ADMINISTRATIVE OR JUDICIAL TRIBUNAL ?

THE SETTING up of administrative tribunals is envisaged by article 323-*A* in part XIV-*A*, introduced by the Constitution (Forty-second Amendment) Act 1976. Clause (1) of the article empowers Parliament to provide by law for the adjudication or trial by such tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services under its clause 2(*d*). Parliament is competent to exclude the jurisdiction of all courts except special leave jurisdiction of the Supreme Court under article 136. Pursuant to these provisions, Parliament enacted the Administrative Tribunals Act 1985 supplanting the jurisdiction of courts except that of the Supreme Court under article 136. The *vires* of the Act, not of the amendment, was at stake before the Supreme Court in an application invoking its writ jurisdiction under article 32 in *S.P. Sampath Kumar* v. *Union of India*.[1] Though, on a plain reading, the Act did not transgress the limits laid down by the Constitution, the court, by reading the constitutional provision somewhat "obliquely," was able to transform the attack on the constituent power to that on the legislative power of Parliament. This the court did by taking a lead from the minority judgment of Justice Bhagwati (as he then was) in *Minerva Mills Ltd.* v. *Union of India*.[2] That lead statement is:

> The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rules of law would become a teasing illusion and a promise of unreality. I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that effective alternative institutional mechanisms or arrangements for *judicial review* cannot be made by Paliament.[3]

Referring to the amendment in the context of his minority judgment in *Minerva Mills*, Chief Justice Bhagwati in his concurring judgment observed:

> If this constitutional amendment were to permit a law made under clause (1) of Article 323-A to exclude the jurisdiction of the High Court under Articles 226 and 227 [providing for writ jurisdiction and power of superintendence respectively] without setting up an effective alternative institutional mechanism or arrangement for judicial review, it would be violative of the basic structure doctrine and hence outside the constituent

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1. (1987) 1 S.C.C. 124.
2. (1980) 3 S.C.C. 625.
3. *Supra* note 1 at 136 quoting from *id.* at 678. Emphasis in original.

power of Parliament.[4]

The shift from the attack on the constituent power to that on the legislative power was facilitated by the Attorney-General who, after securing instructions from the Central Government, filed a memorandum promising several amendments in the original Act through appropriate measures. A promise was made to amend it so as to save the jurisdiction of the Supreme Court under article 32 in respect of specified service disputes. Promise was also made to set up "a permanent or if there is not sufficient work, then a circuit bench of the Administrative Tribunal at every place where there is a seat of the High Court."[5] It was also promised that the Act "would be suitably amended so as to exclude officers and servants in the employment of the Supreme Court and members and staff of the subordinate judiciary from the purview of the Act" inasmuch as exercise of jurisdiction of the tribunal would interfere with the control hitherto vested in the judiciary.[6] Some of these promises were fulfilled instantly through the Administrative Tribunals (Amendment) Ordinance 1986, replaced by the appropriate Act of Parliament.

Having secured these changes in the original Act, the Supreme Court read article 323-*A* as if the article itself had been amended. According to its interpretation, this constitutional provision permits Parliament to abrogate the jurisdiction of High Courts under articles 226 and 227 provided the same is exercised effectively and efficiently by a closely comparable institution or body.

In the present case, the alternative institutional arrangement was contemplated in the setting up of the administrative tribunals. In this respect, according to the court, "[w]hat, however, has to be kept in view is that the Tribunal should be a real substitute for the High Court--not only in form and *de jure* but in content and *de facto*."[7] Under sections 14 and 15 of the Act, all powers of courts except those of the Supreme Court in regard to service matters specified therein vest in the tribunal, either central or state. Rest of the concern of the court was to ensure "that the substitute institution--the Tribunal--must be a worthy successor of the High Court in all respects."[8] This is how the Supreme Court asserted itself in the case.

For carrying this assertion to its logical conclusion, the court reconsidered the various provisions of the Act as amended. It examined first of all the composition of the tribunals and the mode of appointment of chairman, vice-chairmen and other administrative members. In its view, the provisions of the Act in regard to their composition were "a little weighted in favour of the members of the Services. This weightage...and value-discounting of the judicial members does have the effect of making the Administrative Tribunal less effective and efficacious than the High Court."[9] This tilt in favour of the services

4. *Id* at 130
5 *Id* at 134.
6 *Id* at 136
7 *Id* at 139
8 *Id* at 139-40.
9 *Id* at 132

was sought to be straightened by insisting "that every bench of the... Tribunal should consist of one judicial member and one administrative member and there should be no preponderance of administrative members on any bench."[10]

Regarding the requisite qualifications of a person to be appointed as chairman, section 6(1) provides that he should be or should have been a judge of a High Court or he should have held for at least two years office of vice-chairman or he should have at least for two years held the post of a secretary to the government carrying a scale of pay which is not less than that of a secretary to the Government of India.

In view of the court, so long as the chairman happens to be a sitting or retired judge of a High Court, it is perfectly all right; but if he is a person "who has merely held the post of a Secretary to the government and who has no legal or judicial experience would not only fail to inspire confidence in the public mind but would also render the...Tribunal a much less effective and efficacious mechanism than the High Court."[11] Chief Justice Bhagwati reflectively stated:

> We cannot afford to forget that it is the High Court which is being supplanted by the Administrative Tribunal and it must be so manned as to inspire confidence in the public mind that it is a highly competent and expert mechanism with judicial approach and objectivity.[12]

Accordingly, for approximating the tribunal with the High Court in terms of appointing its chairman with legal training and experience, the court struck down the latter part of section 6(1) as invalid.

