Justice of India himself acts or (a nominee of his) act and have a final binding say as to which all members can be appointed to these tribunals. Also, at no circumstance whatsoever can the number of technical members exceed the number of judicial members in a bench. For instance, if there is a division bench of two members then at least 1 judicial member has to be there. Or if the bench is of three members, then at least two judicial members need to be presiding the bench and so on."[19]

As the Supreme court was not satisfied with the optimum amount of existence of feature like the independence of the judiciary, separation of powers and trappings of traditional courts in the tribunals, it held that the NCLT and & NCLAT unconstitutional. What must be noted at this point is that the court, at a principle level did affirm the power of the legislature of constituting such tribunals legally. The relevant chapters were removed from the 1956 companies act. However, in 2013, a new Companies Act was enacted which had analogous proviso fro the creation of the NCLT and NCLAT, therefore the Madras Bar Association once again moved the court.

A five-judge bench in 2015 held both the tribunals to be constitutional in this fresh suit. The court, being extremely formal in its approach, tried to differentiate between this decision and the NTT decision. It held that the tribunals in the present case, unlike the NTT, were to decide questions of both fact and law. Henceforth the court held that the primary argument used in the NTT case that the tax tribunal encroaches upon the exclusive domain of the judiciary falls flat in this regard. However, what the court has missed discussing is that irrespective of the fact that what questions the tribunal decide, what remains the ground reality is that it is still taking away the jurisdiction of the High Court to adjudicate upon those matters. The court in this case escaped discussing the constitutionality of the NCLT and

[19]Madras Bar Association v. Union of India, (2015) 8 SCC 583

NCLAT by reiterating that the 2010 judgement had, in principle, held the creation of such tribunals valid. What is also surprising to note is that not even once in this judgement, was the landmark case of *L Chandra Kumar* discussed.

III. UNDERSTANDING THE JUXTAPOSITION

Having discussed the controversial judgements regarding the constitutionality of tax and company law tribunals, one cannot help but contrast the former with the latter. It is evident that in the original NCLT and NCLAT case, though the court declared the tribunals to be unconstitutional, the idea of the existence of tribunal was protected and therefore an elaborate checklist of recommendations and suggestions was provided by the court that would prove to be the touchstone of checking the constitutionality of a tribunal as any tribunal which does not incorporate the court's suggestions, would be automatically held unconstitutional.What is critical to note at this juncture is that the court in the case of the NTT did not take such a liberal approach and on the contrary took the strict test of the basic structure doctrine and directly held the NTT to be unconstitutional for violating the same without even considering certain improvements in the structure that could be made to protect it.it would not be irrational. To argue that if such a considerate scope was provided to the company law tribunal, the same could also have been extended to the NTT because in the present scheme of things, what becomes the narrative is that irrespective of any amount of structural and procedural overhauling, the very entity of a National Tax Tribunal will remain unconstitutional unless a larger bench of the Supreme Court overrules the previous judgement and extends the in principle justification of the existence of the tribunal to the tax law tribunal also.

CHAPTER V: CONFLICT BETWEEN TRIBUNALS AND COURTS AND TRIBUNALS INTER SE

CONFLICT BETWEEN TRIBUNALS

The purpose of the constitution of National Company Law Tribunal was to hear all matters related to corporate law. The Tribunal has 10 benches spread all across the country for speedy disposal of cases and efficient utilization of jurisdiction. A particular section calls for a compromise between the board of directors of the companies and the shareholders. The section confers discretion on the Tribunal to call for a meeting of shareholders. However, different benches of the Tribunal have come up with diametrically opposite interpretations of the section. The New Delhi and Bombay benches are in stark disagreement with the Chennai and Bengaluru benches over the interpretation of this section.

The legal position which ought to have been taken is beyond this paper's scope. For the sake of clarity, the contrasting position is referred to as the first strand and the second strand. The first strand contains matters adjudicated in January and February such as the verdict given in JVA and the Gauss verdict given by the Mumbai bench. The second strand is representative of the matters adjudicated upon by the Chennai and Bengaluru in early February wherein the conclusions were completely different.[20]

This paper only contextualizes the practical implications of these divergent interpretations. There are two issues which need to immediately address. The first issue is whether these conflicting interpretations militate against the special purpose for the constitution of the NCLT i.e. to assist the traditional judicial forums in spheres of special knowledge. The whole purpose of setting up the NCLT and the NCLAT was to bring a semblance of uniformity in dispute resolution. However, the conflicting interpretation by different benches in the same year makes one question of the efficacy of these tribunals. The second issue captures the overlapping jurisdictions of the Supreme Court and the NCLAT. The constitution of the NCLAT goes against the Supreme Court's observation that pertinent questions of law could not be adjudicated upon by Tribunals. Hence, if any matter is heard by the NCLAT and the Supreme Court in appeal, the multiplicity of litigation would increase. Moreover, a two-stage appellate process would be adhered to. A better system would entail the apex court hearing

[20]PawanJhabakh&HariniSubramani, *NCLT's Contrary Actions: What Does It Signal?* available at: http://www.livelaw.in/nclts-contrary-actions-signal/ Last accessed on: 8th April 2018 11:23 PM

matters in an appeal from High Courts in order to reduce multiplicity of litigation and burden on the judicial structures.

CONFLICT BETWEEN HIGH COURTS AND TRIBUNALS

This part discusses an important legal question. Whether High Courts can review decisions of Tribunals? The text of the Constitution and numerous judgements allow the respective High Courts to review decisions of a court or tribunal within its jurisdiction.

