LAW COMMISSION OF INDIA

ONE HUNDRED SIXTY SECOND REPORT

ON

REVIEW OF FUNCTIONING OF CENTRAL ADMINISTRATIVE TRIBUNAL; CUSTOMS, EXCISE AND GOLD (CONTROL) APPELLATE TRIBUNAL AND INCOME-TAX APPELLATE TRIBUNAL

1998

D.O.No.6(3)(21)/93-LC(LS)

JUSTICE
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August 14, 1998

Dear Dr.M.Thambi Durai,

I am forwarding herewith the One Hundred Sixty Second Report on "Review of functioning of Central Administrative Tribunal; Customs, Excise and Gold (Control) Appellate Tribunal and Income-tax Appellate Tribunal".

2. The Hon'ble Supreme Court of India in the case of R.K.Jain Vs Union of India, (1993)4 SCC 119 directed the Law Commission to make a comprehensive study of the functioning of the several tribunals in India and to suggest measures for their improved functioning. It was observed that the Commission may also suggest changes in the different statutes and evolve a model on the basis whereof tribunals may be constituted or reconstituted with a view to ensure greater independence. An extract of the relevant observations is set out under paragraphs 1.1 and 1.2 of the report in this regard.

3. The previous Commissions, accordingly, took up the matter for consideration, prepared a 'Questionnaire' and a 'Revised Additional Questionnaire' and circulated the same for opinion to all concerned persons, departments and authorities. It received opinions, suggestions and comments from various quarters which have been duly considered by the Commission.

4. The Commission would have submitted its report in the year 1996 itself but for the fact that it was brought to its notice that the issue relating to the functioning of Administrative Tribunals and the validity of Articles 323-A and 323-B of the Constitution of India had been referred to a larger Constitution Bench for consideration and that the same was then pending.

5. The seven-Judge Constitution Bench of the Supreme Court has since delivered its judgment in L. Chandra Kumar Vs. Union of India, (1997)3 SCC 261 which is extremely significant and relevant for the purpose of this study and has accordingly been kept in mind while preparing this report.

6. When the Commission had initiated the study pursuant to the observations in R.K.Jain's case (supra), it devoted its attention to three types of tribunals, namely, (i) Administrative tribunal,

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constituted under the Administrative Tribunals Act, 1985, (ii) The Customs, Excise and Gold (Control) Appellate Tribunal, and (iii) The Income Tax Appellate Tribunal.

7. The Commission decided that it would be appropriate and convenient to examine the functioning of each of these types of tribunals separately.

8. The Commission is of the considered opinion that the radical changes recommended in the report need to be taken immediately to achieve the reforms in the working of the Central Administrative Tribunal, Central Excise and Gold (Control) Appellate Tribunal, and Income Tax Appellate Tribunal to attain a sound justice delivery system which is sine qua non for the efficient governance of a country wedded to the rule of law.

9. Finally, we wish to express our appreciation for valuable help received from Shri Sushil Kumar, Additional Law Officer, in drafting of this report and assisting the Commission right through.

With regards,

Yours sincerely,

(B.P. Jeevan Reddy)

Dr.M.Thambi Durai,
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CHAPTER - I

Introduction

1.1 The Supreme Court of India in the case of R.K.Jain v. Union of India, (1993) 4 SCC 119 (A.M.Ahmadi, J. speaking for himself and M.M.Punchhi, J. (as they then were) directed the Law Commission to make a comprehensive study of the functioning of the several tribunals in India and to suggest measures for their improved functioning. It was observed that the Law Commission of India may also suggest changes in the different statutes and evolve a model on the basis whereof tribunals may be constituted or reconstituted with a view to ensure greater independence. It would be appropriate to set out the relevant observations made in the said decision:-

> "8. Lastly, the time is ripe for taking stock of the working of the various tribunals set up in the country after the insertion of Articles 323-A and 323-B in the Constitution. A sound justice delivery system is a sine qua non for the efficient governance of a country wedded to the rule of law. An independent and impartial justice delivery system in which the litigating public has faith and confidence alone can deliver the goods. After the incorporation of these two

Articles, Acts have been enacted whereunder tribunals have been constituted for dispensation of justice. Sufficient time has passed and experience gained in these last few years for taking stock of the situation with a view to finding out if they have served the purpose and objectives for which they were constituted. Complaints have been heard in regard to the functioning of other tribunals as well and it is time that a body like the Law Commission of India has a comprehensive look-in with a view to suggesting measures for their improved functioning. That body can also suggest changes in the different statutes and evolve a model on the basis whereof tribunals may be constituted or reconstituted with a view to ensuring greater independence. An intensive and extensive study needs to be undertaken by the Law Commission in regard to the constitution of tribunals under various statutes with a view to ensuring their independence so that the public confidence in such tribunals may increase and the quality of their performance may improve. We strongly recommend to the Law Commission of India to undertake such an exercise on priority basis. A copy of this judgment may be forwarded by the Registrar of this Court to the Member-Secretary of the Commission for immediate action."

1.2 To the same effect are the observations of K.Ramaswamy, J. who delivered a separate concurring judgment in the said decision. The learned Judge observed -

> "Before parting with the case it is necessary to express our anguish over the ineffectivity of the alternative mechanism devised for judicial reviews. The judicial review and remedy are fundamental rights of the citizens. The dispensation of justice by the tribunals is much to be desired. We are not doubting the ability of the members or Vice-Chairman (non-Judges) who may be experts in their regular service. But judicial adjudication is a special process and would effeciently be administered by advocate Judges. The remedy of appeal by special leave under Article 136 to this Court also proves to be costly and prohibitive and far-flung distance too is working as constant constraint to litigant public who could ill afford to reach this Court. An appeal to a Bench of two Judges of the respective High Courts over the orders of the tribunals within its territorial jurisdiction on questions of law would assuage a growing feeling of injustice of those who can ill afford to approach the Supreme Court. Equally the need for

recruitment of members of the Bar to man the tribunals as well as the working system of the tribunals need fresh look and regular monitoring is necessary. An expert body like the Law Commission of India would make an in-depth study in this behalf including the desirability to bring CEGAT under the control of Law and Justice Department in line with Income Tax Appellate Tribunal and to make appropriate urgent recommendations to the Government of India who should take remedial steps by an appropriate legislation to overcome the handicaps and difficulties and make the tribunals effective and efficient instruments for making judicial review efficacious, inexpensive and satisfactory."

1.3 The Law Commission of India accordingly took up the matter for consideration, prepared a 'Questionnaire' and a 'Revised Additional Questionnaire' (Annexures I & II respectively) and circulated the same for opinion to all concerned persons, departments and authorities. The response has been quite encouraging. It has received opinions, suggestions and comments from various sources which have been duly considered by the Commission.

1.4 The Commission would have submitted its report in the year 1996 itself but for the fact that it was brought to its notice that the issue relating to functioning of

the Administrative Tribunals and the validity of Articles 323-A and 323-B of the Constitution of India has been referred to a larger Constitution Bench for consideration and that the same was pending. In view of the said information, the Commission withheld further action awaiting the opinion of the Supreme Court in the matter. The seven-Judge Constitution Bench of the Supreme Court has since delivered its judgment in L.CHANDRA KUMAR v. U.O.I. (1997) 3 SCC 261. The unanimous opinion of the Court has been delivered by A.M.Ahmadi, C.J. The essential features of the judgment are in the succeeding chapters.

1.5 The above decision is extremely significant and relevant for the purpose of this study and has accordingly been kept in mind while preparing this report.

1.6 When the Law Commission of India had initiated the study pursuant to the observations in R.K.JAIN v. Union of India, it devoted its attention to three types of tribunals only viz.,-

(i) Administrative Tribunals constituted under the Administrative Tribunals Act, 1985 enacted pursuant to Articles 323-A of the Constitution.

(ii) The Customs, Excise and Gold (Control) Appellate Tribunal established under Section 129 of the Customs Act, 1962 and dealing with cases under both the Customs Act and the Central Excises and Salt Act, 1944.

(iii) The Income Tax Appellate Tribunal constituted under Section 252 of the Income Tax Act, 1951.

1.7 The Law Commission of India is of the opinion, keeping in view all the relevant circumstances, that it would be appropriate and convenient to examine the functioning of each of these types of tribunals separately. Indeed these three tribunals are constituted under three different enactments. Only the tribunals mentioned in (i) above are governed by Art.323-A and not the other two types of tribunals. They are also situated differently in the matter of their powers, status, importance, method of recruitment and other conditions of service.

Major issues of study regarding functioning of Administrative Tribunals in the country:-

The Commission has decided to confine its area of study on the following major issues pertaining to the functioning of Administrative Tribunals in the country:-

1. Appointment of members of the Tribunals, their eligibility mode of appointment etc.
2. Composition of the Tribunal.
3. Need to standardise the powers and procedures of administrative tribunals.
4. Guarantee parties appearing before the tribunals basic procedural rights and safeguards; and ancillary issues like seeking justice through post.
5. Simplify administrative law, particularly with regard to judicial review and appeal; and
6. Ensure the requisite degree of independence when a tribunal is required to act in a judicial fashion.

The Reference to the Law Commission is to specifically consider the functioning of those agencies which could be classified as "administrative tribunals". These agencies are authorized by the Government through law to make decisions which can affect people's fundamental rights of equality, property, economy, political and liberty rights and economic and social entitlements. Besides this there are many decision making bodies which are not, strictly speaking, "tribunals" which affect people and make decisions about

resources in a community. The Commission feels that the role of such decision making bodies in the administrative justice system also deserves careful consideration.

The Commission refers to the extracts of the Malimath Committee report quoted in L.Chandra Kumar's case (1997) 3 SCC 261 pr.88 citing a number of reasons which show that several tribunals in the country have not inspired confidence in the public mind.

(i) The foremost is the lack of competence, objectivity and judicial approach.

(ii) The next is their constitution, the power and method of appointment of personnel thereto, the inferior status and the casual method of working.

(iii) Their actual composition; men of calibre are not willing to be appointed as presiding officers in view of the uncertainty of tenure, unsatisfactory conditions of service, executive subordination in matters of administration and political interference in judicial functioning.

The Supreme Court observed:

"89... That the various Tribunals have not performed up to the expectations is a self-evident and widely acknowledged truth.

However, drastic measures may have to be resorted to in order to elevate their standards to ensure that they stand up to constitutional scrutiny in the discharge of the power of judicial review conferred upon them."

(Emphasis supplied)

Besides these reasons, we are of the view that the following issues also need drawing attention:-

(a) There is delay, lack of training and public perception of unfairness and a feeling that impermissible considerations play a part in many cases.

(b) Issues of efficiency and cost to individuals and to the Government in the administrative system providing justice are of fundamental concern. In some cases, particularly involving individual's rights or entitlements, delay in the system can result in injustice and undermine the credibility of the system as a way to achieve justice.

(c) The Government, in carrying out reform, should try to avoid making decisions expensive.

(d) The question of appropriate procedures often seems difficult for people to understand, particularly when issues relating to appeals and judicial review are involved.

(e) There appears to be an ad hoc approach to procedures used by some tribunals on making decisions. Some agencies create their own, some are governed by regulations, and others have none.

Some objectives which should be achieved by an administrative justice system and also be reflected in decision making procedures include: Representativeness, Accessibility/Openness, Expertise, Accountability, Efficiency.

The attainment of these objectives by an administrative system will create an environment in which the principles of natural justice can operate and, in fact, many of these objectives are integral to natural justice or fairness.

CHAPTER - II

2.1 The Purpose of Administrative Law

The State regulates the lives of its citizens in manifold ways. The ordinary citizen has to encounter the government at every turn, particularly so if he is engaged in business or is the owner of the property or employed in the Government or its agencies. It is, therefore, a requisite of efficient public administration that a fair balance must be struck between the interest of the State on the one hand and those of the citizen on the other hand because of the paramount concern of administrative law which is to protect the public and the citizen from abuse of official power. This notion of fair balance is a justification for the existence of administrative law or its French equivalent, droit administratif, as part of public law. The courts interfere to protect the interest of the citizen only to the extent necessary and within the framework of principles and concepts known to the science of administrative law. It is not for the courts, in the exercise of revisional jurisdiction to determine in the first instance, matters of administration, before the Government has itself dealt with such matters on merit.

(Z.M.Nedjati and J.E.Trice, English and Continental Systems of Administrative Law, Chapter I)

2.2 Advantages of Administrative Tribunals:-

Among the other advantages noted for such tribunals, some important ones, need highlighting as follows:-

(i) cheapness, where cheapness is an essential ingredient of justice (e.g. in the Central Administrative Tribunal (CAT) the application can even be sent by post).

(ii) speed

(iii) expert knowledge of the technical matters involved.

(iv) capacity to give effect to the policies of social improvement without undue restriction arising from common law policies and the doctrine of precedent.

It is generally understood that for the creation of new standards in such diverse matters such as housing, social services, townplanning, capacity for work, control of transport, professional and trade discipline, and the like, greater technical experience, greater flexibility and a greater emphasis on social welfare are required than the ordinary judicial process and tradition allow. (Principles of Australian Administrative Law by Benjafield, D.G. and Whitmore, H., page 332, (fourth edition).

CHAPTER - III

PART-I

Administrative remedies in other countries and in India

3.1 A study on the tribunals will be incomplete unless the position of administrative remedies in other countries is adverted to. At the same time, the attempts to reform made in the past in India need to be referred to for taking into consideration the broader perspective of the situation.

3.2 Franks Committee Report and Committee on Minister's power (U.K.):-

The Franks Committee -

In 1955, the United Kingdom Parliament, established the Committee on Administrative Tribunals and Enquiries, usually known as the Franks Committee, to examine the process of administrative adjudication. The basis for the setting up of this Committee was the anxiety of all political parties, prompted largely by the Crichel Down affair (Crichel Down Enquiry (Cmnd. 9176 (1954), as to the need to protect the citizens in relation to administrative action.

The Committee's general recommendations include an appeal on fact, law and merits from an administrative tribunal of first instance to an appellate tribunal (other than a minister himself), except where the tribunal of first instance is exceptionally strong and well qualified. Further, an appeal on a point of law should lie, with certain exceptions, to the ordinary court's machinery, for such appeals should be simple, cheap and expeditious. The Committee also recommended that no statute should contain words purporting to oust the remedies by way of certiorari, prohibition and mandamus. The most important recommendation was the proposal that there should be set up a Council on Tribunals for England, (and a separate Council for Scotland), the members of which should be appointed by and responsible to the Lord Chancellor. The Council would suggest how the Committee's more detailed recommendations as to the constitution, organisation and procedure of tribunals should be applied to existing tribunals, and keep tribunals under continuous review and advise on the constitution and procedure of any proposed new type of Tribunal (Principles of Australian Administrative Law by D.G. Banjafield and H.Whitmore, fourth edn, pp.333;336).

It would be beneficial to extract the relevant passage from D.C.M.Yardley in his book on Principles of Administrative Law, (1981) pp.198-201 regarding the extent of implementation of these two reports:-

> The two major legislative achievements of the Franks Report were the creation of the Council on Tribunals and the institution of appeals on law from many tribunals direct to the Divisional Court. But there were many other marked effects upon the whole flavour of the system of administrative tribunals and inquiries. The great majority of the ninety-five detailed recommendations of the Committee were promptly accepted by the Government of the day, and a number of others were later accepted either in whole or in part. Only a mere handful were in the end rejected or simply not carried into effect. But as many of the recommendations which were accepted were on matters of detail, rather than principle, it was possible to implement them without resorting to legislation. For example, the recommendation that all chairmen of rent tribunals should have legal qualifications has been effected as a matter of practice without altering either the primary or the secondary legislation concerning the tribunals. Again, the emphasis placed by the Committee upon the

requirements of openness, fairness and impartiality has been reflected usually not in subsequent legislation, but by a change in general attitude by those tribunals which had not previously appreciated the full import of these characteristics.... the statutory instrument which governs the procedure of rent tribunals dates from 1946, though it has since been amended in some respects, and that instrument permits tribunals to sit either in private or in public at their own discretion. Before the Franks Committee Report it was quite common for rent tribunals to sit in private, and to exclude the press, but since the Franks Report chairmen of rent tribunals have realised the importance of sitting in public unless there is some really compelling reason to sit in camera. Accordingly,...it is now common practice to sit in public unless persuaded to do otherwise by the principles already stated.

A host of other reforms have been achieved by changes of administrative practice. Many of these are concerned with the detailed procedure of individual tribunals or types of inquiry, and need not be considered here. But among the most prominent we may perhaps list three:

(a) Appellate tribunals now customarily publish selected decisions as guidance both for themselves in later cases and for first instance tribunals. Thus decisions of rent assessment committees are circulated to all members of the relevant panel, and to all rent officers within the panel area. Also, and perhaps of greatest importance in this context, the decisions of the Social Security Commissioners are published by Her Majesty's Stationery Office and circulated to all local insurance officers, all chairmen of local tribunals, and to selected libraries. These decisions, though not of quite the same binding precedent value upon other tribunals in the social security field which would attach to a decision of the High Court, are nevertheless considered by local insurance officers and local tribunals as generally binding upon them, so that a consistent body of social security tribunal case law is built up. Furthermore, a highly authoritative Digest of Commissioners' 'Decisions', compiled by a retired National Insurance Commissioner, Mr.Desmond Neligan OBE, and also published by the Stationery Office, is of the greatest assistance in helping to establish this consistent body of precedent. The Digest is kept up to date by a regular loose-leaf service.

(b) Legal representation is allowed before almost all tribunals, but it is a matter for each party whether he avails himself of such representation. The Franks Committee had recommended that the legal aid scheme should be extended to the more formal or expensive tribunals, and to final appellate tribunals. The right to legal representation is generally re-cognised, and is sometimes specifically stated in rules of procedure. Also the legal advice scheme has been progressively extended in the years since the Franks Report so that it is now available to cover advice before hearings in any tribunals. But the scheme has not yet been generally extended to cover the cost of legal representation. This may well be largely because of the cost to the public purse which it would entail. But other reasons probably include doubts about whether solicitors, who would be the more likely practising lawyers to appear at most inferior tribunal hearings, are adequately equipped to cope with the specialist law which is dealt with. Certainly in proceedings before tribunals in the social security field the experience of the present writer as chairman of a local tribunal suggests that trade union officers usually make more effective advocates for appellants than do lawyers. So parties are

welcome to retain lawyers to represent them in almost all tribunal proceedings, but normally only at their own expense.

