CHAPTER V

JUDICIAL REVIEW

If administrative tribunals are not to become tiny despots it is essential to develop some mechanism to control their functioning. Several suggestions towards this objective have been mooted in the common law world in this regard. These proposals have taken the following major forms. First, establishing a general administrative appeal tribunal on something like the French model. The proposal to establish a general administrative appeal tribunal did not receive the support of the Franks Committee in 1957. In 1971 the *Justice* (The British section of the International Commission of Jurists) in its report *Administration under Law* also did not agree to the French model. The report states : "We consider, however, that the Conseil d' Etat 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."[1] Second, to have an administrative division in the High Court to deal with administrative law litigation either by way of appeal from an administrative tribunal or original jurisdiction. The Franks Committee did not agree to this suggestion, though subsequent to the committee's report this idea is gaining ground. Amongst the common law countries New Zealand implemented this suggestion in 1968 by creating an Aministrative Division in its Supreme Court.[2] In 1971 this suggestion received the approval of *Justice*. Its report states :

> A deliberate attempt now needs to be made to create a more coherent system having courts and judges capable of developing, shaping and enforcing a distinct corpus of administrative law and, in the process, of focussing the attention of administrators and lawyers alike upon the problems of justice in administration....The Administrative Division would thus be in a position to provide the cohesive influence which English administrative law now lacks. It would exercise both the existing original and appellate jurisdictions in administrative matters now vested in the High Court, and the new general powers of review proposed in this part of the report.[3]

1. *Report* at 9.
2. See Northey, A Decade of Change in Administrative Law, 6 *N.Z.U.L.R.* 25 (1974).
3. *Supra* note 1 at 26-27.

A slight variation of the above proposal has been the suggestion by the Commonwealth Administrative Committee of Australia to establish' (1) A Commonwealth Administrative Court to exercise jurisdiction by way of judicial review on legal grounds (as distinct from review on the merits) of the decisions of the Commonwealth Ministers, officials and administrative bodies—the grounds upon which relief to be granted by the court to be the denial of natural justice, failure to observe prescribed procedures, want or excess of jurisdiction, ultra vires action, error of law, fraud, failure to reach a decision where there was a duty to do so and unreasonable delay in reaching a decision. (2) An Administrative Review Tribunal to review administrative decisions on the merits with particular concern for fact-finding and any improper or unjust exercise of discretionary power.[4]

Thirdly, the Franks Committee was of the view that all decisions of tribunals should be subject to review by the courts on point of law which should be obtained by proceedings for certiorari or by appeal. The Tribunals and Inquiries Act, 1958 (now Act of 1971) implemented this recommendation by giving a right of appeal to an individual to the High Court on a point of law in the case of a number of specified tribunals.

There is an obvious need to have some kind of judicial review over the decisions of tribunals—to keep them within the bounds of their authority and to correct errors of law (which term will include errors of fact if there was "no legal evidence" to support the finding) committed by them, and also to assimilate the jurisprudence developed by tribunals with the general jurisprudence of the country. The judicial review may have to be limited in the sense that it has to be only on points of law and not points of facts except where there is complete absence of evidence. If review is to be extended to the latter also then it will mean substituting the viewpoint of a comparatively inexpert body over an expert body. This will duplicate the work, and the administrative authorities would become merely transmitting agencies of evidence to the courts robbing the system of much of the advantage of tribunal-adjudication.

The statutory provisions relating to some of the tribunals surveyed above reveal that there is judicial review of some kind over almost all the tribunals though there is no consistent pattern. The broad patterns are : (1) Reference to the High Court on a question of law;[5] (2) power with the tribunal to refer a question of law to the High Court in a proceeding pending before it and also a right of appeal to the High Court in cases involving substantial question of law;[6] (3) appeal to a Court of Small Causes

4. See (1972) 46 *A.L.J.* 1, 3.
5. The Income Tax Appellate Tribunal.
6. The Workmen's Compensation Commissioner; the Employees' Insurance Court.

or district court without restriction with power to refer questions of law to the High Court by these appellate authorities;[7] (4) appeal to the High Court if the amount in dispute is over a specified sum;[8] (5) appeal to a higher administrative tribunal consisting of a whole-time judicial officer below the district judge;[9] (6) appeal on questions of law to the High Court;[10] (7) first appeal to a higher administrative tribunal and a further appeal to the High Court on substantial questions of law;[11] (8) direct appeal to the Supreme Court in some cases.[12]

The three conspicuous examples where no judicial review has been provided are: the Authority for determining claims arising out of the payment of less than the minimum rates of wages; the Railway Rates Tribunal; and labour tribunals. In the case of all the three tribunals the statutes have ouster clauses either expressly ousting the jurisdiction of the courts (in cases of the Authority under the Minimum Wages Act and labour tribunals) or making their decisions final (in the case of the Railway Rates Tribunal). The reason for exclusion of judicial review in the case of the Authority under the Minimum Wages Act and the Railway Rates Tribunal appears to be that the cases coming before them primarily involve questions of fact — and further in the case of the Authority under the Minimum Wages Act the questions may be too simple involving modest amounts to justify creation of a second forum, and in the case of the Railway Rates Tribunal the questions may be such as require expert or specialised knowledge which competence the court may not be having.

