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FORTY SECOND AMENDMENT: A RETROGRADE STEP TOWARDS FRENCH ADMINISTRATIVE MODEL?

by

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Laws were like cobwebs; where the small flies were caught, and the great brake through.

Francis Bacon

Should the supervisory jurisdiction of the High Courts over tribunals be dispensed with is one of the many significant questions which have been raised in a recent monograph 'Administrative Tribunals in India.' 1 It has assumed importance in the backdrop of Forty-Second Amendment 2 which has empowered the legislature to exclude the jurisdiction of all courts with respect to all or any of the matters falling within the jurisdiction of tribunals except that of the Supreme Court under Article 136. 3 The issue deserves a detailed and deeper consideration.

Administrative Justice through tribunals is an accepted mode which is found not only in India but almost everywhere else as well. If Dicey were alive to-day, he would have been greatly hurt in the pride with which he spoke about the virtues of regular courts monopolising the business of adjudication of disputes between the administration and the individual in England. 4 Tribunals with which we are familiar to-day are a by product of the welfare state. They owe their origin to the 20th century. It is infact, the welfare state that gave a real boost to administrative adjudication and administrative law in England and elsewhere. India could launch welfare activities after 1947. Slowly but steadily, we have marched ahead. Constitution of India of 1950 had not made any specific provision for the establishment of such adjudicatory bodies. But they were otherwise constitutionally recognised since the Supreme Court and the High Courts were empowered to exercise judicial control on them through articles 32, 136, 226 and 227. Number of such bodies were established through different Acts and

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they functioned successfully under the Control of Courts. Now the Forty-Second Amendment to the constitution has empowered the Parliament and the state legislatures to establish tribunals in a variety of areas: Civil Service; levy, assessment, collection and enforcement of any tax; foreign exchange, import and export across customs frontiers; industrial and labour disputes; land reforms; ceiling on urban property; elections to Parliament or state legislatures; production, procurement, supply and distribution of foodstuffs. 5 The list is not exhaustive but covers a wide range and it is hoped that many tribunals in these areas will be constituted.

The main aim of the Government, particularly of democratic Government is make available 'Justice' to the people. These tribunals will prove to be good contributers of 'Justice'. We know it too well that the courts are finding it very difficult to cope with the amount of work in the context of socio-economic legislation. Various ways and means are being thought of to meet the challenge. Increase in number of Judges is only a mini solution. Courts need a solid helping hand. Tribunals can work as 'partners' with courts for they will be able to share the burden. They will take over the rush in certain areas from the courts. Infact, these tribunals will go a long way in furthering the cause of Justice. Traditional conception of courts of law is not enough. These tribunals are like the family saloons. They will be able to render easy, cheap and immediate Justice to the people. 6 Need is not of Ashoka and Chanakis. People want more of Indian Coffee Houses. Court Justice is no doubt vital but let us not forget, it is so technical, so dilatory and so expensive. Courts law greatest stress on giving statutes their literal meaning rather than examining the underlying purpose of the legislation. These tribunals will function free from many technicalities of law and will be able to probe certain areas which the High Courts cannot do in their writ Jurisdiction and provide the necessary relief to the needy which so far was not available. Tribunals employ experts in contrast to courts who have 'all rounders'. A Judge has to be Jack of all trades for his subject is full of variety. Tribunals with their 'special skill' will be able to handle many complex problems and in the process build up a solid administrative Jurisprudence in India. There cannot be two opinions that we need more of tribunals for ushering a welfare state.