(c) Chairmen of tribunals must usually now have legal training, and must normally be selected by the appropriate Minister from a panel of persons appointed by the Lord Chancellor, or in Scotland by the Lord Advocate. This helps to ensure that the person who chairs any tribunal proceedings is qualified to appreciate the importance of a full disclosure of all material facts to all parties before the hearing takes place and that an adequate opportunity is given to all parties to attend the hearing (and any inspection which may be involved). Furthermore, the legal qualifications of the chairman should help to ensure that a proper watch is kept from the chair to see that the rules of natural justice are followed in the course of the hearing, and that any questions are put from the chair to parties to elicit facts or argumentswhich are relevant, but which may not have been sufficiently presented without such prompting. This latter function of a chairman probably more than makes up for any absence of actual legal representation of a party at the hearing.

....the overall effect of the publication of the Report of the Donoughmore-Scott Committee on Ministers' Powers was to remove the great majority of the previous fears and apprehensions about delegated legislation; but it took many years for this effect to be appreciated, and decades before Parliament acted upon any of the Committee's detailed recommendations. The effect of the Franks Report was far more immediate. The first Tribunals and Inquiries Act received the Royal Assent only a year after the Report was published, and indeed a number of the administrative changes recommended by the Committee were already in train by that time. The overall effect upon the climate of opinion was also much quicker, and by the time the Council on Tribunals embarked upon its work in 1959 there was already a general belief that any defects were being ironed out."

It is pertinent to quote from the relevant passage of H.W.R.Wade in his book, The Administrative Law, 7th Edition, pages 915-920 regarding radical recommendations made by the committee and the extent of reforms carried out legislatively:-

<u>THE REFORMS OF 1958</u>

The Tribunals and Inquiries Act, 1958 (U.K.) gave effect to the policy of the Franks Committee's report, though with some variations in detail. The Act was short and did not present the whole picture, since important reforms were also made by changes of administrative regulations and practice. It has now been replaced, first, by the Tribunals and Inquiries Act 1971, and now, by the Tribunals and Inquiries Act 1992 both of which are consolidating Acts which make no change of substance.

The Act of 1958 provided first for the Council on Tribunals. It has a maximum membership of sixteen; but there is special provision for a Scottish Committee of the Council, consisting partly of persons not members of the Council itself. The Council emerged as a purely advisory body, without the function of appointing tribunal members, but with general oversight over tribunals and inquiries. The tribunals under its superintendence were listed in a schedule, which included the great majority of those considered by the Committee. It was probably right that such a body, which is intended to be a watch-dog and independent of ministerial control, should not be given executive functions; it was designed to bark but not to bite. It is not, therefore, a court of

appeal, or a council of state on the French or Italian Model. But it has to keep under review the 'constitution and working' of the listed tribunals, and report on any other tribunal questions which the government may refer to it. In practice, it receives complaints from individuals and invites testimony from witnesses. It is also frequently consulted by government departments in the ordinary course of their work. Its annual report must be laid before Parliament. It is specifically empowered to make general recommendations as to the membership of the listed tribunals, and it must be consulted before any new procedural rules for them are made. Some particulars of the Council's work will be found below.

As the Franks Committee had recommended, the Council on Tribunals consists partly of lawyers and partly of lay members, the lay members being in the majority. The purpose of the lay majority is to make sure that the Council's guiding principle shall be the ordinary man's sense of justice and fair play, freed so far as possible from legal technicality. The membership comprises wide experience in industrial, commercial and trade union affairs, as well as administrative experience contributed by eminent retired civil

servants. This structure has both advantages and disadvantages. Although much of the Council's work, such as the vetting of Bills in Parliament and procedural regulations, requires the aid of lawyers, its policy is to evolve and maintain the standards which the public demands of tribunals, rather than to copy the practices of the established courts of law. But naturally the elements of substantial justice are to a large extent the same in both systems.

OTHER REFORMS MADE BY THE ACT OF 1958

The Tribunals and Inquiries Act 1958 also made the following provisions.

1. Chairmen of rent tribunals and of tribunals dealing with national insurance, industrial injuries, national assistance, and national service were to be selected by their ministries from panels nominated by the Lord Chancellor.

2. Membership of any of the listed tribunals, or of a panel connected with it could be terminated only with the Lord Chancellor's consent.

3. No procedural rules or regulations for the listed tribunals might be made without consultation with the Council on Tribunals.

4. A right of appeal to the High Court on a point of law was given in the case of a number of specified tribunals, including rent tribunals, and tribunals dealing with the children, employment, schools, nurses and mines. In various other cases this right already existed...

5. Other tribunals could be brought within the Act by ministerial order. Since Parliament has continued to create new tribunals as fast as ever, many additions have been made to the schedule, including mental health review tribunals, betting levy appeal tribunals, industrial tribunals, rent assessment committees, immigration tribunals, VAT tribunals, school allocation appeal committees, the data protection tribunal and the financial services tribunal.

6. Judicial control by means of certain remedies (certiorari and mandamus) was safeguarded. This is discussed elsewhere.

7. The Act gave a legal right to a reasoned decision from any of the listed tribunals, provided this was requested on or before giving or notification of the decision. This is discussed below.

8. The ministers responsible under the Act, and to whom the Council on Tribunals was to report, were the Lord Chancellor and the Secretary of State for Scotland (replaced for this purpose in 1973 by the Lord Advocate).

The Act fell short of the Committee's recommendations in certain respects, for instance in its arrangements as to the appointment of Chairman and Members of tribunals. Perhaps the most notable divergence was in the failure to provide for appeals on questions of fact and merits. The Committee recommended a right of appeal on 'fact, law and merits', but the Act provided only a right of appeal on a question of law. Thus the Committee's proposal that there should be a right of appeal from rent tribunals to county courts remained unfulfilled, and no right of appeal was given, except on a point of law, from the rent assessment committees set up by the Rent Act 1965. Jurisdictional facts are of-course reviewable independently.

WORK OF THE COUNCIL ON TRIBUNALS

Although the Council has no legal right to be consulted about Bills in Parliament constituting or affecting tribunals, it is in practice consulted as the Franks Committee intended. The Council comments on Bills in much the same way as it does on procedural rules, and in particular it attempts to help departments drafting provisions for new tribunals. In this way it has been able, for example, to secure a statutory right to be heard for a licence-holder threatened with cancellation of his licence.

It has investigated various complaints made to it by dissatisfied parties, and in some cases has been able to obtain reform of tribunals' practices. It has secured improvements in tribunals' accommodation by following up complaints, and also as a result of its members' visits to tribunal hearings. It has, thus, acted as a kind of ombudsman in the sphere of tribunals, as also in that of inquires, though with a view to the improvement of the system rather than the remedying of individual cases. For some years now the flow of complaints about tribunals has been

much reduced. This may be in some degree a measure of the success of the reforms of 1958 and the improvements effected subsequently by government departments, stimulated in some cases by the Council."

3.3 The Act of 1958 has been replaced by the Tribunals and Inquiries Act, 1992 (U.K). Sections 1-4 thereof concern the provisions of the Council on Tribunals and their functions. Section 1 envisages the functions of the Council and includes inter alia, to keep under review the constitution and working of the tribunals specified in Schedule I of the Act and, from time to time, to report on their Constitution and working; to consider and report on such particular matters as may be referred to the Council with respect to Tribunals other than the ordinary courts of law, whether specified or not in Schedule I of the Act.

Section 2 provides for the composition of the Council and section 4 prescribes the procedure of making reports by the Council.

Section 5 envisages that the Council may make to the appropriate Minister general recommendations as to the making of appointments to membership of any tribunals mentioned in Schedule I or of Panels consituted for the

purpose of any such tribunals. However, section 6 envisages the procedure of the method of appointment of the Chairman of certain tribunals.

The Council has to be consulted under section 8 of the Act in order to make the procedural rules for any Tribunal specified in Schedule I of the Act.

Section 11 governs the appeals from certain Tribunals. Under sub-section (1) if any party to proceedings before any specified Tribunal is dissatisfied in point of law with a decision of the Tribunal he may, according as rules of court may provide, either appeal from the Tribunal to the High Court or require the Tribunal to state and submit a case for the opinion of the High Court. Under sub-section 3 thereof, rules of court made with respect to all or any of the Tribunals may also provide for authorising or requiring a Tribunal in the course of proceedings before it, to state in the form of a special case for the decision of the High Court, any question of law arising in the proceedings and the decision of the High Court shall be deemed to be the judgment of the court. Under sub section (5) it is specified that appeal to the court of appeal shall not be brought by virtue of this section except with the leave of the High Court or the court of appeal.

3.4 Report of the Committee of JUSTICE - All Souls Review of Administrative Law in the United Kingdom has adopted the six themes as under mentioned while preparing its report. (paras 1.11 to 1.17 thereof). These are:

a. The need to prevent grievance;
b. The need to openness in decision making;
c. The ease of access to remedies;
d. The adequacy of remedies;
e. The need to keep the law upto-date; and
f. The need for public information.

a. The need to prevent grievance:

The Report emphasis that it is of paramount importance to minimise the number of occasions when there is any grievance to redress. In the planning field it recommended that effective appeal procedures are essential as the appellants and objectors must feel that their case has been fairly considered.

b. The need for openness in decision making:

Decisions should be clear and intelligible. Administrators should be required on demand to give reasons for their decisions and to state the facts on which such decisions are based. The Report points out that a rule to this effect will serve the purpose under (a) above, i.e. the prevention of grievance. This is

because the discipline of having to give a properly articulated decision curbs the chance of an arbitrary or irrational or prejudiced decision.

c. Remedies should be freely available:

The Report emphasises the need to do away with the artificial powers which make it difficult for a person to avail himself of a needed remedy. Based on this underlying principle the Report was against the principles of order 53, i.e. leave of the court must be obtained by the applicant for judicial review. Similarly it was against the rule which requires that the fiat of the Attorney General must be obtained before an action to declare or enforce a public right can be brought.

d. Adequacy of remedy:

The Report observes that it is not much to the point to have a streamlined procedure for getting to court if the remedies which the Judge can award are inadequate. In this regard the Report points out that in the Ombudsman field, it is essential that the remedies recommended by the local Ombudsman should be complied with.

e. The need to keep the law upto-date:

It is pointed out in the Report that there is a danger that rigidity and ossification will take over. It recommends that a careful watch need to be kept over all

the institutions to ensure that they fulfil their task promptly and efficiently. It advocates that there is need of a standing body, independent of Government, which can comment on pending legislation, itself propose reforms and draws attention to deficiency in judicial review, in the substantive law and in the Ombudsman's jurisdication. It proposed that such a body could be created by statute or be set up as a standing Royal Commission and the Council on Tribunals would remain in being and work alongside the new Commission. The proposed body suggested in the Report is "Administrative Review Commission". (Page 75 of the said report).

f. The need for public information and access:

The Report advocates that public should be informed adequately of the avenues of redress. The grounds on which judicial review can be sought should be codified in statute (though in a form which leaves room for the growth of the law to continue).

3.5 Judicial Review in Australia

Statutory statements of the grounds on which a court will set aside an administrative decision in Australia are as follows:-

The Report of the Committee of the JUSTICE (page 18 thereof) sets out the grounds of review contained in section 5(1) of the Australian Administrative Decisions

(Judicial Review) Act, 1977, as amended in 1978 and 1980, in the following abbreviated forms:-

a. Breach of the rules of natural justice;

b. Breach of mandatory procedural requirements;

c. Lack of jurisdiction;

d. Absence of statutory authority;

e. Improper exercise of statutory power;

f. Error of law;

g. Decisions induced by fraud;

h. Absence of evidence;

i. Decisions otherwise contrary to law;

Section 5(2) of the Act expands on ground (e) above by stating that improper exerecise of a power is to be construed as including a reference to the following:-

a. Taking an irrelevant consideration into account;

b. Failing to take relevant consideration into account;

c. Exercising a power for non-statutory purpose;

d. Excercising a power in bad faith;

e. Acting at the direction of another person;

f. Applying a rule or policy without regard to the merits of a particular case

g. unreasonable exercise of power;

h. Producing an uncertain result; and

i. Any other exercise of a power in a way that constitutes abuse of the power.

3.6 A glance at the systems of administrative law on the continent of Europe is made by Z.M.Nedjati and J.E.Trice in the book entitled "English and Continental Systems of Adminsitrative Law", 1978 Edn., Chapter 3 as follows:-

French Administrative Law

In France there is a two-tier hierarchy of administrative courts headed by the 'Conseil d'Etat. This specialised tribunal, which comprises about 150 carefully selected specialists had its origins in the ancient regime and is a markedly French institution. Its function is twofold : first, to advise the government and the executive upon the implications and validity of administrative regulations and ordinary laws which may be submitted; second, to judge through its litigation department (section du contentieux) any disputes which may arise between the State or public bodies and the individual citizen. In the lower tier are grouped the 24 Tribunaux Administratifs which act as the administrative courts of first instance for their particular region.

Litigation before Administrative Courts

In France, litigation between a citizen and some organ of the State in an administrative context comes within the jurisdiction of the Conseil d'Etat statuant au contentieux.

3.7 Federal Republic of Germany

In the Federal Republic of Germany there are separate administrative courts and tribunals in each Land or State (Verwaltungsgericht) at local level, and an appellate Oberverwaltungsgericht or Verwaltungsgerichtshof (High Administrative Court) in each Land. The highest court of administrative matters is the Bundesverwaltungsgericht (Federal Administrative Court). There is also a separate hierarchy of courts dealing with special administrative matters such as social security courts and fiscal courts.

3.8 Belgium

In the course of the nineteenth century the Belgian ordinary courts worked out a system of substantive droit administratif not far removed from the French system. The Belgian Conseil d'Etat was established by the Law of December 23rd, 1946. It consists of two sections, one of which deals with legislative matters and the other with administrative affairs. The legislative section is responsible for

improving the drafting and editing of legal texts. The administrative section has the task of ensuring protection of the citizens' rights and interests in relation to exercise of public powers. It has jurisdiction to quash a decision of the administration (contentieux d'annulation) on grounds (cas d'ouvertures) corresponding to the grounds of French administrative law.

3.9 Italy

The new Constitution which replaced the old constitutional statute of 1848, was promulgated on December 27th, 1947 and came into force on January 1st, 1948.

An Act of 1889 remoulded the organisation of the Italian Council of State (Consiglio di Stato) establishing a new division besides the three old ones. The fourth division (or section) was vested with power to determine all complaints (ricorsi) against acts of administrative agencies whenever these applications were not within the province of the ordinary courts. In the exercise of this jurisdiction the Consiglio di Stato could decide on the legality of administrative acts. The grounds which make an administrative act unlawful were described in the statute in the still living formula: incompetenza, eccesso di potere and violazioni di legge

incompetence, excess of power and violation (or breach) of law, respectively. This jurisdiction of the Consiglio di Stato, being an equivalent of what French doctrine describes as the recours pour exces de pouvoir affords the remedy of annulment of unlawful administrative action.

3.10 Greece

Section 47 of Law No.3713/1928 is the material section regulating the substantive competence of the Greek Council of State which has jurisdiction to annul administrative action on grounds not far removed from the cas d'ouvertures of French administrative law.

3.11 Turkey

The basis of all judicial jurisdictions in Turkey is the Constitution of 1961.

The principle of a separate and independent administrative court system was first established in Turkey in 1868 under the Ottoman Empire and was continued by the Turkish Republic.

Article 140 of the 1961 Constitution declares that the Council of State (Danstay) is an administrative court of first instance in matters not referred by law to other

administrative courts and an administrative court of last instance in general. The law relating to the Turkish Council of State is Law No.521 of 1964 which has been subsequently amended. The Council of State has jurisdiction to annul administrative action on grounds of defects of jurisdiction, form, cause, subject-matter and motive.....

3.12 Human Rights under the European Convention-Relevance to Administrative law

The European Convention on Human Rights was drawn up by the Council of Europe in 1950 and came into force in 1953. The Member States of the Council of Europe who ratified the Convention have thereby become Contracting Parties to it. The Convention sets out certain fundamental rights and freedoms that are to be protected in binding provisions which are interpreted and applied by the European Commission and Court of Human Rights or, in certain circumstances, by the Committee of Ministers of the Council of Europe.

3.13 Position in United States of America

In USA, the importance in the exercise of power by the administration and judicial control of administrative action was realised. Consequently, the emphasis was laid upon procedural safeguards to ensure the proper exercise

of administrative authority, which fact was articulated in the form of legislative enactment in the Federal Administrative Procedure Act, 1946, a law which lays down the basic procedures which must be followed by American Administrative Agencies.

Every administrative law case arises out of a controversy between a private citizen and some organ of the administration of, as it is usually termed in the United States, some administrative agency. According to the definition in the Federal Administrative Procedure Act of 1946 "agency" means each authority ..... of the Government of the United States other than Congress, the Courts, or the Governments of the possessions, Territories,or the Districts of Colombia...."

Essentially, this definition equates the agency with the executive branch of Government and under it every governmental organ outside of the legislature and the courts is an administrative agency.

The Administrative Procedure Act contains a number of provisions regulating the conduct of the agency hearings. A hearing examiner may not be assigned inconsistent duties nor may he consult "any person or party on a fact in issue (Sec.5 of the Act). Examiners are empowered to administer oaths, to issue subpoenas, to rule upon matters of proof and relevant evidence and

generally to regulate proceedings (Sec.7 of the Act). In practice the procedure may range from an informal conference type hearing to a hearing which resembles a trial and extend over many days or weeks. Representation before the examinee is of right (Section 6). The examiners must keep a record and give a very detailed discussion which becomes part of the record; the reasoned discussion must contain findings and reasons upon all issues of fact, law or discretion presented on record (Sec.8(b). The initial decision by the examiner is deemed to be the final decision in the absence of an appeal to the agency or a motion to review by the agency (Sec.8(a)). .... Judicial review of administrative action is readily available. The Administrative Procedure Act allows for review where there is error of law or where the agency fails to base its decision on substantial evidence on record (Sec.10) (Principles of Australian Administrative Law by D.G.Benjafied and H.Whitmore. pp.344-45).

3.14 Attempts of reforms relevant to our study made in the past in India:

On parity with the theme of the Report of JUSTICE on the need to prevent grievance (quoted under para 3.4, supra), the Law Commission has also recommended for framing litigation policy in this regard.

