CHAPTER VII

MATTERS FOR WHICH TRIBUNALS MAY BE CREATED

Tribunals offer better safeguards to the individual than an administrative authority entrusted with the task of taking decisions or even the courts under their writ jurisdiction. Tribunals are somewhat independent of the executive and are thus in a position to take an objective view of the matter rather than be guided by administrative expediency or policy which may happen in the case of the department. They arrive at their decisions after giving a fair hearing to the individual whereas this may not apply to decision-making by the department. As compared with the writ jurisdiction of the courts, tribunals may give better protection to the individual on substantive grounds, as in the case of the former the courts have evolved a few restrictions on their power of review, such as, they do not review questions of facts unless there is "no legal evidence" (that is, only in exceptional situations) or questions of law unless the error is apparent on the face of the record, or decide on merits, whereas tribunals are not so limited in their power of adjudication.

What matters may be entrusted to tribunals as against the department and vice versa? It is comparatively easy to determine why, in most cases, a tribunal may be preferred to courts as a deciding authority. The factors which go in favour of tribunals as compared with courts are the needs of expedition, expertise, cheapness, freedom from technicality, informality of atmosphere, and easy accessibility. However, it is not an easy matter to specify factors which control allocation of functions to tribunals as against the department. A broad criterion, which is often suggested for allocation of functions between tribunals (or courts) and departments, is that where the subject matter is suitable for pre-ordained rules or could be disposed of by application of law it should be allocated to the former; but where the subject matter involves application of policy it should be assigned to the latter.[1] However, whether the subject-matter

1. Thus Wade says : "The tribunal finds facts and decides the case by applying legal rules. The inquiry finds and leads to a recommendation to a minister who then takes a decision in which there may be a large element of policy." *Administrative Law* 256 (1971). See also *Report of the Committee on Ministers' Powers* 73-74 (1932); *Report of the Franks Committee* 6 (1957), the committee stating: "All or nearly all tribunals apply rules .... Particular decision cannot, single case by single case, alter the Minister's policy. Where

involves application of fixed rules or policy, there is no escape from the discretionary element in the decision making. As Ganz has observed:

> Where a decision is reached according to fixed rules the process is essentially a logical one. The question that has to be asked is whether the facts of the particular case fall within the rule. If the rule says all red-haired people shall be executed it is clear that any red-haired person falls within the rule. But even here problems of definition arise, *i.e.* what constitutes red hair. This is where choice or discretion begins to creep in. Almost any words raise problems of definition and most of all words such as 'reasonable' or 'just and equitable' or 'in the public interest' which involve value judgments. Rules may therefore be merely a delegation of discretion to the decision maker. Further, discretion will enter into the process of selecting the rule to be applied to the facts. This is one of the main areas of judicial discretion of which distinguishing precedents is the most common example. Rules do not therefore exclude discretion. Every application of the rule involves some discretion and is more than a purely logical process.
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> What then is the difference between decisions according to rule and discretionary decisions ? Rules are themselves value judgements whereas discretion is the power to make a value judgment. In practice the difference may not be very great as in the examples mentioned where the rule contains words such as 'reasonable' which amount to a delegation of discretion to make value judgments. On the other hand a discretion may be substantially limited by laying down the factors which must be evaluated and even the weight to be attached to them. There is then no absolute difference between rules and discretion as regards the area of choice left to the decision-maker. Every rule involves some discretion and every discretion involves some limitation. The degree of freedom of choice will depend on the type of rule and its context and on the extent to which discretion is limited.[2]

this is so, it is natural to entrust the decisions to a tribunal, if not to the courts. On the other hand it is sometimes desirable to preserve flexibility of decisions in the pursuance of public policy. Then a wise expediency is the proper basis of right adjudication, and the decision must be left with a Minister." Reference may also be made to Wraith and Hutchesson, *Administrative Tribunals* 231-32 (1973); Farmer, *Tribunals and Government* 181-99 (1974). Ganz, Allocation of Decision-Making Functions, 1972 *Public Law* 215, 299.

2. Allocation of Decision-Making Functions, 1972 *Public Law* 215-16.

The allocation of functions should not depend upon whether the application of rules or that of discretion is involved in the decision-making. Rather, it should depend on an answer to the question : who should be the authority to make necessary value judgment ?

Discretionary element is, however, an important controlling factor in determining allocation of functions, though other factors also come into operation. If discretion is to be exercised on the basis of a particular departmental policy, position of finance, priorities, and allocation of resources between competing claims, then it may be that the function is assigned to the department for its decision. If the departmental policy is not material (or if there is no policy interest in the outcome) or if considerations of fairness overwhelm the departmental policy, then it may be desirable to entrust the task to an administrative tribunal (or a court).

The need for accountability of Ministers to Parliament is a factor going in favour of the executive. Again smallness in the number of cases which are likely to occur under the statute may not justify creation of a separate autonomous machinery, though the subject matter is otherwise suitable for decision by a tribunal.

There will be some clear cases where the matter may not be allocated to tribunals and cases where it may be a good idea to do so, *e.g.*, the power of acquisition of land for a public purpose under the Land Acquisition Act may not be tribunalized but the question of payment of compensation under the Act may be. In between the extreme cases where the decision with regard to allocation of functions may be easy there will be large number of border-line cases where it is not so.