In the adoption of these administrative tribunals, there are two courses open: with or without the supervision of courts. In France, there are separate Administrative Courts which function independent of the Judicial Courts. They have their own body of law 'droit administratif' which governs them. This complete bifurcation was the result of French Revolution. There was a strong demand from the suffering people for a strong and effective check on the excesses of the administration. The

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political thought prevailing in 1789 was in favour of stopping the ordinary courts from meddling in the affairs of the administration. This thought was in consequance with the theory of separation of powers propounded by the French writer Montesquieu in his famous Esprit des Lois, that the state should provide for a system of checks and balances with a sharp cleavage between the three powers of the Government, the Executive, the Judiciary and the Legislature. The Control of the Judicial courts over the administration was lifted under article 12 of the law of 16-24 August, 1790, which is in force even to-day. It reads as follows:

> 'Judicial functions are distinct and will always remain separate from administrative functions. Judges in the civil courts may not, under pain of forfeiture of their offices, concern themselves in any manner whatsoever with the operation of the administration, nor shall they call administrators to account before them in respect the exercise of their official functions.'

This was no remedy, even worse than the disease. Whatever little check was there, even that stood obliterated. Administration was left free and could do anything. But this was only passing phase. When Napoleon took the charge of First Consul, he decided to establish a strong, almost military like control over his administrators to keep them within their bounds. It was very essential to re-inforce the confidence of the people in the Government. He decided in favour of separate administrative courts to review the actions of the administration. Constitution of 1799, established 'Conseil d' Etat' which sowed the seeds of 'droit administratif'. To-day, it can legitimately claim itself to be the oldest systematic system of administrative Justice.

This French system has functioned for so long without the supervision of Judicial Courts. Indeed, a remarkable performance. But the fact of the matter is: it has remained confined to European countries - Belgium, Greece, Holland, Italy, Luxembourg, Portugal and Spain. Other systems have also faced problems of administrative Justice but they have not decided to lift the umbrella of courts from the administrative adjudicatory bodies.

French pattern has been considered in England number of times. Professor Robson in his evidence before the Donoughmore Committee urged for the creation of a unified system of administrative courts. 7 It did not find favour with the committee for they were of the view that it would be 'inconsistent with the Sovereignty of Parliament and the Supremacy of the Law.' 8

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Robson has been a strong supporter of Conseil d' Etat,[9] he repeated his contention before the Franks Committee but they thought that it will be too great a breach with tradition, and not a solution acceptable to the majority. [10] The Justice (The British section of the International Commission of Jurists) have also rejected the French model for the reason that it draws its strength from specifically French history, traditions and methods of administration, and that to import an institution isolated from its supporting environment would be to invite failure"[11] Famson in his Hamlyn Lectures has explained why French system is not transportable to England:

> "... I do not suggest that the answer to our difficulties is to seek to set up in England a body modelled upon the Conseil d' Etat. Human affairs, and comparative legal studies, do not unfortunately possess that degree of simplicity. The Conseil d' Etat is itself the creature of a peculiar history, it is conditioned by its own environment, it is the special response to the special set of circumstances existing in France. It cannot, as such, be transported across the Channel, it will not as such fit into our circumstances and our traditions and prejudices."[12]

In the same series of lectures, Sir Leslie Scarman has revealed that there is no popular movement for introducing into our legal system any institution of control of the administration comparable with the French Conseil d' Etat. The need for such an institution is not yet felt and the civil service character of the Conseil d'Etat raises doubts in English minds.[13] In short, they are convinced of the fact that this system is not workable in England.

American has also not been enthusiastic about the French recipe. Bernard Schwartz's writings bear testimony to this.[14] He says that there are deficiencies in the present system of Judicial Control in the Angle-American world cannot be denied. But the answer to one who has studied the droit administratif is not the creation of separate administrative courts. [15] He adds that there is at least as much danger of discord between the administration and administrative courts as there is between it and the ordinary law courts. The Judges of the administrative courts will not unnaturally tend to consider themselves to be as expert in the field of administrative law as the agencies whose acts they are called upon to review. [16] Simon Rifkind gives a recent reason for not setting apart administrative law from the rest of the law. "It would contract the area of its exposure to the self-correcting forces of the law. In time such a body of law, secluded from the rest, develops a jargon of its own,

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thought patterns that are unique, internal policies which it subserves and which are different from and sometimes at odds with the policies pursued by the general law. 17 In America as in common law areas, courts are not manned by experts, for they decide all type of litigation. They feel that such experts tend too often to become sterile in their outlook and to make their decisions in the pigeonholes of their own restricted experience. 18 Australia, Canada and New Zealand have also not voted in favour of French system.