126th report on Government and Public Sector Undertaking Litigation Policies and strategies of Law Commission recommends, inter-alia, as follows:

"4.13 Assuming that litigation as a whole is unavoidable, an alternative method for resolution of dispute has to be found. An alternative method could be of a standing committee representing the employers, employees and the organisation to which every case can be taken wherever the dispute arises and the result of it must be binding. Today most of the countries are in search of non-court forums for resolution of disputes. It is therefore necessary for such an organisation, which is devoting itself to expanding social justice benefits to the employees working in industries, to organise such a forum for resolution of disputes and which must as well as satisfy the employers. The organisation is triangular in character and all the affected interests must have confidence in a forum for resolution of disputes arising amongst them. The Law Commission would certainly devise such a forum for their consideration.

"5.19 It would, therefore, be idle parade of familiar knowledge to advance all those supporting reasons for setting up various Tribunals.

However, let it not be forgotten that the approach paper relevant to the present report invited suggestions not for setting up different forum to the exclusion of courts for resolution of disputes involving public sector undertakings/Government. In fact, the search is for litigation policy and strategy to be followed by public sector undertakings and Government, with a view to, as far as possible, avoiding litigation or resort to courts and to devise a machinery to settle the disputes amongst contending parties. That cannot be ascertained with certainty by recommending tribunals involving litigation by or against public sector undertakings as well as Government."

"7.5 The Law Commission has come to note that the Government has resolved to set up a Directorate in the Cabinet Secretariat itself to strengthen the machinery for redressal of public grievances. Presumably, an official in the rank of a Secretary to the Government of India would head the Directorate. In the first instance, the new Directorate would deal with grievances relating to railways, posts and tele-communications and banking if the concerned Department has turned deaf ear to the complainant. The details are yet to be worked out but the format appears to be of a three-tier set up : one

in the Department itself, a monitoring cell and a Directorate at the level of Cabinet Secretary. The experiment may be evaluated when it is made fully operational. For the present, the Law Commission can only take note of the wholesome attempt in this behalf. What would be required would be a total and radical change in the attitude towards those coming forward with grievances. Experience shows that generally one who can set right the grievance turns deaf ear to the complainant and he is not subject to any social audit. In the absence of social audit, the doctrine of accountability suffers and wide yawning chasm develops between the maker of the grievance and the one who has power to redress the same. While suggesting effective measures, this aspect will have to be kept in central focus."

"8.6 Therefore, the first thing that is required to be done is that the Government of India must issue a compulsory directive binding on public sector undertakings that in the event of a dispute between any one or more public sector undertakings or between two or more public sector undertakings on one hand and Government on the other, the parties shall refer the dispute to arbitration. It shall be presumed by a legal device, if the parties to a dispute are two or

more public sector undertakings or public sector undertakings on one hand and Government on the other, excluding the tax authorities, that a valid arbitration agreement subsists.

"8.7 In order to provide teeth and effectiveness to this suggestion, the Government of India should set up an arbitration panel composed of retired Supreme Court Judges and High Court Judges from which the parties can agree to the selection of one or more arbitrators and failing agreement, the appointment will be made by the Minister of Law from the panel. There must be a fairly good number of panelists so that the work can be distributed amongst them. The fees to be paid to the panelists shall be fixed by executive order in advance and those who agree to accept the fees so prescribed may be empanelled. There is no dearth of retired Supreme Court and High Court Judges willing to put to constructive use their experience and expertise for the national good."

"8.8 If necessary, an amendment to the Arbitration Act, 1940 should be made which would empower the court before which any public sector undertaking has initiated litigation without

resorting to arbitration to compel the undertaking to go to arbitration and not merely stay the suit but dismiss the same.

"8.9 The award of the arbitrator shall be final and unless the Minsiter of Law permits the challenge of the award on a valid and rational ground, the same shall not be challengable before any court.

"8.10 In the matter of tax disputes between public sector undertaking on one hand and taxing authorities on the other, ordinarily the dispute would arise before an Income Tax Officer or Inspecting Assistant Commissioner or a Commissioner of Income Tax or the lowest grade tax officer functioning under statutes levying indirect taxes. So far, the law should be allowed to take its own course. Once the Commissioner decides the dispute, the aggrieved undertaking may approach the nodal Ministry under which it is functioning seeking permission whether the matter should be litigated further at all. If need be, an opinion from one of the panelists in the arbitration panel may be obtained and that should become binding. If, however, the recommendation of the Law Commission for setting up Tax Courts is

accepted and implemented, the matter may be litigated up to the Central Tax Court and must end there.

"8.11 Dealing with the disputes between the public sector undertaking and its employees, every public sector undertaking must set up a Grievance Cell composed of management and workmen's representatives not exceeding three on either side and presided over by a retired Judge who has functioned as a Judge of the Supreme Court or High Court or Chairman of the Industrial Court/Tribunal. Every dispute involving individual employee must be brought, if need be by amending the standing orders or service rules, before the Grievance Cell. The decision of the Grievance Cell shall be binding. If the dispute involves more than one employee but not all the employees of the undertaking, same procedure has to be followed. Even the disputes as to seniority, promotion and allied issues must be brought before this Cell. Promotion has long since ceased to be a management function. Therefore, the Grievance Cell would be competent to deal with the same. In the first instance, the promotion may be decided by the management but the dispute arising out of promotions granted or refused may be brought before the Grievance Cell.

The decisions of the Grievance Cell will be binding and if any one, despite this arrangement and effective implementaton, takes the matter to the court, the court must decline to entertain the dispute."

"8.20 Turning to the complaints by the employees of the Government of India vis-a-vis the departmental bosses, the procedure indicated in para 8.11 must be effectively followed. Effective Grievance Cell should be set up which must remain active and must be in a position to dispose of the problems raised by the staff. Where a point of legal formulation without a precedent is involved and if the Grievance Cell is unable to deal with that point effectively, the concerned Department and the employees involved in the dispute must agree to abide by the opinion of a member of the panel of arbitrators to whom a reference on a point of law be made and his opinion invited. The disputes must be disposed of in consonance with his opinion.

"8.21 It is equally necessary in the larger national interest of reducing litigation and curbing litigative culture that a central body should be devised for having a continuous overview of the different bodies recommended herein. The

role of this central body would be of a co-ordinating nature, of devising ways and means of reducing inter se litigations between Union and States, between States and States, between public sector undertakings inter se, between public sector undertakings and taxing authorities, and lastly between Government and public sector undertakings on one hand and citizens on the other. This needs planning, strategy and effective implementation of policy decisions. It must be a body which can effectively curb the tendency to rush to the court or to rush to higher courts by preferring appeals. In fact, this body can effectively lay down ground rules which, when effectively followed, would make a direct dent on litigious tendencies. Such a body can be appropriately described a Federal Legal Cell composed of retired Judges, retired law officers, both Central and State, and senior executives who have worked in public sector undertakings. The function and duties of the Federal Legal Cell can be extensively drawn up centering round policy and strategy planning with a view to reducing frequent resort to litigation. It can also work as a courier between the Executive and the Judiciary. The link till today is missing and is responsible

for many ills which are otherwise curable. The Government of India should set up such Federal Legal Cells with appropriate terms of reference.

"8.22 .....Therefore, like the Public Accounts Commitee, there should be a Parliamentary Committee on Litigation with power to inquire into every litigation taken by or on behalf of the Government to question the correctness of the decision with a view to pointing out that care should be taken in future not to resort to such litigation. Parliamentary Committee can every year seek detailed information on expenses incurred on litigation by Government, public sector undertakings, and Departments and instrumentalities of the Government, and take upon itself the inquisition of any particular litigation which was avoidable and yet resorted to. It can inquire whether appeals are merely being pereferred for extraneous and irrelevant considerations. This will introduce sufficient accountability of the officers in whom the decision-making power for initiating and continuing litigation vests. The composition of the Committee must be a matter of concern of the Parliament itself."

3.15 In the 131st Report on the Role of Legal Profession in Adminsitration of Justice, the Law Commission recommended inter-alia as follows:-

"3.15 Another tendency which has become very recently visible, especially where pleadings are drawn up for Mofussil Courts, is to raise all and sundry, frivolous and untenable points of facts and law...."

"3.16 For a positive check, while deciding the cost quantum to be awarded one way or the other, the presiding judge must also certify whether untenable and frivolous defences were raised, necessitating framing of the issues on which parties were at variance and the time spent in recording decisions on them. If the presiding Judge is satisfied that such frivolous and totally untenable defences with regard to facts and law were raised, the same must enter the verdict and quantify the costs to be awarded."

3.16 The Law Commission in its 79th report on Delay and Arrears in High Courts and other Appellate Courts recommended, inter-alia as follows:-

"16.17 Grouping of writ petitions:- While dealing with civil appeals we have pointed out the necessity of grouping of appeals involving the same question of law. This is all the more important and necessary in the case of writ petitions. Very often, a number of writ petitions are filed in respect of the orders of administrative tribunals, involving not only the same point of law, but also the same or similar facts. The grouping of all such petitions by the Registry will very much help in the quick and satisfactory disposal of these cases."

"17.12. Conflicting views unavoidable:- It is, no doubt, true that the disposal of references by the various High Courts sometimes results in different and conflicting views. This is in the very nature of things and cannot be helped. It, however, needs to be mentioned that as stated elsewhere, the Appellate Tribunal is empowered to make a reference direct to the Supreme Court of a question of law, if the Tribunal is of the opinion that, on account of a conflict in the decisions of High Courts in respect of any particular question of law, it is expedient that a reference should be made direct to the Supreme Court."

"17.13 Substitution of Appeal for Reference:- A view has also been expressed that the present procedure of the Appellate Tribunal making a reference to the High Court should be done away with, and, instead of that, an appeal should lie to the High Court against the order of the Tribunal on a question of law or a substantial question of law. The position, as already noted is that an appeal lies from the Income Tax Authority concerned to the Appellate Tribunal on a question of fact as well as well as law. The finding of the Appellate Tribunal on a question of fact is final. In case, however, the assessee or the department feels aggrieved with regard to the finding of the Appellate Tribunal on a question of law, it can file an application to the Appellate Tribunal under section 256(1) of the Income Tax Act, 1961, within the prescribed time, for a reference to the High Court on the question of law arising out of the order of the Tribunal. If the Appellate Tribunal finds, after issuing notice to the opposite party, that a question of law arises out of its order, it draws up a statement of case and refers to the High Court the formulated question of law.

If the Appellate Tribunal declines to make a reference to the High Court, it is open to the aggrieved person to apply to the High Court under sub-section (2) of section 256 of the Income Tax Act for an order directing the Appellate Tribunal to make a reference to the High Court regarding the question of law about which the Tribunal had declined to accede to the prayer of the applicant. The High Court in such application can, after hearing both the parties, make an order if the circumstances of the case so warrant, directing the Appellate Tribunal to refer the question of law to the High Court. In pursuance of the order of the High Court the Appellate Tribunal draws up a statement of case and refers the formulated question to the High Court."

"17.14 Advantage of appeal:- The advantage of doing away with the reference, and substituting in its place a right of appeal, is that the time spent before the Appellate Tribunal in proceedings for referring the question of law to the High Court would be saved. It would also obviate the necessity of filing applications under sub-section (2) of section 256 of the Income Tax Act in those cases in which the Appellate Tribunal has declined to make a reference about a question of law to the High Court."

"17.18 Direct reference to Supreme Court by the Appellate Tribunal:- It may also be mentioned that if on an application made under section 256, the Appellate Tribunal is of the opinion that on account of a conflict in the decisons of the High Courts in respect of any particular question of law, it is expedient that a reference should be made direct to the Supreme Court, the Appellate Tribunal may draw up a statement of the case and refer it through its President direct to the Supreme Court.

"17.19 No further comments:- Since the matter about the substitution of appeal in place of reference against the order of the Tribunal has already been dealt with by the High Courts Arrears Committee and the Law Commission in its 58th Report, sent in 1974, we do not propose to say anything further in the matter."

The Fifteenth Law Commission does not wish to pursue the idea of providing for appeal in the place of reference, at this juncture.

3.17 In order to attain uniformity in decisions of higher courts, the Law Commission in its 136 report on Conflicts in High Court Decisions on Central Laws - How to foreclose and how to Resolve, recommended, inter-alia, as follows:-

"Second Recommendation

The need for evolving a mechanism for nipping in the bud the conflicting interpretation at the High Court level and the suggested solution.

"5.3.1 The question that requires to be addressed to is as regards the need for evolving suitable machinery so as to maintain, strengthen and restore uniformity on questions of law. For, the present constitutional and statutory provisions that are designed to maintain such uniformity operate only when the matter reaches the highest judiciary by way of appeal by the aggrieved party or the Legislature finds time to attend to the conflict of decisions. If one keeps aside certain special provisions, such as the advisory jurisdiction of the Supreme Court, one finds that a point on which there is want of uniformity can come up for decision only when a litigant invokes the jurisdiction of the Supreme Court. In other words, if a litigant who has failed in the High Court on a question of law cannot afford to go to

the Supreme Court, or does not, for any reason, propose to approach the Supreme Court, then the ruling of the High Court stands. The conflict of decisions on a particular point of law will then remain as it is. This is not a satisfactory position.

"5.3.2 To allow a conflict of views between High Courts to arise and languish in comfort for many years, even decades, before resolving it 'if' the conflict is carried to the Supreme Court and ironed out in due course 'when' the matter happens to come up for hearing there, is less than an exemplary solution. A much better, much speedier, and much more satisfactory solution which will systematically address this problem deserves to be evolved. And such is the present endeavour of the Commission.

"5.3.3 <u>The contours of the suggested solution are:</u>

(1) When High Court "A" is faced with a problem pertaining to an all-India law (excluding the Constitution of India) on which High Court "B" has already made a pronouncement, if High Court "A" holds a view different or inconsistent from the view already pronounced by High Court "B", High Court "A", instead of making its own

pronouncement, shall make a reference to the Supreme Court. The order of reference shall be accompanied by a reasoned opinion propounding its own view with particular specification of reasons for differing from the view pronounced by High Court "B".

(2) (a) The party supporting the reference may arrange for appearance in the Supreme Court but will not be obliged to do so.

(b) The said party will have the option of submitting written submissions suplementing the reasoning embodied in the order of reference.

(c) The party opposing the reference shall also have a similar option for engaging an advocate in the Supreme Court and submitting written submissions, inter alia to counter the written submissions, if any, submitted by the other side.

(3) The Supreme Court may require the Government of the State in which the High Courts "A" and "B" are situated to appoint at the State's cost any advocate from the State panel of lawyers of the concerned States to support by oral arguments the view points of the respective High Courts.

(4) All such references may be assigned to a Special Bench which may endeavour to dispose of all such references within six months of the receipt of the references in the Supreme Court in view of the inherent urgency to ensure uniformity.

(5) If any SLP or appeal is already pending on the same point from judgment of High Court "B" or any other High Court, the said matter may be clubbed alongwith the reference. Any interested party may be permitted to appear as interveners.

(6) The Supreme Court may return the reference if it appears that the parties are acting in collusion.

(7) The Attorney General may be served with a copy of the reference and he shall be entitled to urge the point of view of the Central Government in regard to the relevant provision of the concerned Central Statute, if so desired.

(8) The referring High Court shall finally dispose of the appeal on all points in the light of the decision of the Supreme Court in regard to the referred point.

(9) The decison of the Supreme Court in the reference will have no impact or effect on the decison of High Court "B" in the event of the Supreme Court upholding the reference in case it has become final between the parties by reason of the matter not having been carried to the Supreme Court and the said decision shall remain undisturbed as between the parties in High Court "B"."

"5.3.4 In order to give effect to the aforesaid recommendation, a suitable legislation may have to be enacted. A draft of the suggested legislation has been appended for the sake of facilitating the task."

PART-II

3.18 ADJUDICATORY MACHINERY UNDER THE CUSTOMS ACT, 1962:

Under Section 122 of the Customs Act, in every case under Chapter XIV of the Customs Act in which anything is liable to confiscation or any person is liable to a penalty, such penalty or confiscation may be adjudged:-

(a) without limit, by a Collector of Customs or a Deputy Collector of Customs;

(b) where the value of the goods liable to confiscation does not exceed Rs.50,000/- by an Assistant Collector of Customs;

(c) where the value of the goods liable to confiscation does not exceed Rs.2500/- by a gazetted officer of customs lower in rank than an Assistant Collector of Customs.

An order of confiscation for penalty under this Act is not a mere administrative or executive act, but is really a quasi-judicial act.

The Act also provides for valuation and classification of goods imported and exported as the case may be.

APPEALS TO COLLECTOR (APPEALS)

Under section 128, any person aqggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Collector of Customs, may appeal to the Collector (Appeals) within 3 months from the date of communication to him by such decision or order. This right extends to important matters like classification and valuation besides several other matters provided by the Act.

Under Section 128 A, the Collector (Appeals) after making such inquiry as may be necessary, may pass such order as he thinks fit confirming, modifying or annulling the decision or order appealed against, or may refer the case back to the adjudicating authority with such directions as he may think fit for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary. On disposal of the appeal, the Collector (Appeals) communicates the order passed by him to the appellant, the adjudicating authority and the Collector of Customs.

APPELLATE TRIBUNAL

Under section 129 of the Act the Central Government has constituted an appellate tribunal called the Customs, Excise and Gold (Control) Appellate Tribunal, consisting of judicial and technical members.

Any person aggrieved by any of the following orders may appeal to the appellate tribunal against such order -

(a) A decision or order passed by the Collector of Customs as an adjudicating authority;

(b) An order passed by the Collector (Appeals) under section 128-A.

(c) An order passed by the Board or the Appellate Collector of Customs under section 128 as it stood immediately before the appointed date;

(d) An order passed by the Board or the Collector of Customs, either before or after the appointed date under section 130, as it stood immediately before that day;

Provided that the Appellate Tribunal may in its discretion, refuse to admit an appeal in respect of an order referred to in clause (b), clause (c) or clause (d), where -

(i) the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation under section 125; or

(ii) in any disputed case other than a case where the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or

(iii) the amount of fine or penalty determined by such order, does not exceed Rs. 50,000/-.

Under sub-section (2), the Collector of Customs may, if he is of the opinion that an order passed by the Appellate Collector of Customs under section 128, as it stood immediately before the appointed date or the Collector (Appeals) under section 128-A, is not legal or proper, direct the proper officer to appeal on his behalf to the Appellate Tribunal against such order.