It has been pointed out in England that there has not been a rational approach in selecting one over the other (tribunal or the department, or vice versa) by the legislature. Thus Wade says :

> But Parliament has experimented with many different bodies and procedures and has in some cases set up tribunals where one would expect to find inquiries and vice versa. Transport licensing, in particular, has been affected by the tradition of employing independent tribunals for deciding what are really questions of policy. The Railway Commission (1873), the Railway and Canal Commission (1888), the Railway Rates Tribunal (1921), and the Transport Tribunal (1947) were successfully empowered to control railway rates and charges. This was essentially a commercial and political matter, yet an independent tribunal was employed....Similarly the licensing of commercial road services is entrusted to tribunals, the Traffic Commissioners; appeals lie from them to the Transport

> Tribunal in respect of goods services and to the Minister of Transport in respect of passenger services. The logic of these arrangements is not evident, but they work well and have survived several investigations. Air transport licensing which was introduced in 1960 to control the allocation of routes and the scales of charges, is assigned to a tribunal, the Air Transport Licensing Board, from which however appeal lies to the minister. This curious system at least recognizes that ultimately the decision is one of policy.[3]

He also goes on to show that in several cases the matters are entrusted to ministers though they involve ascertainment of facts and application of law. Thus he says : "This is the situation where ministers have to decide questions of fact and law, for example under the national insurance scheme where certain important questions in claims for benefits are 'minister's questions', subject to a right of appeal to the court on a point of law".[4]

Ganz, by taking a few concrete cases and going into the legislative debates concerning those, shows the difficulties involved in these matters.[5] Ganz concludes :

> One of criteria put forward for allocating decisions to a Minister is that 'the decision is largely determined by policy based on a consideration of what is desirable in the future in the public interest rather than on a finding as to past fact or an interpretation of a statute or accepted principle of common law or equity. But this is by no means a decisive factor in practice. Decisions of this nature have been conferred on independent bodies.... Similarly, the lack of 'fixed or measurable criteria' has not been the determining factor in allocating decisions to Ministers".[6]

The position in India is not different. In some cases, on the one hand, questions involving policy have been given to tribunals; but on the other hand, there are frequently decisions involving somewhat fixed or reasonably measurable criteria which have been entrusted to the departments. Thus the Railway Rates Tribunal decides essentially economic issues involving policy determinations when it hears complaints against the railway

3. *Administrative Law* 256-57 (1971).
4. *Ibid.* at 257.
5. Allocation of Decision-Making Functions, 1972 *Public Law* 215, 299.
6. *Ibid.* at 307-08. Also see Wraith and Hutchesson, *supra* note 1. They observe : "Certainly when one examines the actual ways in which decisions are taken it seems that not only principle but tradition, changing circumstances — even chance — may help to determine whether they are taken administratively or judicially...." At 232.

administration that it is charging discriminatory or unreasonable rates for carrying a commodity between two stations, etc. Again it is the Regional Transport Authority (a tribunal) which has power to grant stage carriage permits though one of the statutorily prescribed factors to be taken into account is "the interest of the public generally". Similarly, the Monopolies Commission deals with matters which are largely economic involving policy choices or value judgments. About the creation of Restrictive Practices Court in England it has been stated that the "judicial tribunal" solution has resulted in an over-concentration on legal questions and an obscuring or exclusion of the fundamental economic issues.[7] The same difficulty has been felt in India.

On the other hand, there are innumerable instances where the subject matter fit for decision by a tribunal was left to the department for its determination. A conspicuous example is that of the Central Board of Indirect Taxes which is the final appellate authority under the Customs Act, 1962. A few other examples are : determination of the amount of compensation by the collector under the Land Acquisition Act 1894; hearing appeals by the Central Government to decide disputes regarding registration of shares between a company and a person who has purchased its shares under the Companies Act, 1956; cancellation of licences under the various statutes, *e.g.*, the Imports and Exports (Control) Act, 1947, the Essential Commodities Act, 1956, and the Industries (Development and Regulation) Act, 1951.

As far as the new constitutional proposals are concerned, amongst the subjects mentioned for possible adjudication by tribunals, there are clear cases which could be tribunalized, *e.g.*, assessment, collection and enforcement of tax, industrial and labour disputes and elections to the legislature, but there are subjects which are not so very clear for tribunalization, *e.g.*, production, procurement, supply and distribution of essential goods, ceiling on urban property, foreign exchange, import and export of commodities (except violation of these laws). Even service matters fall in the border-line area for here the two conflicting factors to be reconciled are fairness to the individual with administrative efficiency; and further ultimately what punishment is to be imposed on a delinquent civil servant is a matter of discretion. Though creation of tribunals in some of these matters as against the department and to the exclusion of courts (writ jurisdiction of the High Courts) may provide a better safeguard to the individual on substantive grounds, as a tribunal will be a body having authority to go into the merits of the case and also into questions both of law and facts as against the limited nature of the writ jurisdiction, yet would hamper functioning of the administration. Thus it may do more harm than good if such matters as fixation of prices of goods,

7. Ganz, *ibid.* at 218.

regulation of their supplies or their procurement, etc., are allocated to tribunals; in these cases the tenuous safeguard of article 226 provides a good mean between the needs of administrative efficiency and safeguards to the individual.

In spite of the constitutional provisions, a great care thus will have to be used in deciding what to tribunalize and what not. It would simply spoil things if the matter is rushed through without sufficient forethought.

Finally, a note of warning must be struck against tribunalization of offences to the exclusion of courts. In the matter of offences it is essential that the jurisdiction of the courts is retained.