Constitution of India provided for a unified system of courts like in England and America. No separate courts for separate matters. The same courts administer different laws in their area of Jurisdiction. During the last twenty eight years of Indian constitutional history, possibility of adopting the French model in India has been examined more than once. The matter was considered at length by the Law Commission of India and it recorded:

> "It would be derogatory to the citizen's rights to establish a system of administrative courts which would take the place of the ordinary courts of law for examining the validity of administrative action. It may be that in view of certain inherent advantages like speed, cheapness, procedural simplicity and availability of special knowledge in extra-Judicial tribunals, these may be useful as a supplementary system. But it will not be right to conceive them as a device to supplant the ordinary courts of law. It would be unthinkable to allow Judicial Justice administered by courts of law to be superseded by executive Justice administered by administrative tribunals." 19

B. Mukherji has warned against the adoption of French droit administratif in Indian Jurisprudence. It would result in throwing overboard the major part of the Indian Constitution. 20 Suggestion was also recently made before Swaran Singh Constitutional Committee. 21 The proposal was rejected 'as we have not yet developed a system of administrative law.' 22 Having rejected the French system, the Committee recommended to constitute administrative tribunals both at the state level and the centre to decide cases relating to service matters and certain other categories of matters. It also recommended that the writ Jurisdiction over these matters of the Supreme Court under article 32 and of the High Court under article 226 should be excluded. The relevant statutes governing these matters should also make specific provision to exclude the Jurisdiction of Courts over such matters. Reference to tribunals in article 227 should be omitted. The right to apply for special leave to the Supreme Court under article 136 against the decisions of the tribunals should, however, be retained. 23

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These recommendations of Swaran Singh Committee have been made a part of the constitution by way of Forty Second Amendment:

(i) Part XIV A 'Tribunals' containing articles 323 A and 323B has been added whereby the legislature has been empowered to constitute tribunals.

(ii) Legislature can also exclude the Jurisdiction of all courts, except of the Supreme Court under article 136 over these tribunals.

(iii) Power of superintendence of High Courts over tribunals under article 227 has been excluded. 24

In totality, if these changes are executed, the effect of them will be that the only Judicial Review which will be exercised over the tribunals will be of the Supreme Court under article 136. This certainly is a step towards the French Model for it has the germs of making the tribunals almost all-in-all. Article 136 does not entitle a person to appeal to the Supreme Court as a matter of right, it is only when the Supreme Court exercises its discretion to grant special leave to appeal in his favour that the matter can be examined by the Supreme Court. Even otherwise article 136 has a limited scope. It can be explained in the words of Mahajan C.J.:

> "It being an exceptional and overriding power, naturally it has to be exercised sparingly and with caution and only in special and extraordinary situations." 25

Since there will be no other right to appeal from a decision of a tribunal, still it cannot be construed that one could go to the Supreme Court under article 136 as of right. 26 This much of Judicial scrutiny will be no safeguard to prevent the tribunals from becoming despots unto themselves. Infact, an indirect way has been adopted to adopt the French system. 42nd Amendment has virtually intended to uncover the tribunals of its Judicial cover. It makes administrative Justice a big farce. Why cannot we be straight in our dealings atleast with our constitution?

Forty-Second Amendment has been in operation for a year now. Some part of it is being removed by the Forty-Third Amendment which has been passed by the Parliament. More of it will be done in the coming session of the Parliament. No legislation has been enacted as yet under Articles 323A and B. Reversal is even pending in this regard. The whole of Part XIV A does not need to be deleted. We do need tribunals, many of them for administrative adjudication has come to stay.

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Effective Judicial Review over them is as essential as the tribunals themselves. Both go hand-in-hand, that is what our past experience speaks. Two major changes need to be introduced in this context:

(i) Article 227 be restored with the position it had prior to Forty-Second Amendment.