Under Section 129-B the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decison or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.

POWERS OF BOARD OR COLLECTOR OF CUSTOMS TO PASS CERTAIN ORDERS

Under Section 129-D, the Board may of its own motion, call for and examine the record of any proceedings in which a Collector of Customs as an adjudicating authority has passed any decision or order under this Act for the purpose of satisfying itself as to legality or propriety of any such decision or order and may, by order, direct such Collector to apply to the

Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order. Similarly, the Collector of Customs may of his own motion, call for and examine the record of any proceedings in which an adjudicating authority sub-ordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality and propriety of any such decision or order and may, by order, direct such authority to apply, to the Collector (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Customs in his order. Then such applications made to the appellate tribunal or the Collector (Appeals) as the case may be are to be treated as if such applications were an appeal against the decision or order of the adjudicating authority and the provisions regarding appeals applies to such applications.

Where the decision or order appealed against relates to any duty demanded in respect of goods which are not under control of the customs authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order has to deposit with the proper officer the duty demanded or penalty levied during the pendency of the appeal except in cases which would cause undue hardships to such persons.

STATEMENT OF CASE TO THE HIGH COURTS:

Under Section 130, the Collector of Customs or the other party may against an order under section 129-B (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment) require the Appellate Tribunal to refer to the High Court any question of law arising out of such order and the Appellate Tribunal is required to draw up a statement of the case and refer it to the High Court, after giving due opportunity to the opposite party. If the Appellate Tribunal refuses to state the case on the ground that no question of law arise the Collector of customs or the other party may apply to the High Court and the High Court may, if it is not satisifed with the correctness of the decision of the Appellate Tribunal require the Apellate Tribunal to state the case and to refer it and on receipt of any such requisition the Appellate Tribunal has to state the case and refer it accordingly.

If the Appellate Tribunal is of the opinion that on account of conflict in the decisions of the High Court in respect of any particular question of law, it is expedient that a reference should be made direct to the Supreme court, the Appellate Tribunal may draw up a

statement of the case and refer it through the President direct to the Supreme Court under section 130-A of the Act.

If the High court or the Supreme Court is not satisfied that the statements in a case referred to it are sufficient to enable it to determine the questions raised thereby, the court may refer the case back to the Appellate Tribunal for the purpose of making such additions thereto or alterations therein as it may direct in that behalf.

Under section 130-D the High Court or the Supreme Court decides the questions of law in the case referred to them and delivers its judgment thereon containing the grounds on which such decision is founded and a copy of the judgment is sent to the Appellate Tribunal. The Appellate Tribunal then passes such orders as are necessary to dispose of the case in conformity with such judgment.

Appeal to the Supreme Court of India:

Under Section 130-E, an appeal lies to the Supreme Court from -

(a) Any judgment of the High Court delivered on a reference made under section 130 in any case which, on its own motion or on an oral application made by or on behalf of the party aggrieved, immediately after passing of the judgment, the High Court certifies to be a fit one for appeal to the Supreme Court;

(b) Any order passed by the appellate tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment.

In the transitory provision every appeal which was pending immediately before the appointed date before the Board under Section 128 and any matter arising out of or connected with such appeal and which was so pending, was taken to be transferred to the appellate tribunal.

3.19 Central Excise Act, 1944

Under this Act, the adjudication of confiscation of goods and imposition of penalties is processed as under:-

Under section 33, where by the rules made under this Act anything is liable to confiscation or any person is liable to penalty, such confiscation or penalty may be adjudged -

(a) without limit by a Collector of Central Excise;

(b) up to confiscation of goods not exceeding 500 rupees in value and imposition of penalty not exceeding 250 rupees, by an Assistant Collector of Central Excise.

The Central Board of Excise and Customs may vary the limits of powers indicated above.

This Act and the Rules made thereunder provide for valuation and classification of excusable goods and various other incidental matters.

Under section 35 of the Act any person aggrieved by any decision or order passed under this Act by a Central Excise Officer lower in rank than a Collector of Central Excise in matters of importance like classification and valuation apart from the matters provided under the Act may appeal to the Collector of Central Excise (Appeals) (hereinafter referred to as the Collector (Appeals). The Collector (Appeals) may, after

making such further inquiry pass such order as he thinks fit confirming, modifying or annulling the decision or order appealed against, or may refer the case back to the adjudicating authority with such directions as he may think fit for a fresh adjudication or decison, as the case may be, after taking additional evidence, if necessary. On the disposal of the appeal, the Collector (Appeals) shall communicate the order passed by him to the appellant, the adjudicating authority and the Collector of Central Excise.

Appeals to the Appellate Tribunal

Under section 35B any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -

(a) a decision or order passed by the Collector of Central Excise as an adjudicating authority.

(b) an order passed by the Collector (Appeals) under section 35A.

(c) an order passed by the Central Board of Excise and Customs constituted under the Central Board of Revenue Act, 1963 (hereafter referred to as the Board) or the Appellate Collector of Central Excise under section 35, as it stood immediately

before the appointed day;

(d) an order passed by the Board or the Collector of Central Excise, either before or after the appointed day, under section 35A as it stood immediately before that day;

Provided that the Appellate Tribunal may, in its discretion, refuse to admit an appeal in respect of an order referred to in clause (b) or clause (c) or clause (d) where-

(i) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or

(ii) the amount of fine or penalty determined by such order, does not exceed fifty thousand rupees.

The Collector of Central Excise may, if he is of opinion that an order passed by the Appellate Collector of Central Excise under section 35, as it stood immediately before the appointed day, or the Collector (Appeals) under section 35A, is not legal or proper, direct any Central Excise Officer authorised by him in this behalf to appeal on his behalf to the Appellate Tribunal against such order.

The Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.

The decision of the Appellate Tribunal is thus final, as regard the questions of facts are concerned except in matters (under sec.35L(b)). The Appellate Tribunal shall send a copy of every order passed under this section to the Collector of Central Excise and the other party to the appeal.

Under section 35E the Board of its own motion can call for and examine the record of any proceeding in which a Collector of Central Excise as an adjudicating authority has passed any decison or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may, by order, direct such Collector to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order.

At the same time, the Collector of Central Excise is also empowered under sub-section (2) of section 35E that he may of his own motion, call for and examine the record of any proceeding in which an adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decison or order and may, by order, direct such authority to apply to the Collector (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Central Excise in his order. Such applications are then treated to be as if appeals made against the decision or order of the adjudicating authority.

Statement of case to High Court

Under section 35G, the Collector of Central Excise or the other party may, within sixty days of the date upon which he is served with notice of an order under section 35C (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purpose of assessment) by application in the prescribed form, require the Appellate Tribunal to refer to the High Court any question of law arising out of such order and the Appellate Tribunal shall if it agrees to it draw up a statement of the case and refer it to the High Court. In this process the other party is also given an opportunity to file his cross-objections. If the Appellate Tribunal refuses to state the case on the ground that no question of law arises, the Collector of Central Excise or the other party may apply to the High Court and the High Court may if it is not satisifed with the correctness of the decision of the Appellate Tribunal, require the Appellate Tribunal to state the case and to refer it and on receipt of any such requisiton, the Appellate Tribunal shall draw up the case and refer it to the High Court.

Under section 35H if on an application made under the above section the Appellate Tribunal is of opinion that, on account of conflict in the decisions of High Courts in respect of any particular question of law, it is expedient that a reference should be made direct to

the Supreme Court, the Appellate Tribunal may draw up a statement of the case and refer it through the President direct to the Supreme Court. If the High Court or the Supreme Court is not satisfied to enable it to determine the questions raised thereby, the Court may refer the case back to the Appellate Tribunal for the purpose of making such additions thereto or alternations therein as it may direct in this behalf.

Under section 35K the High Court or the Supreme Court hearing any such case shall decide the questions of law raised therein and shall deliver its judgment thereon containing the grounds on which such decision is founded and a copy of the judgment shall be sent to the Registrar of the Tribunal. The Appellate Tribunal has then to pass such orders as are necessary to dispose of the case in conformity with such judgment.

Appeals to Supreme Court

Under section 35L, an appeal shall lie to the Supreme Court from

(a) any judgment of the High Court delivered on a reference made under section 35G in any case which, on its own motion or on an oral application made by or on behalf of the party aggrieved, immediately after the

passing of the judgment, the High Court certifies to be a fit one for appeal to the Supreme Court; or

(b) any order passed by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment.

3.20 Adjudication process under the Gold (Control) Act, 1968

The adjudication machinery in the Gold Control Act, 1968 is almost on the same pattern as discussed above in matters relating to the Customs Act and the Central Excise Act, 1944. These are not being reproduced here for the sake of brevity.

A perusal of systems of administrative law on the continent of Europe reveals that the administration of justice through tribunals has taken firm roots in the foreign jurisdictions also and societies have been content with the system. Therefore, there is no question of abolition of the tribunals' system in the country but we have to look for reformative measures in the direction to further iron out the problems in achieving justice through the tribunals system.

CHAPTER - IV

Central Administrative Tribunal

4.1 We shall first take up and deal with the Administrative Tribunals constituted under the Administrative Tribunals Act, 1985:

4.2 Constitution of the Central Administrative Tribunal:-

In 1976, by the Constitution 42nd Amendment Act, Part XIVA containing Articles 323A and 323B was included in the Constitution of India by which the Parliament and the State Legislatures were authorised to constitute administrative tribunals for service matters and Tribunals for certain other matters. In 1985, the Parliament passed the Administrative Tribunals Act. Some of its relevant provisions are being discussed below. Chapter II of the Act deals with the establishment of tribunals and benches thereof. Section 4 provides for establishment while section 5 deals with composition of the tribunal and benches thereof. Section 6 lays down the qualifications of Chairman, Vice-Chairman and Members. So far as the Chairman is concerned, sub-section (1) requires that he should be or have been-

(a) a judge of a High Court; or

(b) has, for at least two years, held the office of Vice-Chairman;

(c) (omitted by Act 51 of 1987)

Sub-section (2) prescribing the qualification for Vice-Chairnan provides that he should be or have been -

(a) a judge of a High Court; or qualified to be a judge of a High Court (inserted by Section 3(b) of Act 51 of 1987); or

(b) has, for at least two years, held the post of a Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of a Secretary to the Government of India; or

(bb) has, for at least five years, held the post of an Additional Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of an Additional Secretary to the Government of India; or

(c) has, for a period of not less than three years, held office as [a Judicial Member or an Administrative Member].

Sub-section (3) prescribes the qualification of a Judicial Member and requires that:

(a) he should be or should have been or qualified to be a judge of a High Court; or

(b) has been a Member of the Indian Legal Service and has held a post in Grade I of that service for atleast three years.

Sub-section (3-A) provides the qualification for appointment as Administrative Member and lays down that such person (a) should have, for atleast two years, held the post of an Additional Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay not less than that of an Additional Secretary to the Government of India; or (b) has, for atleast three years, held the post of a Joint Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of a Joint Secretary to the Government of India, and shall in either case have adequate administrative experience.

Section 8 of the Act prescribes the term of office and provides that the term for Chairman, Vice-Chairman or Members shall be of five years from the date on which he enters upon his office, but shall be eligible for re-appointment for another term of five years. The proviso to section 8 provides that no Chairman, Vice-Chairman or other Member shall hold the office after

he has attained, in the case of Chairman or Vice-Chairman, the age of 65 years, and in the case of any other Member, the age of 62 years.

Chapter III of the Act deals with jurisdiction, powers and authority of tribunals. While section 14 deals with jurisdiction, powers and authority of the Central Administrative Tribunal, Section 15 is concerned with State Administrative Tribunals and Section 16 deals with Joint Administrative Tribunal.

It is pertinent to quote the provisions laid down under Section 14 below:-

"14. Jurisdiction, powers and authority of the Central Administrative Tribunal. - (1) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable immediately before that day by all courts (except the Supreme Court) in relation to-

(a) recruitment and matters concerning recruitment, to any All-India Service or to any civil service of the Union or a civil post under the Union or to a post connected with defence or in the defence services, being, in either case, a post filled by a civilian;

(b) all service matters concerning -

(i) a member of any All-India Service; or

(ii) a person [not beig a member of an All-India Service or a person referred to in clause (c)] appointed to any civil service of the Union or any civil post under the Union; or

(iii) a civilian [not being a member of an All-India Service or a person referred to in clause (c)] appointed to any defence service or a post connected with defence;

and pertaining to the service of such member, person or civilian, in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation [or society] owned or controlled by the Government;

(c) all service matters pertaining to service in connection with the affiars of the Union concerning a person appointed to any service or post referred to in sub-clause (ii) or sub-clause (iii) of clause (b), being a person whose services have been placed by a State Government or any

local or other authority or any corporation [or society] or other body, at the disposal of the Central Government for such appointment.

[Explanation. - For the removal of doubts, it is hereby declared that reference to "Union" in this sub-section shall be construed as including references also to a Union territory.]

(2) The Central Government may, by notification, apply with effect from such date as may be specified in the notification the provisions of sub-section (3) to local or other authorities within the territory of India or under the control of the Government of India and to corporations [or societies] owned or controlled by Government, not being a local or other authority or corporation [or society] controlled or owned by a State Government:

Provided that if the Central Government considers it expedient so to do for the purpose of facilitating transition to the scheme as envisaged by this Act, different dates may be so specified under this sub-section in respect of different classes of, or different categories under any class of, local or other authorities or corporations [or societies].

(3) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall also exercise, on and from the date with effect from which the provisions of this sub-section apply to any local or other authority or corporation [or society], all the jurisdiction, powers and authority exercisable immediately before that date by all courts (except the Supreme Court) in relation to-

(a) recruitment, and matters concerning recruitment, to any service or post in connection with the affiars of such local or other authority or corporation [or society]; and

(b) all service matters concerning a person [other than a person referred to in clause (a) or clause (b) of sub-section (1)] appointed to any service or post in connection with the affairs of such local or other authority or corporation [or society] and pertaining to the service of such person in connection with such affairs."

Section 17 empowers the Tribunal to punish for contempt.

Chapter IV deals with the procedure to be followed by the Tribunal. The provisions contained under section 19 are extracted below-

"19. Application to Tribunals. - (1) Subject to the other provisions of this Act, a person aggrieved by any order pertaining to any matter within the jurisdiction of a Tribunal may make an application to the Tribunal for the redressal of his grievance.

Explanation. - For the purposes of this sub-section, "order" means an order made-

(a) by the Government or a local or other authority within the territory of India or under the control of the Government of India or by any corporation [or society] owned or controlled by the Government; or

(b) by an officer, committee or other body or agency of the Government or a local or other authority or corporation [or society] referred to in clause (a).

(2) Every application under sub-section (1) shall be in such form and be accompanied by such documents or other evidence and by such fee (if any, not exceeding one hundred rupees) [in respect of the filing of such application and by such other fees for service or execution of processes, as may be prescribed by the Central Government].

[(3) On receipt of an application under sub-section (1), the Tribunal shall, if satisfied after such inquiry as it may deem necessary, that the application is a fit case for adjudication or trial by it, admit such application; but where the Tribunal is not so satisfied, it may summarily reject the application after recording its reasons.]

(4) Where an application has been admitted by a Tribunal under sub-section (3), every proceeding under the relevant service rules as to redressal of grievances in relation to the subject-matter of such application pending immediately before such admission shall abate and save as otherwise directed by the Tribunal, no appeal or representation in relation to such matter shall thereafter be entertained under such rules.

Under Section 20, it is provided that applications by the tribunal shall not ordinarily be admitted unless other remedies are exhausted. Section 21 prescribes the limitation period within which the application can be entertained by the tribunal. Section 22 provides that a tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, but shall be guided by the principles of natural justice and subject to other provisions of the Act and the rules made by the Central Government. The tribunal shall have power to regulate

its own procedure including the fixing of places and times of its enquiry and deciding whether to sit in public or in private. Sub-section (2) thereof provides that every application made to the tribunal shall be decided expeditiously as possible and ordinarily every application shall be decided on a perusal of documents and written representations and after hearing such oral arguments as may be advanced. The powers vested in a tribunal are set out under sub-section (3) of Section 22 of the Act.

Section 24 lays down conditions as to making of interim orders.

Section 27 deals with execution of orders of a tribunal and section 28 excludes the jurisdiction of courts except the Supreme Court under Article 136 of the Constitution. However, the finality of the tribunals decisions is now open to challenge under the writ jurisdiction before the concerned High Court in view of L.Chandra Kumar's decision (infra).

4.3. Observations of the Constitution Bench of the Supreme Court in L.Chandra Kumar v. Union of India:-

The seven-Judge Constitution Bench of the Supreme Court has since delivered its judgment in L.Chandra Kumar v. U.O.I. (1997) 3 SCC 261. The unanimous opinion of the Court has been delivered by A.M.Ahmadi, C.J. The essential features of the judgment are the following:-

(a) Clause 2(d) of Article 323-A and clause 3(d) of Article 323-B of the Constitution of India to the extent they provide for excluding the jurisdiction of the High Courts and the Supreme Court under Articles 226 and 227 and Article 136 respectively are un-constitutional on the ground that they violate the basic structure of the Constitution. Judicial review conferred upon the High Courts and the Supreme Court by the aforesaid Articles, it has been held, is a basic feature of the Constitution and is not amenable to amendment, and since the 42nd Amendment Act of the Constitution which introduced the aforesaid Articles is a post-Bharati enactment, it is invalid and unenforceable in so far as it violates the said basic feature of the Constitution. Section 28 of the Administrative Tribunals Act, 1985 and other clauses in any other enactment providing for excluding the power of judicial review of the High Courts and the Supreme Court, it has been held, is equally void and ineffective.

(b) While the 'power of judicial review' of the High Courts and the Supreme Court cannot be taken away, it is open to the legislature to create courts and tribunals and entrust them with judicial powers but such powers can only be supplementary to the powers conferred upon the High Courts and the Supreme Court by Articles 226 and 227 and Article 32 of the Constitution. The tribunals created under the aforesaid Articles, of course, are competent to pronounce upon the constitutional validity of statutory provisions and rules, with this exception that they cannot examine or pronounce upon the validity of the provisions of the enactment under which they are created.

(c) The decisions of the Administrative Tribunals created under Article 323-A and the Administrative Tribunals Act, 1985 shall be subject to scrutiny by a Divison Bench of the High Court within whose jurisdiction the relevant tribunal is located. The tribunals will continue to act as courts of first instance and it shall not be open to the parties to approach the High Court directly in the matters relating to their conditions of service except where the constitutionality of any of the provisions of the very enactment under which the particular tribunal is constituted, is questioned.