In Lawyers Environmental Awareness Forum v. State of Kerala[21], the petitioner had approached the National Green Tribunal to check the plying of diesel vehicles that were 10 years old as they were not in compliance with the requisite BSES standards. The Tribunal ordered these vehicles to be taken off roads to curb environmental damage. The High Court of Kerala granted a stay order against the judgement of NGT. In another matter, the High Court of Allahabad quashed an order given by the Debt Recovery Appellate Tribunal. Interestingly, matters falling under the jurisdiction of the Debt Recovery Tribunal are heard by the DRAT in appeal and later by the High Courts and the Supreme Court if the litigants remain unsatisfied by the orders of the DRT or DRAT. Thus, the establishment of DRT and DRAT to hear matters on debt recovery is egregious. For the sake of avoidance of petition, similar examples are elaborated upon in the next section.

The Madras High Court affirmed L. Chandra Kumar wherein it was held that judicial review is an intrinsic aspect of the Basic Structure doctrine. Thus, the power of judicial review of the High Courts would extend to tribunals in any case. Henceforth, one can safely assert that High Courts take precedence over Tribunals in matters of the grant of jurisdictions and power of review. However, in Shiv Kant Sharma v. Union of India, a division bench of the apex court held that even though the power of judicial review vested in High Courts, they could not be employed against Tribunals. The controversy in the aforementioned case was whether the Armed Forces Tribunal Act provided for a remedy or review mechanism against the orders of AFTs. In 2015, the Supreme Court delivered its judgement wherein they called for

[21] S. Nikhil Shanker, *Kerala High Court grants complete stay of NGT order on ban and usage of diesel vehicles above 10 years* available at: http://www.livelaw.in/kerala-high-court-grants-complete-stay-ngt-order-ban-usage-diesel-vehicles-10-years/ Last accessed on: 7th April 2018 09:44 AM

the exclusion of the jurisdiction of the High Courts in favour of the AFTs as they were statutory judicial forums. Thus, the same judicial reasoning can be imported in the context of other Tribunals like NGT, DRT etc. where High Court continue to exercise their powers of judicial review. Moreover, a major reason for the apex court to strike down the constitution of the National Tax Tribunal was the fact that it could never be an effective alternative to the High Courts. Thus, the question which needs to be discussed here is as to what is the judicial threshold that needs to be traversed by a judicial body to become an effective substitute to the High Court? The current judicial trends cannot constitute a rigid legal position especially in an environment wherein the constitution of Tribunals is adjudicated upon based on the whims and fancies of the judges whichare highly counterproductive in itself.

CHAPTER VI: CONCLUSION

The direct implication of the L. Chandra Kumar judgement is that it restored the power of judicial review to the High Courts. Having accepted the fact that by this judgement, the institution of tribunals was made to closely adhere to constitutional principles by testing them against the basic structure of the constitution, what must also be accepted is that fact that this judgement, did add avenue of appeal in the chain of justice delivery system and thereby further elongated the process of dispensation of justice. This was precisely the problem for the obliteration of which the entire institution of tribunals was contemplated in the first place. Moreover, the second reason that if often cited to support the proliferation of tribunals is that they have a more specialized board and therefore they are much more capable to adjudicate matters about specific technical matters like taxation, corporate law, environmental law etc. This argument, analyzed in the light of the 2017 finance bill[22], does prove to be antithetical to the very cause of the creation of tribunals. The Finance act of 2017 has wound up eight tribunals and merged these with the existing ones. Reduction of cost has been given as the primary justification for this move. What needs to be understood is that such merger attacks at the very roots of the reasons of creating a tribunal because it leads to the loss of specialization of the board of the tribunal when two unrelated tribunals are merged and the

[22] Radhika Merwin, *Merger of Tribunals to rationalise working Business Line* (Jun. 2, 2017) http://www.thehindubusinessline.com/economy/policy/merger-of-tribunals-to-rationalise- working/ Last accessed on: 8th April 2018 05:40 PM

different technical issues coming before it is to be decided by the same members. For instance: - The Airports Economic Regulatory Authority Appellate Tribunal has been merged with the Telecom Disputes Settlement and Appellate Tribunal. The Cyber Appellate Tribunal has also been merged with the latter. Senior Advocate Arvind P. Datarargues that "the tribunalization of our judicial system will lead to consequences that our country will bitterly regret. Although the functioning of most tribunals is in a pathetic state, the zeal to create more tribunals has not abated. Very few have realized that the real solution lies in strengthening the existing courts and confining tribunals to a few specialized areas. It is equally important to ensure that specialized tribunals are not manned by generalist civil servants or judges"[23]. Even if the above suggestion sounds too radical, some improvements must be made in the present structure and functioning of the tribunals. The Law Commission of India has made several recommendations in 2017 in its 272nd report titled "Assessment of Statutory Frameworks of Tribunals in India"[24] which target all dimensions of the framework i.e. right from the transfer of jurisdiction to the tribunals to the appointment of members as judges in the tribunals. Apart from that, it is recommended by authors like M.P. Jain and Wade that the institution of tribunals should be more integrated with the judiciary and distant from the executive organ. Moreover, to eliminate the arbitrary standards of the courts to validate a certain tribunal and invalidate another, either the government should come up with a constitutional amendment to lay down certain prerequisites which a tribunal must meet or the court itself should, via a larger bench than the L. Chandra Kumar case, remove the doubts and lay down the minimums standards that are required to be met for a tribunal to be held constitutionally valid.

[23] Arvind P. Datar, Tribunals: A tragic obsession, India Seminar, Available at http://india-seminar.com/2013/642/642_arvind_p_datar.htm Last accessed on: 9th April 2018 06:11 PM

[24] 272th report, Law Commission of India, "Assessment of Statutory Frameworks of Tribunals in India", October 2017, available at: http://lawcommissionofindia.nic.in/reports/Report272.pdf Last accessed on: 9th April 2018 03:20 PM