(ii) Articles 323A(2)(d) and 323B(3)(d) which empower the legislatures to exclude the Jurisdiction of courts be deleted.

If this is not done and on the other hand, the legislature proceeds to exclude the Jurisdiction of courts, it will result in practical difficulties:

(i) It will give birth to 'Two court system' which has an inherent weakness. 27 However specifically, the boundaries of tribunals and courts be demarcated, yet the Jurisdictional problems will come up. France had to constitute a 'Tribunal of Conflicts' 28 to deal with Jurisdictional conflicts. In India, it will bring in constitutional problem. In a service matter, if a government servant wants to challenge his order of dismissal on different grounds including the ground of unconstitutionality of the law under which the order has been passed, will the matter be taken up before the administrative tribunal because it is a 'Service' matter or will it be taken before the High Court because the constitutionality of a law cannot be questioned before a tribunal or will he be first required to go to the High Court to get the constitutionality of the law determined and then come to the tribunal? The government servant will be in the same predicament if he were to challenge an order on the ground of the violation of fundamental rights which can only be enforced by the High Courts and the Supreme Court. These Jurisdictional issues are bound to be a major hurdle. This is the lesson from the French system and this is also the story of the English Common Law Jurisdiction and Equity Jurisdiction which later had to be merged. Almost complete exclusion of Judicial Scrutiny over certain matters and the rejection of French model are contradictory propositions and difficult to reconcile. 29

(ii) It is hoped that in the Constitution of tribunals, care will be taken in their composition and procedure. Even if they are manned by competent and independent persons, there is liklihood of flood of appeals to the Supreme Court since this will be the only avenue left open. It is extremely doubtful that the Supreme Court will be able to carry the burden even with its increased man power of seventeen Judges.

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(iii) In the enactment of constitutional provisions, we should not blind ourselves to the vastness of the country. How difficult it will be for the people from the remoter parts of the country to come to Delhi to invoke the discretionary power of the Supreme Court under Article 136? Precisely for this reason, the framers of the constitution empowered both the Supreme Court and the High Courts with the power of enforcing fundamental rights through the prerogative writs. If High Courts Jurisdiction is excluded, it will tantamount to the tinkering with the basic structure of the constitution.

With the Forty-Third Amendment, some relief has come. High Courts will be able to go into questions of constitutionality, not only of state laws but even of central laws. Similarly, the Supreme Court will be able to examine the state laws. In the absence of this, the functioning of tribunals would have been still acuter. As the vires of a state law could not be directly canvassed before the Supreme Court and the matter could not be entertained before the High Court since it had no Jurisdiction, it would have rendered the litigent remediless.

It was realised by Swaran Singh Committee also that it is not safe to leave the tribunals alone as it is clear from the fact that it is recommended that Jurisdiction under article 136 be retained. But the point is: Is this enough? As pointed out earlier, it is not. Infact, it weakens the pillars of the constitution. With the increase in tribunals, Judicial review over them needs to be strengthened if we wish to make the foundations of administrative justice strong.

Eminent authorities in England have spoken in favour of retaining Judicial review over the tribunals. Wade has cautioned us in his Towards Administrative Justice that since the tribunals are themselves so much part of the system of administration, it is not enough to leave them to the government without an independent body to make sure that the claims of administration do not smother the claims of Justice. 30 Wheare has reminded Parliaments in his Maladministration and its Remedies that no statute should contain words purporting to oust the supervisory jurisdiction of the courts by way of the remedies of certiorari, prohibition and mandamus. 31 Street in Justice In the Welfare State has made a strong plea that in the background, we must always have the ordinary courts standing by on call when there is a breakdown of a tribunal. A tribunal might exceed its Jurisdiction or threaten to do so. It might arrive at an erroneous legal answer, even though it is entitled to reach a decision on the