(d) The concept of judicial and quasi-judicial tribunals has a sound basis, though it may be that the tribunals constituted under various enactments have not come up to the expectations. The remedy is not in abolishing them but in improving them so that they become effective instruments of the justice delivery system.

(e) The provision for appointment of administrative members in the Administrative Tribunals Act, 1985 cannot be said to be wrong in principle. On the contrary, the administrative members do provide a certain input and expertise which contributes to, and is conducive of, an effective, just and balanced decison by the tribunal.

(f) No appeal shall lie to the Supreme Court against the decisions of the Administrative Tribunals directly. The parties must approach the Division Bench of the High Court concerned. From the decision of the High Court, of course, a party can approach the Supreme Court under Article 136 of the Constitution, if he is so advised.

(g) It is necessary that an independent agency for the administration of all the tribunals constituted under Article 323-A and 323-B be set up. All such tribunals should be placed under a single nodal

agency which will be in a position to supervise the working of these tribunals. Until creation of such a central independent agency, the Ministry of Law should supervise the working of these tribunals. The Ministry of Law may, however, appoint an independent supervisory body to oversee the working of these tribunals.

(h) So far as the inter-play of sub-section (2) and (6) of Section 5 is concerned, the position is that a single-member of an administrative tribunal shall not be entitled to decide a question involving the interpretation of a statutory provision or rule in relation to the Constitution. All matters involving such questions shall be placed before a Bench of at least two-members, one of them shall be a judicial member.

4.4 Other relevant observations made in L.Chandra Kumar v Union of India, (1997) 3 SCC 261 are as follows:

(i) The power of judicial review over legislative action vested in the High Courts under Article 226 and in the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution constituting a part of its basic structure. Ordinarily the power of High

Courts and Supreme Court to test the constitutional validity of legislations can never be ousted or excluded.

The power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdiction is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation is equally to be avoided.

Clause 2(d) of Article 323-A and clause 3(d) of Article 323-B to the extent they exclude the jurisdiction of the High Courts and the Supreme Court and the Supreme Court under Articles 226/227 and 32 of the Constitution are unconstitutional.

Section 28 of the Administrative Tribunals Act, 1985 and the 'exclusion of jurisdiction' clauses in all other legislations enacted under the aegis of Articles 323-A and 323-B are, to the same extent, unconstitutional.

(ii) There are pressing reasons why the conferment of such a power of judicial review of administrative actions be preserved. When the framers of our Constitution bestowed the powers of judicial review of legislative action upon the High Courts and the Supreme Court they ensured that other constitutional safeguards were created to assist them in effectively discharging this onerous burden. The expectation was that this power would be required to be used only occasionally. However, in the five decades that have ensued since Independence, the quantity of litigation before the High Courts has exploded in an unprecedented manner. The decision in Sampath Kumar's case was rendered against such a backdrop. We are conscious of the fact that when a Constitution Bench of this Court in Sampath Kumar's case adopted the theory of alternative institutional mechanisms, it was attempting to remedy an alarming practical situation and the approach selected by it appeared to be most appropriate to meet the exigencies of the time.

The various Tribunals have not performed up to the expectations is a self-evident and widely acknowledged truth. However to draw an inference that their unsatisfactory performance points to their being founded on a fundamentally unsound

principle would not be correct. The reasons for which the Tribunals were constituted still persist; indeed, those reasons have become even more pronounced in our times. We have already indicated that our consitutional scheme permits the setting up of such Tribunals. However, drastic measures may have to be resorted to in order to elevate their standards to ensure that they stand up to constitutional scrutiny in the discharge of the power of judicial review conferred upon them.

"Pr....78....The constitutional safeguards which ensure the Independence of the Judges of the superior judiciary, are not available to the Judges of the subordinate judiciary or to those who man tribunals created by ordinary legislations."

Though the subordinate judiciary or tribunals created under ordinary legislations cannot exercise the power of judicial review of legislative action to the exclusion of the High Courts and the Supreme Court there is no constitutional prohibition against their performing a supplemental as opposed to a substitutional role in this respect.

The Tribunals are competent to hear matters where the vires of statutory provisions are questioned, they cannot act as substitutes for the High Courts and the Supreme Court. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts.

This power of the Tribunals will be subject to one important exception that the Tribunals shall not entertain any question regarding the vires of their parent statutes. The High Court concerned may be approached directly. All other deicisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes will also be subject to scrutity before a Division Bench of their respective High Courts. The Tribunals will continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. The litigants have to directly approach firstly the Tribunals even in cases where the vires of statutory legilsations (except where the legislation which creates the particular Tribunals) is challenged.

All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts.

The decision in L. Chandra Kumar will come into effect prospectively.

No appeal from the decision of a Tribunal will directly lie before the Supreme Court under Article 136 of the Constitution; but instead, the aggrieved party will be entitled to more the High Court under Articles 226/227 of the Constitution and from the decision of the Division Bench of the High Court the aggrieved party can move the Supreme Court under Art. 136 of the Constitution. Regarding the need for appointment of Administrative members, the Supreme Court held:

"95.... It has been urged that only those who have had judicial experience should be appointed to such Tribunals. In the case of Administrative Tribunals, it has been pointed out that the Administrative Members who have been appointed have little or no experience in adjudicating such disputes;. the Malimath Committee has noted that at times IPS Officers have been appointed to these

Tribunals. It is stated that in the short tenures that these Administrative Members are on the Tribunal, they are unable to attain enough experience in adjudication and in cases where they do acquire the ability, it is invariably on the eve of the expiry of their tenures. For these reasons, it has been urged that the appointment of Administrative members to Administrative Tribunals be stopped. We find it difficult to accept such a contention. It must be remembered that the setting up of these Tribunals is founded on the premise that specialist bodies comprising both trained administrators and those with judicial experience would, by virtue of their specialised knowledge, be better equipped to dispense speedy and efficient justice. It was expected that a judicious mix of Judicial Members and those with grassroot experience would best serve this purpose. To hold that the Tribunal should consist only of Judicial Members would attack the primary basis of the theory pursuant to which they have been constituted. Since the Selection Committee is now headed by a Judge of the Supreme Court, nominated by the Chief Justice of India, we have reason to believe that the Committee would take care to ensure that Administrative members are chosen from amongst those who have some background to deal with such cases."

(iii) The Supreme Court emphasised the need for changes in respect of appointment to Tribunals and supervision of their functioning by an independent body or authority. It held:

> "96.... The situation at present is that different Tribunals constituted under different enactments are administered by different administrative departments of the Central and the State Governments. The problem is compounded by the fact that some Tribunals have been created pursuant to Central Legislations and some others have been created by State Legislations. However, even in the case of Tribunals created by parliamentary legislations, there is no uniformity in administration. We are of the view that, until a wholly independent agency for the administration of all such Tribunals can be set up it is desirable that all such Tribunals should be as far as possible under a single nodal ministry which will be in a position to oversee the working of these Tribunals. For a number of reasons that Ministry should appropriately be the Ministry of Law. It would be open for the Ministry, in its turn, to appoint an independent supervisory body to oversee the working of the Tribunals. This will ensure that if the President or Chairperson of the Tribunal is for some reason unable to take

sufficient interest in the working of the Tribunals, the entire system will not languish and the ultimate consumer of justice will not suffer. The creation of a single umbrella organisation will, in our view, remove many of the ills of the present system. If the need arises there can be separate umbrella organisations at the Central and the State levels. Such a supervisory authority must try to ensure that the independence of the members of all such Tribunals is maintained. To that extent, the procedure for the selection of the members of the Tribunals, the manner in which funds are allocated for the functioning of the Tribunals and all other consequential details will have to be clearly spelt out."

(Emphasis supplied)

The Supreme Court felt that these suggestions should be considered in detail by those entrusted with the duty of formulating the policy in this respect. It couched:

"97. The suggestions that we have made in respect of appointments to Tribunals and the supervision of their administrative function need to be considered in detail by those entrusted with the duty of formulating the policy in this respect. That body will also have to take into consideration the comments of expert bodies like the LCI and the Malimath Committee in this regard.

We, therefore, recommend that the Union of India initiate action in this behalf and after consulting all concerned, place all these Tribunals under one single nodal department, preferably the Legal Department."

(Emphasis supplied)

(iv) The Supreme Court upheld the provision under Sec.5(6) of the Administrative Tribunals Act as valid, since where a question involving the interpretation of a statutory provision or rule in relation to the Constitution arises for the consideration of a single Members Bench of the Administrative Tribunal, the proviso to Sec.5(c) will automatically apply and the Chairman or the Member concerned shall refer the matter to a Bench consisting of at least two Members, one of whom must be a Judicial Member. This will ensure that questions involving the vires of a statutory provision or rule will never arise for adjudication before a single Member Bench or Bench which does not consist of a Judicial Member.

4.5 ADMINISTRATIVE TRIBUNALS CONSTITUTED UNDER THE ADMINISTRATIVE TRIBUNALS ACT, 1985 (ART. 323-A OF THE CONSTITUTION OF INDIA)

The Administrative Tribunals Act, 1985 excluded the jurisdiction of the High Court in the matters within the seisin of the Tribunals created thereunder, as contemplated under clause 2(d) of Article 323-A of the Constitution. Until the decision in Chandra Kumar's case, the decision of the Administrative Tribunals could not be questioned before the High Court. Parties aggrieved with the decisions of the Administrative Tribunals had to approach and were approaching the Supreme Court directly under article 136 of the Constitution, irrespective of the fact whether the decision of the tribunal was rendered by a single member or a Bench. This was the position affirmed by the Supreme Court earlier in S.P.Sampat Kumar v. Union of India (1987) 1 SCC 124. But the later decision in L.Chandra Kumar, rendered by a larger Constitution Bench has made a substantial and qualitative difference to the above position, as has been detailed hereinabove. With this later decision, the status of these tribunals has also undergone a radical change. They have now become tribunals subordinate to the High Court which is evidenced from the fact that the decisions of these tribunals are now amenable to writ jurisdiction of the High Court under Article 226 of the Constitution. It is no longer an alternative mechanism to the High Court, but a tribunal whose decisions are subject to scrutiny by the High Court, albeit by a Division Bench. (As a matter of fact, Shri Justice Shiva Shankar Bhat, a retired Judge of

the Karnataka High Court, who was appointed as chairman of the Karnataka State Administrative Tribunal, tendered his resignation soon after the decision in L.Chandra Kumar was rendered, complaining that inasmuch as the position and status of the Tribunal has been downgraded by the said decision, he cannot continue as the Chairman of the State Administrative Tribunal). While striking down certain clauses of Articles 323-A and 323-B of the Constitution of the Administrative Tribunals Act 1985, the Supreme Court has at the same time affirmed the soundness of the principle on which these administrative tribunals are created. It did not agree with the contention that these tribunals should be abolished inasmuch as they have not proved effective in discharge of their duties and have failed to achieve the object with which they were created. The Supreme Court has also held that though these tribunals are subject to the writ jurisdiction of the High Courts, they are yet competent to decide questions relating to the constitutinal validity of the statutory provisions and rules except, of-course, the provisions of the Administrative Tribunals Act 1985 under which they have been constituted. The Supreme Court has also rejected that there ought to be no technical/administrative members in these tribunals. They said that these non-judicial members provide an input which may not be available with the judicial members.

In the light of the above dicta of the Supreme Court, not much room is left for the Law Commission of India to suggest any substantial measures or recommendations with respect to the functioning of these tribunals. Even so, there are certain areas which can be and are dealt with hereunder:-

(a) With a view to improve the efficiency of the administrative tirbunals, the present practice of appointing retired or about to retire District Judges as judicial members is not entirely satisfactory. These District Judges do not deal with service matters during their judicial service and since they are appointed towards the end of their career, there is not much time and in some cases incliniation to learn this branch of law viz., service jurisprudence. They get hardly two to three years on the job. (It may be remembered that in the light of the judgment of the Supreme Court in All India Judicial Officers Association case, the age of retirement of subordinate judiciary is now 60, in effect. It is obvious that those who are not allowed to continue beyond 58 years in view of their unsatisfactory record, would not be considered or appointed as members of the Administrative Tribunal). In this view of the matter, an attempt should be made to recruit members of the Bar between the ages of 45 and 50

who will have a longer period available to them to prove their mettle. At the same time, it is necessary, with a view to provide an incentive to these judicial members that they should be considered by the High Court (of the State from which they hail) for appointment as judges of the High Court in the quota normally reserved for members of the subordinate judiciary and if for any reason this course is not found feasible or practicable, they may be considered under sub-clause (b) of cl.(2) of Art.217 read with Explanation (aa) and/or (b) appended to the said clause. If this assurance is held out, many members of the Bar may be attracted to this office. It would also mean that persons of competence, who have (acquired) expertise in service matters would be available to the High Court. Section 8 of the A.T.Act, 1985 may accordingly be amended. In the case of members, the initial term should be made ten years, renewable for a further period of five years.

(b) The practice of appointing retired or about to retire High Court Judges as Chairman of State Administrative Tribunals and as Vice-Chairmen of Central Administrative Tribunals has also not proved happy. Since the age of retirement for these posts is 65, the persons so appointed hardly get a three-year or sometimes, even less term in the office. It would be more appropriate if the sitting Judges of the High Courts who have got at

least not less than one year to go before retirement from the High Court, should be considered for appointment to these posts. In this manner, they will have at least a four-year term which would give them sufficient time to settle down in the office and do some productive work. Ordinarily, an Administrative Member should not be appointed as the Vice-Chairman of CAT or as the Chairman of SAT.

(c) An appeal should be provided to the High Court, to be necessarily heard by a Division Bench against the orders of the Administrative Tribunal. The appeal shall lie to that High Court within whose territorial jurisdiction the Tribunal rendering the judgment to be appealed against is located. This measure removes one of the serious and principal criticisms against the judgment of the Supreme Court in L.Chandra Kumar viz., that there cannot be a judicial review of an order passed by an authority in exercise of its power of Judicial Review. The Tribunal's order, according to the said decision, is in exercise of a power of judicial review; if so, this order cannot be the subject-matter of a judicial review once again. Judicial review, by its very nature, content and concept, is only against administrative or quasi-judicial action of administrative and other

authorities say the critics. The remedy of appeal should be provided not only against the final orders but also against the interlocutory orders of the Tribunal.

The Commission is of the opinion that if the aforesaid three measures are implemented along with several other measures and directions issued by the Supreme court in L.Chandra Kumar, these Tribunals should become more effective instruments of law and would give satisfaction to the parties coming before them. It may go a long way in making these Tribunals more effective instruments in the system of dispensation of justice.

4.6 Necessity for training of personnel manning the tribunals:-

The need for imparting training to personnel (judicial and administrative members/technical members) who man the tribunals cannot be ignored. The Frank's Committee (supra) also recommended the imparting of training to the members of the tribunal. The Law Commission has already stressed the need for imparting such training.

(a) Law Commission of India in its 116th Report on formation of All India Judicial Services recommended, inter alia, as follows:

"5.13....While recommending the constitution of an Indian Judicial Service, a bold step is taken to make a total departure from the earlier view that a minimum practice at the Bar is a pre-requisite to become a judicial officer. To the extent that a fresh law graduate, after qualifying at the competitive examination would enter judicial service, the importance of pre-service training both as to pattern, subject and duration, has been considerably increased....."

"5.14....It does not require a long argument to affirmatively assert that State Public Service Commissions generally have lost their credibility. Way back in 1958, the Law Commission observed that "the evidence given by members of the Public Service Commissions in some of the States does create the feeling that they do not deserve to be in the responsible posts they occupy. In some of the southern States, 'the impartiality of the Commissions in making selections to the Judicial service was seriously questioned.....

"....Now that a judicial service at an all-India level is being proposed and recommended, it is necessary to set up a National Judicial Service Commission. Its raison d'etre, composition, powers, functions and duties will be set out in detail in a separate report dealing with this aspect. Broadly, it must be composed of a

recently retired Chief Justice of the Supreme Court of India, one or two retired Justices of the Supreme Court, three to five retired Chief Justices of the High Courts, one to two retired Judges of the High Court, two outstanding members of the Bar, President of the Bar Council of India and two to three outstanding legal academics. The body shall be constituted by the President of India."

(b) The Law Commission in its 117th Report on Training of Judicial Officers recommended, inter alia, as follows:

"Rendering justice is an art in itself and acquiring rudiments of the art needs training. The minimum equipment to render justice requires a keen intellect to sift grain from the chaff, to perceive falsehood, to appraise relative claims, to evaluate evidence, a fair and balanced approach, needs of the society, the constitutional goals and able all times a keen desire to do justice. None of these aspects are dealt with in the syllabus prescribed at law colleges. If training is imparted to an impressionable mind, not contaminated by some of the prevailing undesirable practices in vogue in the present day Bar, amongst others by judges who have mastered the art of rendering justice, the same can be acquired. In order therefore, to equip a fresh law graduate to be a good judge a pre-service training is indispensable. Similarly, those who enter

state judicial service at grass roots level will equally need training in the art of rendering justice. While the basic tenets of training in respect of both may be the same, the duration may vary depending upon the minimum qualification prescribed for becoming eligible for entering service. The Law Commission must cater to the needs for pre-service training at both the levels, institutional as well as practical training."

4.7 Measures to check deterioration in moral values. Corruption, and nepotism are on the increase in the selection process:-

There has been a decline in moral values,and a prevalence of corruption and nepotism in the past.

In the case of Ajay Hasia & Ors Vs Khalid Mujib Sehravardi, 1981(1)SCC 722,745, (Constitution Bench) observed as follows:

"Now, there can be no doubt that, having regard to the drawbacks and deficiencies in the oral interview test and the conditions prevailing in the country, particularly when there is deterioration in moral values and corruption and nepotism are very much on the increase, allocation of a high percentage of marks for the oral

interview as compared to the marks allocated for the written test, cannot be accepted by the court as free from the vice of arbitrariness."

With the intensity of corrosion of moral values, corruption has increased gigantically in our country even after two decades of these observations of the Supreme Court. It can be evidenced through a spurt of various scams in the country. In Shiv Sagar Tiwari v. Union of India (1997) 1 SCC 444, the prevalence of scams in the country has been judicially recognised. It speaks of the prevalent corruption in the country being at it peak, corroding the democratic structure of the country. The experience of selection of judicial personnel through some State Public Service Commissions has been very discouraging inasmuch as these Commissions have lost their credibility (please refer to the observations of the Law Commission of India in its 116th report quoted in this chapter).