Justice Misra categorically stipulated that "ordinarily a retiring or retired Chief Justice of a High Court or when such a person is not available, a Senior Judge of proved ability either in office or retired should be appointed."[13] This should be so because the office of the chairman of the tribunal "should for all practical purposes be equated with the office of Chief Justice of a High Court."[14]

On a similar strength of reasoning, the court recommended that all those persons who are eligible to be appointed as a judge of a High Court should equally be eligible for the post of vice-chairman. Chief Justice Bhagwati argued that, since the tribunal has been created in substitution of the High Court, its vice-chairman would be in the position of a High Court judge, and if a district judge or an advocate qualified to be a High Court judge is eligible to be such a judge, there is no reason why he should not equally be eligible to be vice-chairman of the tribunal. He asked: "Can the position of a Vice-Chairman... be considered higher than that of a High Court Judge so that a person who is eligible to be a High Court Judge may yet be regarded as ineligible for becoming

10. *Id.* at 131.
11. *Ibid.*
12. *Id.* at 132.
13. *Id.* at 140-41.
14. *Id.* at 141.

eligible to be a High Court Judge may yet be regarded as ineligible for becoming a Vice-Chairman ...."[15]

To ensure selection of proper and competent persons to man tribunals and give them the prestige and reputation which would inspire confidence in public mind, the court suggested two alternative modes of appointment. According to Chief Justice Bhagwati, the appointment of chairman, vice-chairman and administrative members should be made by the concerned government but only after consultation with the Chief Justice of India. Such consultation "must be meaningful and effective and ordinarily the recommendation of the Chief Justice...must be accepted unless there are cogent reasons, in which event the reasons must be disclosed to...[him] and his response must be invited to such reasons."[16] In the alternative, the court recommended the setting up of a high powered selection committee headed by the Chief Justice or a sitting judge of the Supreme Court or concerned High Court, nominated by the Chief Justice of India.[17]

Since the tribunal is created in substitution of the High Court and the jurisdiction of the High Court under articles 226 and 227 is taken away and vested in it, its insulation from the executive pressure or influence is a must. "It can no longer be disputed," Chief Justice Bhagwati asserted, "that total insulation of the judiciary from all forms of interference from the coordinate branches of government is a basic essential feature of the Constitution."[18] In his view, this much desired independence of the tribunal could be obtained only through implementation of various directives issued by the court in this case. Otherwise, "the provisions of the impugned Act would be rendered invalid."[19]

In the light of the foregoing position, it is interesting to discern in *Sampath Kumar* how the Supreme Court, starting from the basic premises that judicial review is a basic feature of the Constitution and as such the same must be read in the provisions of article 323-*A*, on the strength of a minority statement in *Minerva Mills*, stipulated that administrative tribunals set up under the Act would be constitutional if they approximate structurally, functionally and even locationally High Courts. This approximation tends to be complete when the court required the personnel of the tribunal to "have same [not just similar] modicum of legal training and judicial experience" because only then they would be able to answer difficult and complex questions that "baffle the minds of even trained judges in the High Courts and the Supreme Court."[20]

In order to make its theory of "sameness" complete, Chief Justice Bhagwati substituted "judicial tribunal" for the expression "administrative tribunal." He wished to induct legal acumen in preference to administrative

15. *Id.* at 132.
16. *Id.* at 134.
17. *Ibid.*
18. *Id.* at 133-34.
19. *Id.* at 134. However, the court stated categorically that its judgment would operate only prospectively and would not invalidate appointments already made to administrative tribunals. See *id.* at 134.
20. *Id.* at 131.

tribunal which is intended to supplant the High Court is legal training and experience."[21] He further recorded that "the legal input would undeniably be more important and sacrificing the legal input or not giving it sufficient weightage would definitely impair the efficacy and effectiveness of the... Tribunal as compared to the High Court."[22]

This approach of the literal "sameness," it is submitted, tends to deprive administrative tribunals of the basic philosophy which was envisaged in its very creation. The Supreme Court, in *K.K. Dutta* v. *Union of India*,[23] dilating on the underlying public policy of establishing tribunals, observed:

> Public servants ought not to be driven or required to dissipate their time and energy in courtroom battles. Thereby their attention is diverted from public to private affairs and their inter se disputes affect their sense of oneness without which no institution can function effectively. The constitution of Service Tribunals by State Governments with an apex Tribunal at the Centre, which, in generality of cases, should be the final arbiter of controversies relating to conditions of service, including the vexed question of seniority, may save the courts from the avalanche of writ petitions and appeals in service matters. The proceedings of such Tribunals can have the merit of informality and if they will not be tied down to strict rules of evidence, they might be able to produce solutions which will satisfy many....[24]

The Supreme Court in *Sampath Kumar* not only approved the public policy underlying the creation of tribunals as articulated in *K.K. Dutta*, but also recognised that "fortunately we have, in our country, brilliant civil servants who possess tremendous sincerity, drive and initiative and who have remarkable capacity to resolve and overcome administrative problems of great complexity."[25] However, this recognition of Indian administrative potential proves elusive. Having eulogised the services, the court has not missed any opportunity to convert tribunals (except the name) into wings of High Courts virtually in all respects--structurally, functionally and locationally. The creation of a new system in supersession of an existing one for certain specific purposes does not necessarily mean an equivalent creation. It is here that the court has gone wrong, essentially and conceptually.

*Aman Preet Dhingra**

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21. *Id.* at 132.
22. *Id.* at 131.
23. (1980) 4 S.C.C. 38, cited with approval in *id.* at 138.
24. Quoted in *supra* note 1 at 138.
25. *Id.* at 132.

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