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particular point. The solution seems simple, a uniform quick procedure whereby an aggrieved citizen can ask the High Court to decide whether the tribunal was empowered to act and whether even so its decision was correct in law. 32 Franks Committee was frank enough to recommend that except in a few cases where the tribunal of the first instance is exceptionally strong, there must be a general right of appeal on fact, law and merits to a second or appellate tribunal. In addition, there should be a right of appeal to the courts on a point of law. Finally, no statute should, by its wording, rule out Judicial control over the Jurisdiction of tribunals, by means of orders of certiorari, prohibition and mandamus. 33 Franks report has been implemented by the Tribunals and Inquiries Act, 1958 (now Act of 1971). At common law, every tribunal with a limited jurisdiction is subject to control by the High Court on the following grounds.

A. Exceeds its Jurisdiction.

B. Acts contrary to natural justice.

C. Fails to perform statutory duty.

D. Fails to exercise its jurisdiction.

E. Commits an error of law. 34

Suggestion to have an 'administrative division' in the High Court to deal with administrative law litigation did not get the approval from Franks Committee but it was supported later by Justice. 35 Though England has yet to give a serious thought to it, the suggestion was implemented in New Zealand in 1968 by creating an Administrative Division in its Supreme Court. 36 Probably, in England the job is being looked after neatly by the High Court and the need for a separate division has not been seriously felt. It has its side effect also. It will cut off administrative law from the general law which may not be a healthy prescription for sound administrative jurisprudence.

In America, Judicial review has been provided in Administrative Procedure Act, 1946. Section 10 reads as follows:

> "Any person suffering legal wrong because of any agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

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In a coke co. case, the position has been further amplified that a statutory provision for administrative conclusiveness cannot override the basic principle that the legislature cannot divest the courts of their inherent power to review the actions of administrative agencies which are illegal, arbitrary or unreasonable and which impair personal or property rights. 37 Indeed, judicial review in America has ensured that administrative adjudicatory bodies must function within the 'Due Process of Law.'

The necessity for judicial review over tribunals in India has been emphasised time and again. The Law Commission has said in unmistakable words:

> "Though we may imbue our administrative tribunals with a greater judicial spirit and insist upon their observance of the rules which would obtain in any system moulded on the principles of natural justice, the ultimate review must lie with our High Court-Judiciary. However, sound and well equipped an administrative judiciary may be, it cannot command from the public the confidence which the irremovable superior judiciary in High Courts have enjoyed for over a century and more. Any scheme of administrative adjudication which has not at its apex the High Court or a High Court Judge in some manner, will fail of its purpose." 38

The need for it has been further corroborated by P.B. Mukharji in his Tagore Law Lectures. He says that the introduction of a whole system similar to 'droit administratif' will be a retrograde and not a progressive step. The enthusiasts for the French administrative law appear to underscore the fact that the place of judiciary in France is radically different from the place of judiciary in Britain, the Commonwealth, the U.S.A. and India. He adds that the present tendency to exclude by statute the right of appeal to the court must be arrested. Modern jurisprudence should recognise a well-regulated system of administrative tribunals under the aegis of law and judicial review by the courts. 39 More than this, minus judicial review over the decisions of tribunals, it will be difficult to assimilate the jurisprudence developed by tribunals with the general jurisprudence of the country. 40

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Conclusion:

Forty Second Amendment is an attempt to introduce the French Model in India to which we are not suited. High Court judicial review has been an instrument of effective check and control on tribunals in India. They have functioned without any blockade inspite of judicial review. Infact, judicial review has helped the tribunals in solving many legal knots. There is certainly no justification for the exclusion of judicial review, in particular the supervisory jurisdiction of the High Courts which is the 'basis' of judicial review under the Indian Constitution. We do need administrative tribunals but there is no reason to make them function like slot machines and computers. Judicial review does not militate against administrative justice. Judicial review should not be viewed as as 'dirty' concept. Without it, modern governments will find themselves in tempest. That is echo of recent happenings in our country. If we wish to avoid the repetition of it, we will have to strengthen our judicial system. In view of this, it is necessary to retain the jurisdiction of the Supreme Court under article 32 and of the High Courts under articles 226 and 227 over the decisions of the tribunals. Position as it existed prior to Forty-Second Amendment should be restored. This will help in taking the rule of law to every nook and corner of the country. Of course, we can as yet wait with regard to the Constitution of 'Administrative Division' of High Courts for it needs a fuller consideration because:

(i) it might necessitate more divisions in more areas both at the High Court and Supreme Court level;

(ii) it might hamper the development of constitutional jurisprudence in India;

(iii) it might not be proper to isolate areas for their growth and development.