Even if the said Commissions are excluded from the jurisdiction of the selection of personnel manning these tribunals (which are relegated to the status of District Judges/Additional District Judges), yet the manner of selection of these persons through personal interview only is not impervious to political interference, corruption, nepotism especially when no evidence of tape-recording of interview is maintained, and public

does not have access to such confidential matters to enable them to impugn the selection process. Candidates coming from far off places do not have contacts or the time to spare to delve out the illegalities in the selection process and thus the illegalities remain hidden in the files of the selection process.

It cannot be denied that those candidates who could manage to secure appointments through corrupt means, can not keep the adjudicating atmosphere free from corrosion as they seek the return of expenditure incurred by them in finding their way into the tribunal. This forms a cycle of corruption and lowering of the judicial values. This cyclic process becomes unending because greed is never curtailed.

As observed in L. Chandra Kumar's case paragraph 89 (supra), certain drastic measures have to be resorted to in order to elevate the standards of tribunals to ensure that they stand up to constitutional scrutiny in the discharge of the power of judicial review conferred upon them. The Supreme Court has also recommended under paragraph 96 and 97 of the judgment that until a wholly independent agency for the administration of all tribunals can be set up, it is desirable that all such tribunals should be as far as possible under a single nodal ministry which will, inter alia, lay down the procedure for the selection of the members of the

Tribunals. That body will also have to take into consideration the comments of expert bodies like the Law Commission of India and the Malimath Committee in this regard.

In the backdrop of these developments, it is evident that the said nodal agency will have before it the data of manpower of the tribunal members, and details of their retirement, and vacancy position etc.

Under the French Administrative Courts System, appointments are made through a national competitive examination (see article by V.S. Chauhan on 'Justice by Administrative Tribunals' AIR 1986 Journal 56, 58). In search of a solution to the problem under consideration, the Law Commission is of the considered view that judicial members (other than the Chairman and Vice-Chairman) to man the tribunal ought to be selected through the process of a high standard written examination followed by personal interview. It is only if he qualifies in the written examination that he should be considered for personal interview. The percentage of marks allocated for written examination and personal interview can be 85% and 15% respectively. Further more, the evidentiary record of personal interview and written test should be maintained at least for a period of two years.

According to section 6(3)(b) of the Act, a Judicial Member has to be selected from two categories vis. (a) a person who has been or qualified to be a judge of the High Court and (b) a person who has been a member of the Indian Legal Service and has held a post in Grade-I of that service for at least three years. In view of the fact that the Commission is recommending the selection of Judicial Members through a process of a high standard written examination followed by personal interview, it is necessary that there should be a wider choice for selecting meritorious persons as Judicial Members. Accordingly, all law officers (irrespective of their designation) holding, for at least three years, a post equivalent to the post of Joint Secretary to the Government of India or any other post under the Central or State Government or in the public undertakings owned or controlled by the Central/State Government carrying a scale of pay which is not less than that of a Joint Secretary to the Government of India, should be made eligible for competing in the examination and selection for the post of a Judicial Member. Accordingly, it is recommended that Section 6(3)(b) of the Act should be substituted by the following words:-

> "Law officers (irrespective of their designation) holding for at least three years, a post equivalent to the post of Joint Secretary to the Government of India; or holding for at least three

years any other post under the Central or State Government or in the public undertakings owned or controlled by the Central/State Government, carrying a scale of pay which is not less than that of a Joint Secretary to the Government of India."

4.8 Constitution of National Appellate Administrative Tribunal : An alternative recommendation

The Supreme Court has laid down in L. Chandra Kumar's case (supra) that an aggrieved party can have recourse to the jurisdiction of the respective High Court under Article 226/227 of the Constitution of India, against the decision of the Central Administrative Tribunal. The repercussions of this development of law have already been felt. The Karnataka Government has sought to abolish the Karnataka State Administrative Tribunal. In the news items in the recent past, it has appeared that even the Central Government is proposing to abolish CAT. The remedy of judicial review by the High Court provided against the decision of the Administrative Tribunal and a possible further appeal to the Supreme Court under Article 136 is not only time-consuming but also expensive. Besides this, the various High Courts may interpret differently any statutory provision concerning the service conditions governing the

employees. Thus the lack of uniformity in the High Court decisions and consequently in CAT benches will create confusion in the mind of the litigant. It will further make the public loose faith in seeking justice through the judiciary, and thus undermine the democratic norms.

The Commission is of the considered view that a National Appellate Administrative Tribunal be constituted on the lines of the National Consumer Disputes Redressal Commission under section 20 of the Consumer Protection Act, 1986. It shall be manned by a retired Chief Justice of a High Court or a retired Judge of the Supreme Court of India. An appeal, on substantial questions of law and fact may lie to the proposed Appellate forum, against the decision of the Central Administrative Tribunal.

The proposed forum may have branches all over the country to reduce the cost of litigation to the litigant.

The decision of the proposed Appellate court will be binding on all benches of CAT. The proposed forum will be of status higher than a High Court but below the Supreme Court.

An appeal may lie against the decision of the proposed appellate forum to the Supreme Court. Under section 130-E of the Customs Act, 1962, an appeal lies from the decision of the CEGAT to the Supreme Court.

Similarly, under section 23 of the Consumer Protection Act, 1986, an appeal lies against the National Commission's decision to the Supreme Court. It will not be advisable to convert the Supreme Court to a first appellate court, because flooding of appeals against the Tribunals' orders may dilute the importance of the Supreme Court and consequently our democratic polity will suffer (1994(2) Journal Section SCALE J1 by Justice A.M. Ahmadi). In this manner, an aggrieved party will not have a right of recourse to the writ jurisdiction under Article 226/227 of the High Court against the decision of CAT inasmuch as it is settled law that where adequate remedy of appeal is there, one cannot have recourse to the writ jurisdiction (see AIR 1996 SC 1209; AIR 1997 SC 2189). Though it is undisputed that where the vires of the statute under which the Tribunal is constituted, is challenged, one can have recourse to the writ jurisdiction under Article 226/227 of the Constitution of India but such cases will be insignificant in number. Similarly when a right to appeal is contemplated to the Supreme Court against the decision of the proposed Appellate Administrative Tribunal, one cannot have recourse to the writ jurisdiction of the High Court under Article 226/227 of the Constitution.

This procedure will take care of the ensuing problems cropping up after the decision in L.Chandra Kumar's case (supra).

The proposed President of the Appellate forum will continue to draw the same salaries and perks as are admissible to a sitting Judge.

All pending writ petitions against the decision of CAT/SAT in pursuance of L. Chandra Kumar's case (except those in which the vires under which the Tribunal is constituted, is challenged), may be transferred to the proposed Appellate Forum.

This proposal can be effective and beneficial, only if Benches of the Appellate Forum are established at all important centres, at least in the capital of every State, on the pattern of the High Court.

4.9 Grouping Appeals before CAT/SAT and the proposed National Appellate Administrative Tribunal

It is the need of the hour that for expeditious disposal of cases, all cases which raise one or more common questions of law and on the basis of which, the cases can be disposed off by a common judgment, should be grouped together and heard together. Thus in the 79th Report of the Law Commission of India on delay and arrears in High Courts and other appellate courts, this recommendation has been echoed as quoted in Chapter III (supra).

4.10 Similarly, the Law Commission of India has recommended in its 125th report on "The Supreme Court A fresh look" in paragraph 4.20:-

> "Cases covered by earlier judgments of the Court must be grouped together by a computer."

Besides the decisions of the apex court, if there are judgments of the proposed Appellate Forum, then the cases covered by it, and pending before CAT/SAT and even before the proposed forum, should be grouped together and disposed off together.

In order to implement the recommendations contained under this paragraph and the preceding paragraph, in a true spirit, CAT/SAT and the proposed Appellate Forum should appoint research officers, to assist the respective Tribunals in this regard, in finding out the common cases, and the judgments already pronounced by courts which are binding on the cases pending. They will be definitely assisting the Tribunal in increasing the expertise and efficiency of the Tribunal and thus realise these objectives. CAT/SAT and the proposed forum may from time to time invite applications from the litigants/opposite parties. The Research Officer may then scrutinise the claim of the applicant and put up the research note to the Bench for passing the appropriate orders. The Forum may issue notice to the parties before disposing of the cases as

per the judgment already pronounced by the higher court and binding upon it. Similarly, an exercise may be done by the Research Officer for grouping of the pending cases which can be heard together.

4.11 Disposal of cases on the basis of arguments filed by the parties even through the post:

Towards achieving the objectives of easy accessibility/openness, under Section 19 of the Central Administrative Tribunals Act, 1985, an application can be filed by a party even through the post (Rule 4 of the Central Administrative Tribunal (Procedure) Rules, 1987). It follows that if notice is issued by CAT/SAT or the proposed forum the opposite party may be allowed to send his reply even through post and it can also be laid down that the applicant can file his rejoinder to the reply in the same manner.

Similarly, the applicant should be permitted to file his written arguments/briefs with precedents on the analogy of the recommendation of the Law Commission of India in its 125th report on "The Supreme Court - A fresh look", pr. 4.18 as follows:-

> "4.18 .... Therefore, it is now inevitable that this reverential approach to oral arguments must yield to the necessities of time. There are a

number of cases which can be identified by the Chief Justice of India in which oral arguments can be totally dispensed with. Petitions for special leave which can be admitted without oral arguments need not be listed in court but must be admitted by circulation.... The Courts must be empowered to dispense with oral arguments and insist upon written briefs."

The proposed research officers may assist the Tribunal in disposing of the case on the basis of the written briefs received.

This practice of making written submissions will at least take care of holding favourable attitude against a particular lawyer and save tribunal's time.

Above-all, it may be necessary to circulate for information of all the members of the Tribunals, the effect of not following the judgment of the Higher Court, especially when attention was drawn by the party in the written brief. The effect is it leads to contempt of Court as held in Shri Baradakanta Mishra Vs. Shri Bhimsen Dixit, AIR 1972 SC 2466:-

"15-16 .... any deliberate and mala-fide conduct of not following the law laid down in the previous decision undermines the constitutional authority

and respect of the High Court. .... It is .... also likely to subvert the Rule of law and engender harassing uncertainty and confusion in the administration of law."

This recommendation will be a step in the direction of making the Tribunal member accountable for his action if he violates the Rule of Law.

It has been observed that litigants and their advocates many a time raise disputes before the superior courts that though a particular decision of the higher court was cited before the lower court, yet it failed to discuss the same in its judgment. In order to advance the cause of the administration of justice so that the rule of law can be further strengthened, it is felt that it may be provided in the procedure followed by the tribunal that before the beginning of the arguments, both the parties be required to file their written arguments and counter arguments, if they desire to do so, and at the conclusion of the arguments both the parties be required to file a list of the cases cited by them before the tribunal during the course of the hearing. Such a course will avoid the raising of any dispute on those issues as well as compel the presiding officer to adhere to the rule of law laid down by the superior court and avoid harassment to the litigants and confusion in the administration of law.

4.12 Constitution of Benches of retired members of Tribunals

As observed by the Law Commission of India in its 124th Report, on 'The High Court Arrears - A fresh look', paragraphs 3.15 to 3.26, there are numerous cases which are more than five years old in the High Courts. It recommended that Benches of retired Judges may be constituted to do civil, criminal and miscellaneous work in the morning from 8.30 a.m. to 12 or 12.30 noon. The High Court Judges will then assemble from 12 or 12.30 noon and work up to 5.30 claiming a half hour lunch break. Thus the rich experience of judges and expertise in the justicing process can be used. Similarly, the services of retired tribunal members can be utilised for disposal of old matters pending before Tribunals, without involving any additional costs on buildings, libraries, etc.

4.13 Laying down of the policy and machinery to curb litigation between employees and the Government:-

Unless a proper litigation policy is evolved by the Government or the public sector undertakings, it would be an idle parade of familiar knowledge to advance advocating the setting up of various tribunals. The Law Commission of India has already recommended the setting

up of an Effective Grievance Cell to dispose of the problems raised by the staff in its 126th report as cited in chapter III, supra.

We reiterate those recommendations without repeating them with the observation that unless an appropriate litigation policy and machinery is evolved to curb the problems, industrial relations will suffer and productivity will go down.

4.14 Need to quantify the costs for raising frivolous defences:-

There is a general proclivity to raise all the sundry, frivolous and untenable points of facts and law. The Law Commission of India has recommended in its 131st report on the "Role of Legal Profession in the Administration of Justice", (cited in chapter III, supra), that the presiding judge must also certify at the time of passing the judgment whether untenable and frivolous defences were raised how much time was spent in recording the decisions on them, and if so, quantify the costs to be awarded. This will curb the tendency of filing frivolous cases. We reiterate those recommendations for implementation in the Tribunals also.

4.15 Need to evolve a mechanism for nipping in the bud the conflicting interpretation at the CAT/High Court:-

Unless uniformity of the decisions at higher level is maintained, it is likely to raise confusion in the minds of litigants. The Commission has exhaustively dealt with the problem and recommended measures to tackle the problem, in its 136th report on "Conflicts in High Court Decisions on Central Laws - How to resolve", (chapter III, supra).

We reiterate those measures quoted under chapter III and recommended that the tribunals should also be empowered to refer the conflicting decisions to the Supreme Court. This will also give a chance to the aggrieved party to present his point of view.

4.16 Locus standi of aggrieved party to review the order and the need to provide explicitly the extent of the powers of review of CAT and the need to publish it in the news papers and to circulate it by the concerned department so that persons can intervene in the proceedings by which they will be adversely affected:-

Section 22(3)(f) of the Administrative Tribunals Act, 1985 enunciates the powers of the tribunal concerning reviewing its decision and provides as follows:-

> "(3) A Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely,-
>
> (f) reviewing its decisions"

Rule 17 of the Central Administrative Tribunal (Procedure) Rules, 1987 prescribes the procedure for making an application for review. Under sub-rule (1) of rule 17, it is provided that no application for review shall be entertained unless it is filed within 30 days from the date of receipt of a copy of the order sought to be reviewed.

In the case of K.Ajit Babu v. Union of India, AIR 1997 SC 3277 the question arose as to whether a review application can be filed by a person not a party to a case but who would be adversely affected by an earlier judgment of the tribunal. The Supreme Court held as follows:-

"4. .....Often in service matters the judgments rendered either by the tribunal or by the court also affect other persons, who are not parties to the cases. It may help one class of employees and at the same time adversely affect another class of employees. In such circumstances the judgments of the Courts or the Tribunals may not be strictly judgments in personam affecting only to the parties to the cases, they would be judgments in rem. In such a situation, the question arises; what remedy is available to such affected persons who are not parties to a case, yet the decision in such a case adversely affects their rights in the matter of their seniority. In the present case, the view taken by the Tribunal that the only remedy available to the affected persons is to file a review of the judgment which affects them and not to file a fresh application under S.19 of the Act. Section 22(3) (f) of the Act empowers the Tribunal to review its decisions. Rule 17 of the Central Administrative Tribunal (Procedure and Rules) (hereinafter referred to as "the Rules") provides that no application for review shall be entertained unless it is filed within 30 days from the date of receipt of the copy of the order sought to be reviewed. Ordinarily, right of review is available only to those who are party to

a case. However, even if we give wider meaning to the expression "a person feeling aggrieved" occurring in S.22 of the Act whether such person aggrieved can seek review by opening the whole case decided by the Tribunal. The right of review is not a right of appeal where all questions decided are open to challenge. The right of review is possible only on limited grounds, mentioned in Order 47 of the Code of Civil Procedure. Although strictly speaking the O.47 of the Code of Civil Procedure may not be applicable to the Tribunals but the principles contained therein surely have to be extended. Otherwise there being no limitation on the power of review it would be an appeal and there would be no certainty of finality of a decision. Besides that, the right of review is available if such an applicationn is filed within the period of limitation. The decision given by the Tribunal, unless reviewed or appealed against, attains finality. If such a power to review is permitted, no decision is final, as the decision would be subject to review at any time at the instance of party feeling adversely affected by the said decision. A party in whose favour a decision has been given cannot monitor the case for all times to come. Public policy demands that there should be end to law suits and if the view of the

Tribunal is accepted the proceedings in a case will never come to an end. We, therefore, find that a right of review is available to the aggrieved pesons on restricted ground mentioned in O.47 of the Code of Civil Procedure and if filed within the period of limitation."

In a recent decision in the case of Sri Gopa Bandhu Biswal v. Krishna Chandra Mohanty, 1998 (3) SCALE 226, the decision in K.Ajit Babu (supra) was also referred to and it was observed as regards third parties are concerned as follows:-

"10.... We will assume for the time being that the applicants are persons aggrieved. Even so, the question is whether they can have a judgment which has attained finality by virtue of an order of this Court, set aside in review. There is no doubt that as between the parties to the main judgment, the judgment is final and binding. The respondents, State of Orissa and Union of India, are therefore, bound to give effect to the judgment of the Tribunal in T.A. No. 1 of 1989 in the case of Gopa-Bandhu Biswal. If this is so, can a third party by filing a review petition get that same judgment reviewed and obtain an order that Gopa-Bandhu Biswal is not entitled to the benefits of the directions contained in the main

judgment since that judgment is now set aside? In our view this is wholly impermissible. It will lead to reopening a matter which has attained finality by virtue of an order of this court. The applicants, even if they are persons aggrieved, do not have, in the present case, a right of review under any part of Order 47 Rule 1. Even under Order 47 Rule 1 (2), the party not appealing from a decree or order can apply for review only on grounds other than the grounds of appeal which were before the appellate court, and during the pendency of the appeal. In the present case all the grounds which were urged in review were, in fact urged before the Tribunal at the time when the tribunal decided the main application and they were also urged by the petitioner in the Special Leave Petition which was filed before this court. The Special Leave Petition has been dismissed. The same grounds cannot be again urged by way of a review petition by another party who was not a party in the main petition.

"11. According to the applicants certain documents though produced before the Tribunal were not noticed by the Tribunal in deciding the main matter. Even so once a judgment of a tribunal has attained finality, it cannot be reopened after the Special Leave Petition against that judgment has

been dismissed. The only remedy for a person who wants to challenge that judgment is to file a separate application before the Tribunal in his own case and pursuade the tribunal either to refer the question to a larger Bench or, if the tribunal prefers to follow its earlier decision, to file an appeal before the Tribunal's judgment and have the Tribunal's judgment set aside in appeal. Review is not an available remedy.