However, it is difficult to justify the exclusion of judicial review in the case of labour tribunals. The reason for the omission appears to be historical as from 1950 to 1956 a Central Labour Appellate Tribunal functioned and when it was abolished an alternative hierarchical body was not created, perhaps in view of the constitutional remedies available to an individual under articles 226 and 136. It has been stated that abolition of the Labour Appellate Tribunal did create a vacuum which was filled by the liberality of the Supreme Court in granting special leave petitions under article 136, thus taking a great deal of its time in labour matters.[13]

From the points of view of the individual and the rule of law, it will be unjust if the legislature taking advantage of the Forty-second Amendment of the Constitution takes away article 226 jurisdiction of the High

7. The Authority for Payment of Wages.
8. Motor Accident Claims Tribunals.
9. Example is that of appeals from the orders of the Regional Transport Authorities.
10. The Foreign Exchange Appellate Board.
11. Example is that of appeals from the orders of the rent controllers.
12. The Monopolies and Restrictive Trade Practices Commission.
13. See M.P. Jain and S.N. Jain, *Principles of Administrative Law* 152-53 (1973).

Courts over these tribunals, without creating an alternative method to enable the courts to review their decisions at least in matters of law. But this now depends on legislative goodwill or even grace and not as a matter of constitutionally guaranteed right.

It is true that the amendment leaves article 136 untouched and that a decision by the tribunal could be taken to the Supreme Court with its special leave. But a few difficulties here may not be lost sight of. Firstly, the appeal under article 136 is not as a matter of right but at the sufferance of the court. Secondly, it will place an immense burden, both economical and physical, for persons located away from the seat of the court, and this problem is an acute one for a country of long distances, to come to Delhi for taking recourse to the discretionary jurisdiction of the court. Thirdly, especially as there would be no judicial forum between tribunals and the Supreme Court, the latter may be flooded by the special leave petitions against the orders and decisions of tribunals, congesting the calendar of the court.

Finally, a few words may be said about the High Court's power of superintendence over courts under article 227. Before the amendment of the article by the Forty-second Amendment, the article gave power of superintendence to every High Court "over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction". The amendment changed this position and has provided that every High Court "shall have superintendence over all courts subject to its appellate jurisdiction". Thus the power of superintendence over tribunals has been taken away. The power of superintendence of the High Court was further curtailed by limiting it only to a judgment of an inferior court which is subject to appeal or revision. The Bombay High Court in its recent judgment *Smt. S. D. Ghatge* v. *State of Maharashtra*[14] considered the question whether in spite of this amendment the power of superintendence of the High Court continued over tribunals in some cases. The court pointed out that all courts were tribunals, though all tribunals were not courts. In its opinion only those tribunals were excluded from the purview of article 227 as were not basically courts. The court stated: "It is obvious that this result will follow if the expression 'Courts' is understood and regarded in its ordinary meaning or its accepted normal connotation, namely, an adjudicating body which performs judicial function of rendering definitive judgments having finality and authoritativeness to bind the parties litigating their rights before it and that too in exercise of the sovereign judicial power transferred to it by the State. Any tribunal or authority possessing these two attributes will be a court...."

14. Decided 22.4.1977.

It may be commented that the power to make binding or final decisions could not be the distinguishing criterion for a body to be regarded as a court-type-tribunal, for practically all quasi-judicial bodies including administrative tribunals give binding decisions and they are final in the sense that they remain operative unless the steps are taken to have them reviewed in accordance with the Constitution or the statute. Further, such phrases as "sovereign judicial powers" or "inherent judicial powers of the state" are extremely vague phrases and do not offer any objective criterion to distinguish ordinary tribunals from court-type-tribunals. Is the judicial power confined to adjudicating disputes between two private parties ? Does it extend to determination of matters between the state itself and the individual also ? By applying the concept of sovereign judicial power it seems clear that the answer to the second question cannot be in the affirmative, but the fact is that in the modern state this type of litigation constitutes a large chunk of judicial work of the courts and tribunals. Further, what about determination of questions involving discretion or policy ? Logic defies a compartmentalised classification of powers of the state between legislative or judicial.[15] In many cases it may ultimately have to be contended by saying that the power is judicial because it is exercised by the court and it is legislative because it is exercised by the legislature.

It is not by attributing such qualities as "exercise of sovereign judicial power" and "power to give binding and final decisions" that tribunals may be distinguished from courts (or court-type-tribunals as the Bombay High Court sought to stretch the term "court") but by the fact of independence of the judiciary from the executive control.[16] If an adjudicatory body discharging exclusively adjudicating functions is as independent from executive control as the courts, then it may be regarded as a "court" even though the statute may have used the term "tribunal" or any other name for it.

15. See M. P. Jain and S. N. Jain, *Principles of Administrative Law* 22-24, 167-68 and 427 (1973); Alice Jacob, Special Leave to Appeal and Administrative Tribunals, 9 *J. I. L. I.* 85 (1967); Opinion of Mathew, J., in *Smt. Indira Gandhi Nehru* v. *Raj Narain*, A. I. R. 1975 S. C. 2299, 2372-74.
16. See M. P. Jain and S. N. Jain, *ibid.* at 167-68.