Let us provide the backbone to administrative adjudication by ensuring the shelter of courts to it.

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F O O T N O T E S

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1. The Indian Law Institute, New Delhi, 3(1977).

2. Received assent of the President on 18.12.1976, published in Gaz. of India, 18.12.1976, Part II-S-I, Ext. p.1483.

3. Articles 323A(2)(d) and 323B(3)(d) - (Section 46 of 42nd Amendment).

4. The Indian Law Institute, supra note 1 at 1.

5. Part XIV A, Articles 323A and B.

6. See Harry Street, Justice in the Welfare State, 2-10(1975) and Gavin Drewry, Law, Justice and Politics 85-86(1975).

7. E.J. Eliock, Administrative Justice 6(1969).

8. Report of Donoughmore Committee, Cmd 4060, para 19, H.M.S.O., 1932. (It is also known as Report of the Committee on Ministers' Powers).

9. William A. Robson, The Governors and the Governed 32(1964).

10. J.D. Garner, Administrative Law 216(1974). Frank Committee Report, Cmd 218 (H.M.S.O., 1957).

11. Administration under Law 9(1971).

12. C.J. Hamson, Executive Discretion and Judicial Control 21(1954)

13. Sir Leslie Scarman, English Law - The New Dimension 48(1974)

14. French Administrative Law and the Common-Law World, Chapter Ten- Droit Administratif and the Rule of Law 306-338 (1954)

15. Ibid. at 319.

16. Ibid. at 321.

17. "A Special court for Patent Litigation? The Danger of a Specialized Judiciary" 37 A.B.A.J. 425 (1951).

18. Supra note 14 at 318.

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19. Law Commission of India, 14th Report Vol.2.693 (1958).

20. P.B. Mukherji, The New Jurisprudence, 289 (1970).

21. Committee was appointed by Congress President, Shri D. Sanjeeva in February, 1976 to propose Amendments to The Constitution of India.

22. Report, 8(1976).

23. Ibid. at 9-10.

24. Section 40 of 42nd Amendment.

25. Dhakeswari Cotton Mills Ltd. v. C.I.T., W.B. (1955)ISCR 941.

26. H.M. Seervai, Constitutional Law of India 1392 (1976).

27. Balram P. Gupta, should we adopt the French Administrative Model? I.J.I.L. Vol. XXVIII, 118 at 120 (1976).

28. It was established in 1872. It comprises of nine members. Three of them are councilors of state, three of them from the court of Cassation. These six elect two more members and the President of the tribunal is Minister of Justice. They are elected for a term of three years and no limit to re-election.

29. Supra note 27 at 120-21.

30. C.K.J. Wade, 93(1963).

31. K.C. Wheare, 22(1973).

32. Harry Street, 65 (1975).

33. Kathleen Bell, Tribunals in the Social Service 26(1969).

34. Michael Adler and Anthony Bradley, Justice, Discretion and Poverty 222 (1975).

35. Supra note 11 at 26-27.

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36. See Northey, A Decade of change in Administrative Law, 6 M.A.U.L.R. 25 (1974).

37. Johnstown Coal and Coke Co. v. Dishong, 84 A. 2d 847, 850 (Md. 1951), cited by Bernard Schwartz in An Introduction to American Administrative Law 177(1962).

38. Supra note 19 at 693-94.

39. Supra note 20 at 314-15.

40. Supra note 1 at 25.