"12. Undoubtedly when the tribunal interprets Service Rules and Regulations, the interpretation so given may affect other members of that service past, present or future. One can understand a wider meaning in this context being given to the phrase "person aggrieved", thus enlarging the right of persons to intervene at the hearing before the Tribunal, or in appeal, or for filing a review petition. Nevertheless, this right must be exercised at the appropriate time and in accordance with law. A review petition must be within the scope of section 22 (3)(f) of the Administrative Tribunals Act read with Order 47 Rule and must comply with the rules framed under the Adminsitrative Tribunals Act. The present review applications are not within the principles laid down in Order 47 Rule 1. They also do not comply with the relevant rules. Rule 17 of the

Central Administrative Tribunal (Procedure) Rules, 1987 prescribes, inter-alia that no application for review shall be entertained unless it is filed within 30 days from the date of the receipt of the copy of the Order sought to be reviewed...."

"16.... If the tribunal decides to follow its earlier judgment the respondents in these applications can file petitions for leave to appeal if they so desire; and any other person aggrieved may also, with the leave of the court, apply for special leave to file an appeal. In the event of the Tribunal coming to a conclusion that its earlier judgment requires re-consideration, the tribunal can refer the question to a larger Bench. In either case the persons aggrieved can apply and intervene to put forward their point of view."

From the aforesaid decisions of the Supreme Court, it is evident that:-

(a) ordinarily a right of review is available only to those who are party to a case.

(b) in circumstances where the judgments may also affect other persons, who are not parties to the cases, such judgments being strictly not judgments in personam affecting only the parties to the

cases, a right of review should be available to the aggrieved persons with the leave of the Tribunal on the restricted grounds mentioned in Order 47 of the Code of Civil Procedure and above all if an application is filed within the period of limitation.

(c) the right of review of the decisions of the tribunal or court should be available only on limited grounds mentioned in Order 47 CPC and the principles contained therein have to be extended to the tribunal.

In view of the above, the Commission is of the considered opinion that section 22 (3)(f) of the Act should be amended to explicitly incorporate the right of review to an aggrieved person (who is not a party to the proceedings) with the leave of the Tribunal but restricted to the ground mentioned in Order 47 CPC. so far as the parties are concerned, the right of review is already secured by the said provision.

4.17 There should be a reform of the administrative justice system in order to ensure better standards of independence, accessibility/openness, expertise, representativeness, efficiency and accoutability.

CHAPTER -V

CUSTOMS, EXCISE AND GOLD (CONTROL) APPELLATE TRIBUNAL (CEGAT).

5.1 The CEGAT is constituted under Section 129 of the Customs Act, 1962 and by virtue of the definition of the "Appellate Tribunal" in clause (AA) of Section 2 of the Central Excise and Salt Act, 1944 read with Sections 35B, 35C and 35D of the said Act, the said Tribunal is also the Appellate Tribunal for the purpose of the Central Excise and Salt Act, 1944. This Tribunal , it is necessary to point out, is not constituted under Article 323B, but under the special enactments aforementioned which are in no way connected with Article 323B. Section 35L(b) of the Central Excise Act and Section 130E(b) of the Customs Act, 1962 provide for a direct appeal to the Supreme Court against the orders of the Tribunal in matters relating to determination of any question having a relation to the rate of duty payable or to the value of the goods for the purpose of assessment, hereinafter referred to for the sake of convenience, as classification and valuation respectively. In other matters, a reference is provided to the concerned High Court under Section 35G of the Central Excise Act and Section 130 of the Customs Act. As a matter of fact, not less than half of the matters which come before the CEGAT under both the enactments pertain either to the rate of

duty payable or to the value of the goods for the purpose of assessment. In this manner, a direct statutory appeal to the Supreme Court is provided against half the number of orders passed by the Tribunal under both the enactments and these matters appear to be more significant having regard to the stakes involved therein both for the Revenue as well as the assessees. In other matters decided by the Tribunal, recourse to High Court by way of reference has to be adopted. Even here, against any judgment delivered by the High Court on such reference, an appeal is provided to Supreme Court under Section 35L(a) of the Central Excise Act and Section 130E(a) of the Customs Act. Though these two enactments do not directly and specifically provide for an exclusion of judicial review by the High Court and the Supreme Court, they do so by necessary implication. By providing a direct appeal to Supreme Court in a good number of cases decided by the Tribunal, which remedy is a far better and a wider remedy than the remedy of judicial review available under Article 226 or 227 or under Article 32 of the Constitution of India and by providing for the reference to the High Court in other cases, the intention to exclude the right to judicial review by the High Court and the Supreme Court is abundantly manifested. The remedy of a reference to the High Court, a procedure prescribed by the Income-Tax Act, 1961 (as well as the repealed Indian Income-Tax Act, 1922), is a well-established procedure and no one has suggested that

the right to judicial review is available against the orders of the Income Tax Appellate Tribunal in addition to the remedy of reference to the High Court and the appeal to Supreme Court from the orders of the High Court.

The Law Commission is of the opinion that the function performed by the CEGAT is of crucial importance both from the point of view of the Revenue as well the assessee. The matters coming before the Tribunal involve huge stakes, sometimes running into tens and hundreds of crores. The Tribunal has also got the power to grant stay pending the appeal, vide the proviso to Section 35F of the Central Excise Act and the proviso to Section 129E of the Customs Act. If a stay is granted and the appeal is not decided by the Tribunal within a reasonably short time, it will result in prejudice both to the Revenue as well as to the Assessees. This is more so after the judgment of the larger Constitution Bench of the Supreme Court in Mafatlal Industries Ltd. v. Union of India 1997 (5) SCC 536, affirming and upholding the doctrine of unjust enrichment and the validity of (Amending) Act 40 of 1991 giving statutory recognition to the aforesaid doctrine. It is in the interest of the assessees in particular that the disputes relating to classification and valuation are disposed of as quickly as possible. The Law Commission has a feeling that the highly significant nature of the function performed by this

Tribunal has not been duly and sufficiently appreciated by those concerned and it is probably for this reason that adquate number of Benches have not been created by the government which is absolutely essential for the prompt disposal of the large number of appeals filed before the Tribunal. (As a matter of fact, the facts and figures made available by the Tribunal show that the filing is increasing with every passing year which is only adding to the problem of the huge backlog which has already accumulated.) In view of the fact that in a bulk of matters decided by this Tribunal, appeal lies to the Supreme Court directly under the two statutes aforementioned, it would not be unreasonable to infer that this Tribunal has been treated by the Parliament almost on par with the High Court. The status and dignity of this Tribunal deserves to be enhanced accordingly.

With a view to make this Tribunal a more effective instrument of law for achieving the objectives for which it has been constituted and for achieving the objectives underlying the Central Excise Act and the Customs Act, the following recommendations are made which the Commission hopes, will be given effect to, without any delay, by the Government of India. The recommendations are:-

(A) No person shall be appointed as the President of the Tribunal unless he is or has been the Chief Justice of a High Court. He must be a person reputed for his efficiency, integrity and hard work. Immediately upon his appointment he must be provided a residence in New Delhi consistent with his status besides other perquisites and amenities to which he was entitled as the Chief Justice of the High Court. The selection of the President should be made by a committee consisting of the Hon'ble Chief Justice of India and the two senior most Judges of the Supreme Court. As a matter of convention, it must be ensured that there is no time lag between the retirement of a President and the appointment of his successor. Only where a suitable sitting or retired Chief Justice is not available, should a senior sitting or retired High Court Judge with the requisite qualities be considered. An effective and efficient President would go a long way in improving the work-culture of the Tribunal - a fact borne out by experience.

(B) Section 129 of the Customs Act calls for an amendment. The appointment of the President of the Tribunal should be a direct appointment in the manner stated above, whereas section 129, as it stands now, contemplates appointing one of the Members of the Tribunal as the President thereof.

While the appointment of the Vice-President can be done from among the Members, the President of the Tribunal should be chosen directly from among the sitting or retired Chief Justices or retiring or retired senior Judges of the High Court.

(C) In the matter of appointment of Judicial Members of the Tribunal, an attempt should be made, as far as possible, to recruit Members of the Bar between the age of 45 and 50. They must be provided with an official residence as soon as possible upon their appointment/posting to a particular city and they should also be entitled to all the perquisites and amenities admissible to their office. Not making a suitable residence available almost immediately upon their posting to a place and driving them to seek private accommodation at exhorbitant cost acts as a disincentive to those considering joining this service. It is equally necessary to provide that these Judicial Members should be considered for appointment as Judges of the High Courts (of the State from which they hail) in the quota normally reserved for members of the subordinate judiciary and if for any reason this course is not found feasible or practicable, they may be considered under sub-clause (b) of clause 2 of Article 217 read with extension (aa) and/or (b) appended to the said clause. If this

assurance is held out, many members of the Bar may be attracted to this office, which may incidentally have the added advantage of making available persons of competence, who have acquired expertise in Central Excise and Customs matters to the High Courts.

The prompt recruitment and posting of Judicial and Administrative Members is again a necessity, which though an obvious requirement, has not really been honoured in practice. In this connection, the practice of taking District Judges on deputation to work as Judicial Members of the Tribunal should be encouraged. They should retain a lien in their parent service so that their chances of promotion or of appointment to the High Court are not jeopardised.

(D) In matters where a reference lies to the High Court under section 35G of the Central Excise Act and Section 130 of the Customs Act, the requirement of applying to the Tribunal for making a reference as provided by sub-section (1) of section 35G and sub-section (1) of section 130 respectively of the said enactments may be dispensed with. Section 35G and section 130 may be suitably amended providing that any person aggrieved with the decision of the Tribunal may apply to the High Court for directing the Tribunal

to refer the questions of law arising from the decision of the Tribunal. The time limitation for making such an application can be retained at six months as is now provided by sub-section (3) of the aforesaid sections. It must however be provided that a person so applying to the High Court should clearly state the questions of law which he seeks to raise and should also specify the paragraphs in the decision/judgment of the Tribunal relevant to the questions sought to be raised. Such a provision is necessary in view of the fact that the judgment of the Tribunal may deal with several other questions of law and fact.

(E) In every High Court there should at least be one Bench regularly hearing matters arising under the Income-Tax Act, Central Excise and Salt Act and the Customs Act. The matters arising under the latter two enactments should, as far as possible, be given precedence in the matter of hearing.

(F) Every Bench of the Tribunal should be headed by a Vice-President. For this purpose, there must be as many Vice-Presidents as there are Benches of the Tribunal. At any rate, the important centres like Mumbai, Ahmedabad, Chennai and Calcutta should necessarily have a Vice-President each.

(G) The number of Benches should be commensurate with the work in the Tribunal. Since every Member/Bench of the Tribunal is expected to dispose of a particular number of cases every year, the number of Benches should be determined on the above basis and provided for. On the present pendency, there ought to be at least 20 to 22 Benches, in all. As stated hereinabove, the filing in the Tribunal is going up with every passsing year - and not decreasing.

(H) Special care should be taken while appointing the Senior Departmental Representatives (SDRs) and Junior Departmental Representatives (JDRs). Their role is no less important. Persons of competence and integrity alone should be designated as such.

(I) The recommendations made regarding Central Administrative Tribunal under paragraphs 4.9; 4.10; 4.11 and 4.13, supra, shall also be extended to CEGAT also.

CHAPTER - VI

INCOME-TAX APPELLATE TRIBUNAL (ITAT)

6.1 So far as ITAT is concerned, the Commission is of the opinion that no change is called for in the working of this Tribunal since it has been working satisfactorily for the last several decades. There is however one measure of improvement which we wish to propose, namely, the dispensing with of the requirement of applying to the Tribunal in the first instance for making a reference to the High Court as provided by sub-section (1) of section 256 of the Income-Tax Act, 1961. The procedure can be simplified and a lot of time can be saved by providing that a person aggrieved with the decision/judgment of the Tribunal may apply to the High Court straightway requesting the High Court to direct the Tribunal to state the questions of law which according to him (the applicant) arise from the decision of the Tribunal. The present practice of clearly stating the questions of law which a person wants to raise must be continued. The applicant must be further directed to specify the paragraphs in the decision of the Tribunal which are relevant to each of the questions of law raised by him, separately. It should also be provided that such applications should be listed before the appropriate Bench in the High Court as soon as they are ready for hearing. This is being emphasised for the reason that in

certain High Courts, applications under section 256(2) are kept pending for years together before they come up for hearing.

6.2 It has been observed that the same question of law is involved in the case of many assessees every year repeatedly in the taxation matters, till the question of law is finally decided by the higher courts. This results in a geometric increase in the number of cases on similar questions and also leads to uncertainty in respect of the payment of taxes. In the event of a decision holding against the assessee on those recurring questions of law, the cumulative interest on taxes payable, under various heads as determined by the court to be payable by the assessee, sometimes reach very high figures, which may give a jolt to the industry and even lead to the closure of the industry in some cases. Therefore, justice demands that the recurring disputes on account of common questions of law should be finally settled at the earliest.

The solution to this problem may lie only if adequate attention of ITAT is drawn to such common issues. Therefore, the ITAT may, through the assistance of research officers specified under paras 4.9 and 4.10, supra, invite applications regarding such common issues/recurring issues from the assessee/appellants or from the Repondent/Revenue department by advertising from

time to time in newspapers and on notice boards. The research officers may also delve into court files to find out such common questions of law and put them up before the ITAT. The Tribunal should decide such issues on a priority basis. In their judgment, the Tribunal may refer to the fact of taking up the common issue on an expeditious basis, so that the High Court may also take it up on a priority basis. Similarly, the High Court may mention in their judgment about taking up the matter on a priority basis, so that in case the matter goes to the Supreme Court, it may also decide the case expeditiously to settle the matter.

6.3 The recomendations made regarding Central Administrative Tribunal under paragraphs 4.9; 4.10; 4.11 and 4.13, supra, shall also be extended to ITAT also.

CERTAIN GENERAL OBSERVATIONS

It may be mentioned that both in the first questionnaire and the revised questionnaire as well as in the suggestions received pursuant to these questionnaires, one of the major issues debated was the establishment of a National Tax Court (for direct taxes) and a National Court of Indirect Taxes (for the purposes of Central Excise and Salt Act and Customs Act) while excluding the jurisdiction of the High Court altogether in these matters. This idea is no longer relevant first for the reason that both under the Central Excise Act and the Customs Act, a direct appeal to the Supreme Court is provided for in important matters viz., classification and valuation and secondly because of the decision of the Supreme Court in L.Chandra Kumar. According to this decision, whose essential features have already been detailed hereinabove, while such Tribunals can be created, the judicial review of the High Courts under Articles 226 and 227 and of the Supreme Court under Article 32 cannot be excluded, which means that the orders of such National Courts would still be subject to judicial review by various High Courts in the country, unless a direct appeal is provided to the Supreme Court against the orders of such National Tax Court/National Court of Indirect Taxes, which course would militate against the very raison d'etre of the idea. And if no such appeal is provided, someone may legitimately say

that the remedy of judicial review even against such National Tribunals cannot be excluded. For the above reasons, the said idea has not been pursued in this Report so far as these tribunals are concerned.

CHAPTER-VII

Conclusions:

7.1 On the basis of the discussions contained in the preceding Chapters, the Commission is of the considered opinion that the following radical changes need to be taken immediately to achieve the reforms in the working of the Central Administrative Tribunal, Central Excise and Gold (Control) Appellate Tribunal and Income Tax Appellate Tribunal to attain a sound justice delivery system which is a sine qua non for the efficient governance of a country wedded to the rule of law.

Thus the substance of the recommendations made in the preceding Chapters is culled out below:-

7.2 The Law Commission makes the following recommendations insofar as the administrative tribunals constituted under the Administrative Tribunal Act, 1985 enacted with reference to Article 323 of the Constitution of India:

(a) With a view to improve the efficiency of the administrative tribunals, the present practice of appointing retired or about to retire District Judges as judicial members is not entirely satisfactory. These District Judges do not deal

with service matters during their judicial service and since they are appointed towards the end of their career, there is not much time - and in some of them, inclination - to learn this branch of the law viz., service jurisprudence, they get hardly two to three years on the job. (It may be remembered that in the light of the judgment of the Supreme Court in All India Judicial Officers Association case, the age of retirement of the subordinate judiciary is now 60, in effect. It is obvious that those who are not allowed to continue beyond 58 years in view of their unsatisfactory record, would not be considered or appointed as members of the Administrative Tribunal). In this view of the matter, an attempt should be made to recruit members of the Bar between the ages of 45 and 50 who will have a longer period available to them to prove their mettle. At the same time, it is necessary, with a view to provide an incentive to these judicial members that they should be considered by the High Court (of the State from which they hail) for appointment as judges of the High Court in the quota normally reserved for members of the subordinate judiciary and if for any reason this course is not found feasible or practicable, they may be considered under sub-clause (b) of clause (2) of Article 217 read with Explanation (aa) and/or (b) appended to the

said clause. If this assurance is held out, many members of the Bar may be attracted to this office. It would also mean that persons of competence, who have (acquired) expertise in service matters would be available to the High Court. Section 8 of the A.T.Act, 1985 may accordingly be amended. In the case of members, the initial term should be made ten years, renewable for a further period of five years.

(b) The practice of appointing retired or about to retire High Court Judges as Chairman of State Administrative Tribunals has also not proved happy. Since the age of retirement for these posts is 65, the persons so appointed hardly get a three-year term or sometimes even less - in office. It would be more appropriate if the sitting Judges of the High Courts, who have got at least not less than one year to go before retirement from the High Court, should be considered for appointment to these posts. In this manner, they will have at least a four-year term which would give them sufficient time to settle down in the office and do some productive work. Ordinarily, an Administrative Member should not be appointed as the Vice-Chairman of CAT or as the Chairman of SAT.

(paragraph 4.5(b), supra)

(c) An appeal should be provided to the High Court, to be necessarily heard by a Division Bench against the orders of the Administrative Tribunal. The appeal shall be to that High Court within whose territorial

jurisdiction the Tribunal rendering the judgment to be appealed against, is located. This measure removes one of the serious and principal criticisms against the judgment of the Supreme Court in L.Chandra Kumar viz., that there cannot be a judicial review of an order passed by an authority in exercise of its power of judicial review. The Tribunal's order, according to the said decision, is in exercise of a power of judicial review; if so, this order cannot be the subject matter of a judicial review once again. Judicial review, by its very nature, content and concept, is only against administrative or quasi-judicial action of administrative and other authorities - say the critics. The remedy of appeal should be provided not only against the final orders but also against the interlocutory orders of the Tribunal.

(paragraph 4.5(c), supra)

(d) As an alternative to the recommendation contained in (c) above, it is recommended that the Government may constitute a National Appellate Administrative Tribunal to entertain appeals against the orders passed by the Adminsitrative Tribunals. Such a National Apellate Tribunal shall have Benches in all important centres in the country, if not in the capital of every State, generally consistent with the pattern of the High Court. Such an appellate forum should be headed by a former

Chief Justice of a High Court or a former Judge of the Supreme Court and whose other members shall be either retired Judges of the Supreme Court or retired Chief Justices of the High Courts as the case may be. An appeal should be provided directly to the Supreme Court and to the Supreme Court alone against the orders of such an Appellate Tribunal. Such a court on the lines of the National Consumer Dispute Redressal Commission created by the Consumers Protection Act, 1986 would ensure that the power under Article 226 and 227 of the Constitution is not invoked against the orders of the appellate forum. Once an appeal is provided by the statute to the Supreme Court against the orders of the appellate forum, it can be stated with certainty that the High Courts would not interfere with the orders of the appellate forum. Such a course would also be consistent with the provisions of the Customs Act and the Central Excise Act which provided direct appeal to the Supreme Court against the orders of CEGAT in matters relating to classification and valuation. If such an Appellate Tribunal is constituted, the writ petitions pending in the several High Courts against the orders of the Administrative Tribunals shall stand transferred to the appropriate Bench of the Appellate Tribunal and be dealt with in accordance with law. It is obvious that subject to the appeal to the Supreme Court the orders of the National Appellate Tribunal shall be final.

(paragraph 4.8, supra)

(e) The need for imparting training to personnel manning the tribunal is essential as discussed in Chapter IV.

(paragraph 4.6, supra)

(f) In order to combat and check deterioration in moral values, corruption and nepotism which are on the increase in the selection process, the Commission is of the considered view that Judicial Members (other than the Chairman and Vice-Chairman) to man the tribunal should be selected through undergoing the process of a high standard written examination followed by personal interview. It is only if he qualifies the written examination that he should be considered for personal interview. The percentage of marks allocated for written examination and personal interview can be 85% and 15% respectively. Further more, the evidentiary record of personal interview and written test should be maintained at least for a period of two years.

According to section 6(3)(b) of the Act, a Judicial Member has to be selected from two categories vis. (a) a person who has been or is qualified to be a judge of the High Court and (b) a person who has been a member of the Indian Legal Service and has held a post in Grade-I of that service for at least three years. In

view of the fact that the Commission is recommending the selection of Judicial Members through a process of a high standard written examination followed by personal interview, it is necessary that there should be a wider choice for selecting meritorious persons as Judicial Members. Accordingly, all law officers (irrespective of their designation) holding, for at least three years, a post equivalent to the post of Joint Secretary to the Government of India or any other post under the Central or State Government or in the public undertakings owned or controlled by the Central/State Government or carrying a scale of pay which is not less than that of a Joint Secretary to the Government of India, should be made eligible for competing in the examination and selection for the post of a Judicial Member. Accordingly, it is recommended that Section 6(3)(b) of the Act should be substituted by the following words:-

> "Law officers (irrespective of their designation) holding for at least three years, a post equivalent to the post of Joint Secretary to the Government of India; or holding for at least three years any other post under the Central or State Government or in the public undertakings owned or controlled by the Central/State Government, carrying a scale of pay which is not less than

that of a Joint Secretary to the Government of India."

(para 4.7, supra)

(g) It is essential that for the expeditious disposal of cases, all cases which raise one or more common questions of law and on the basis of which the cases can be disposed of by a common judgment, should be grouped together and heard together. In this spirit, the Central Administrative Tribunal/State Administrative Tribunal and the proposed appellate forum should appoint research officers to assist the respective tribunals in this regard, in finding out the common cases and the judgments already pronounced by the courts which are binding on the cases pending. These officers will definitely assist the tribunal in increasing the expertise and efficiency of the tribunal and thus realise these objectives. CAT/SAT and the proposed forum may from time to time invite applications from the litigants/opposite parties through advertisement on the notice boards/papers. The Research Officer may then scrutinise the claim of the applicant and put up the research note to the Bench for passing the appropriate orders. The Forum may then issue notice to the parties before disposing of the cases as per the judgment already pronounced by the higher court and binding upon it. Similarly, an exercise may be done by

the research officer for grouping the pending cases which can be heard together.

(paragraphs 4.9 and 4.10, supra)

(h) Disposal of cases can be done by the tribunal on the basis of arguments filed by the parties even through post in the manner discussed earlier.

It has been observed that litigants and their advocates many a time raise disputes before the superior courts that though a decision of the higher court was cited before the lower court, yet it failed to discuss the same in its judgment. In order to advance the cause of the administration of justice so that the rule of law can be further strengthened, it is felt that it may be provided in the procedure followed by the tribunal that before the beginning of the arguments, both the parties may be required to file their written arguments and counter arguments, if they desire to do so, and at the conclusion of the arguments both the parties be required to file a list of the cases cited by them before the tribunal during the course of the hearing. Such a course will avoid the raising of any dispute on those issues as well as compel the presiding officer to adhere to the rule of law laid down by the superior court and avoid

harassment to the litigants and confusion in the administration of law.

(paragraph 4.11, supra)

(i) Constitution of Benches of retired members of the tribunals can be utilised for disposal of old matters pending before the tribunals without involving any additional cost on building, libraries etc. in the manner discussed earlier.

(paragraph 4.12, supra)

(j) A proper litigation policy and machinery should be evolved by the Government or Public Sector Undertakings to curb litigation.

(paragraph 4.13, supra)

(k) Cost for raising frivolous defences should be quantified by the tribunal and awarded to the opposite party as this will curb the tendency of filing frivolous cases.

(paragraph 4.14, supra)

(l) There is an essential need to evolve a mechanism for nipping in the bud the conflicting interpretations by the CAT/High Court in the manner discussed above.

(paragraph 4.15, supra)

(m) The Commission has made recommendations regarding the locus standi of an aggrieved party to apply for review of the order with the leave of the Tribunal and the grounds on which review can be sought by a person not a party to the decision but affected by it.

(paragraph 4.16, supra)

(n) There should be a reform of the administrative justice system in order to ensure better standards of independence, accessibility/openness, expertise, representativeness, efficiency and accoutability.

(paragraph 4.17, supra)

7.3 The recommendations of the Commission in so far as the Central Excise and Gold (Control) Appellate Tribunal are as follows:-

(a) No person shall be appointed as the President of the Tribunal unless he is or has been the Chief Justice of a High Court. He must be a person reputed for his efficiency, integrity and hard work. Immediately upon his appointment he must be provided a residence in New Delhi consistent with his status besides other perquisites and amenities to which he was entitled as the Chief Justice of the High Court. The selection of the President should be made by a committee consisting of the Hon'ble Chief Justice of India and the two senior most Judges of the Supreme Court. As a matter of convention,

it must be ensured that there is no time lag between the retirement of a President and the appointment of his successor. Only where a suitable sitting or retired Chief Justice is not available, should a senior sitting or retired High Court Judge with the requisite qualities be considered. An effective and efficient President would go a long way in improving the work-culture of the Tribunal - a fact borne out by experience.

(paragraph 5.1.A, supra)

(b) Section 129 of the Customs Act calls for an amendment. The appointment of the President of the Tribunal should be a direct appointment in the manner stated above, whereas section 129, as it stands now, contemplates appointing one of the Members of the Tribunal as the President thereof. While the appointment of the Vice-President can be done from among the Members, the President of the Tribunal should be chosen directly from among the retired Chief Justices or retiring or retired senior Judges of the High Court.

(paragraph 5.1.B, supra)

(c) In the matter of appointment of Judicial Members of the Tribunal, an attempt should be made, as far as possible, to recruit Members of the Bar between the age of 45 and 50. They must be provided with official residence as soon as possible upon their

appointment/posting to a particular city and they should also be entitled to all the perquisites and amenities admissible to their office. Not making a suitable residence available upon their posting to a particular place and driving them to seek private accommodation at exhorbitant cost acts as a disincentive to those considering joining this service. It is equally necessary to provide that these Judicial Members should be considered for appointment as Judges of the High Courts (of the State from which they hail) in the quota normally reserved for members of the subordinate judiciary and if for any reason this course is not found feasible or practicable, they may be considred under sub-clause (b) of clause 2 of Article 217 read with extension (aa) and/or (b) appended to the said clause. If this assurance is held out, many members of the Bar may be attracted to this office which may incidentally have the added advantage of making available persons of competence, who have acquired expertise in Central Excise and Customs matters to High Courts.

The prompt recruitment and posting of Judicial and Administrative Members is again a necessity, which though an obvious requirement, has not really been honoured in practice. In this connection, the practice of taking District Judges on deputation to work as Judicial Members

of the Tribunal should be encouraged. They should retain a lien in their parent service so that their chances of promotion or of appointment to the High Court are not jeopardised.

(paragraph 5.1.C, supra)

(d) In matters where a reference lies to the High Court under section 35G of the Central Excise Act and Section 130 of the Customs Act, the requirement of applying to the Tribunal for making a reference as provided by sub-section (1) of section 35G and sub-section (1) of section 130 respectively of the said enactments may be dispensed with. Section 35G and section 130 may be suitably amended providing that any person aggrieved with the decision of the Tribunal may apply to the High Court for directing the Tribunal to refer the questions of law arising from the decision of the Tribunal. The time limitation for making such an application can be retained at six months as is now provided by sub-section (3) of the aforesaid sections. It must however be provided that a person so applying to the High Court should clearly state the questions of law which he seeks to raise and should also specify the paragraphs in the decision/judgment of the Tribunal relevant to the questions sought to be raised as such a provision is necessary in view of

the fact that the judgment of the Tribunal may deal with several other questions of law and fact.

(paragraph 5.1.D, supra)

(e) In every High Court there should at least be one Bench regularly hearing matters arising under the Income-Tax Act, Central Excise and Salt Act and the Customs Act. The matters arising under the latter two enactments should, as far as possible, be given precedence in the matter of hearing.

(paragraph 5.1.E, supra)

(f) Every Bench of the Tribunal should be headed by a Vice-President. For this purpose, there must be as many Vice-Presidents as there are Benches of the Tribunal. At any rate, the important centres like Mumbai, Ahmedabad, Chennai and Calcutta should necessarily have a Vice-President each.

(paragraph 5.1.F, supra)

(g) The number of Benches should be commensurate with the work in the Tribunal. Since every Member/Bench of the Tribunal is expected to dispose of a particular number of cases every year, the number of Benches should be determined on the above basis and provided for. On the present pendency, there ought to be at least 20 to 22 Benches, in all. As stated hereinabove, the

filing in the Tribunal is going up with every passsing year - and not decreasing.

(paragraph 5.1.G, supra)

(h) Special care be taken while appointing the Senior Departmental Representatives (SDRs) and Junior Departmental Representatives (JDRs). Their role is no less important. Persons of competence and integrity alone should be designated as such.

(paragraph 5.1.H, supra)

(i) The recomendations made regarding Central Administrative Tribunal under paragraphs 4.9; 4.10; 4.11 and 4.13, supra, shall also be extended to CEGAT also.

(paragraph 5.1.I, supra)

7.4 So far as ITAT is concerned, the Commission is of the opinion that no change is called for in the working of this Tribunal since it has been working satisfactorily for the last several decades. There is however one measure of improvement which we wish to propose, namely, the dispensing with of the requirement of applying to the Tribunal in the first instance for making a reference to the High Court as provided by sub-section (1) of section 256 of the Income-Tax Act, 1961. The procedure can be simplified and a lot of time can be saved by providing that a person aggrieved with the decision/judgment of the

Tribunal may apply to the High Court straightway requesting the High Court to direct the Tribunal to state the questions of law which according to him (the applicant) arise from the decision of the Tribunal. The present practice of clearly stating the questions of law which a person wants to raise must be continued. The applicant must be further directed to specify the paragraphs in the decision of the Tribunal which are relevant to each of the questions of law raised by him, separately. It should also be provided that such applications should be listed before the appropriate Bench in the High Court as soon as they are ready for hearing. This is being emphasised for the reason that in certain High Courts, applications under section 256(2) are kept pending for years together before they come up for hearing.

7.4.1 It has been observed that the same question of law is involved in the case of many assessees every year repeatedly in the taxation matters, till the question of law is finally decided by the higher courts. This

results in a geometric increase in the number of cases on similar questions and also leads to uncertainity in respect of the payment of taxes. In the event of a decision holding against him on those recurring questions of law, the cumulative interest on taxes payable under various heads as determined by the court to be payable by the assessee, sometimes reach very high figures, which may give a jolt to the industry and even lead to the closure of the industry in some cases. Therefore, justice demands that the recurring disputes on account of common questions of law should be finally settled at the earliest.

The solution to this problem may lie only if adequate attention of ITAT is drawn to such common issues. Therefore, the ITAT may, through the assistance of research officers specified under paragraphs 4.9 and 4.10, supra, invite applications regarding such common issues/recurring issues from the assessee/appellants or from the Repondent/Revenue department by advertising from

time to time in newspapers and on notice boards. The research officers may also delve into court files to find out such common questions of law and put them up before the ITAT. It may decide such issues on a priority basis. In their judgment, the Tribunal may refer to the fact of taking up of the common issues on an expeditious basis, so that the High Court may also take it up on a priority basis. Similarly, the High Court may mention in its judgment about the taking up of the matter on a priority basis, so that in case the matter goes to Supreme Court, it may also decide the case expeditiously to settle the matter.

(para 6.2, supra)

7.4.2 The recommendations made regarding Central Administrative Tribunal under paragraphs 4.9; 4.10; 4.11 and 4.13, supra, shall also be extended to ITAT also.

(para 6.3, supra)

We recommend accordingly.

(MR.JUSTICE B.P.JEEVAN REDDY)(RETD)
CHAIRMAN

(MS.JUSTICE LEILA SETH)(RETD) (DR.N.M.GHATATE) (R.L.MEENA)

MEMBER MEMBER MEMBER - SECRETARY

DATED: 29th July, 1998

ANNEXURE - I

K. N. SINGH
(FORMER CHIEF JUSTICE OF INDIA)

CHAIRMAN
LAW COMMISSION
GOVERNMENT OF INDIA
SHASTRI BHAWAN
NEW DELHI - 110 001
Tel. Off. 38 44 75
Res. 3019465

D.O.No.6(3)(21)/93-LC(LS)

April 29, 1994

Dear Chief Justice,

I have addressed you a letter alongwith questionnaires for eliciting your valued opinion regarding the functioning of Central Administrative Tribunal and Income Tax Appellate Tribunal and Customs, Excise and Gold Control (Appellate) Tribunal. The details are given in the letter and the questionnaires.

I would be grateful if you could kindly circulate the letter and the questionnaires to the Hon'ble Judges of your Court to enable them to express their views in the matter. I am aware this will cause you some inconvenience but the Commission will not be able to complete the in-depth study of the matter without your valued co-operation.

With regards,

Yours sincerely,

(K.N. SINGH)

To

Chief Justices of All High Courts

D.O. No. 6(3)(21)/93-LC(LS) April 29, 1994

Dear

By the 42nd Amendment Act, 1976 the Constitution was amended and Article 323-A and 323-B were inserted to provide by law empowering the Parliament and the State Legislature to enact laws for the constitution of Administrative Tribunals for the adjudication and control of disputes and complaints relating to the service matters of public servants belonging to the Union or the States. The Parliament enacted the Administrative Tribunal Act, 1985 for constituting the Central Administrative Tribunal. Some of the States have also constituted State Administrative Tribunals for the adjudication and trial of the service matters. These tribunals exercise the jurisdiction and power which were earlier exercised by the courts including the High Court and their orders are not amenable to judicial review by the High Courts and the only remedy available to the aggrieved party against the order of the Tribunal is under Article 136 of the Constitution. The Chairman of these tribunals is a retired Judge or Chief Justice of a High Court and the Vice Chairman is Secretary to the Government or equivalent post holder with a requisite experience. The selection of the Chairman, Vice-Chairman and the Members is made by a committee headed by the Chief Justice or his nominee Judge from the Bench. Ordinarily the Tribunal consists of a Judicial Officer and an Administrative Member and its administrative control is under the executive. Orders of these Tribunals are final subject to a Special Leave Petition under Article 136 of the Constitution.

As regards the Income-tax Appellate Tribunal, its orders are subject to the judicial review of the High Court and under Section 256 of the Income Tax Act references are made to the High Court on questions of law. Since a number of references in tax matters were kept pending for long years before the High Court, the Revenue faced great difficulty in collecting the dues from the assessees. The Law Commission by its 115th Report made recommendation for the constitution of a Central Tax Court with all India jurisidction to introduce an all India perception in the matter of implementing of tax law and eliminating conflicting decisions and delay at the High Court level in reference cases. The Tax Reforms Committee set up by the Government of India has also recommended for the setting up of a Central Tax Court. The orders of the proposed Central Tax Court will not be subject to judicial review by the High Court.

Under Section 129 of the Customs Act, Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT) has been constituted. Its orders are final subject to an order made on reference by the High Court under Section 130. The appointment of the President of CEGAT and its functioning came up for consideration before the Supreme Court in R.K. Jain v. The Union of India, AIR 1993 SC 1769. While considering the question of appointment, selection and functioning of the CEGAT, the Court referred to the appointment and functioning of other tribunals also including the CAT and Income Tax Appellate Tribunal. The Supreme Court observed:

> "The dispensation of justice by the Tribunals is much to be desired. But judicial adjudication is a special process and would efficiently be administered by advocate Judges. The remedy of appeal by

special leave under Art.136 to the Supreme Court also proved to be costly and prohibitive and far-flung distance too is working as constant constraint to litigant public who could ill afford to reach the Supreme Court. An appeal to a Bench of two Judges of the respective High Courts over the orders of the Tribunals within its territorial jurisidction on questions of law would assuage a growing feeling of injustice of those who can ill afford to approach the Supreme Court. Equally the need for recruitment of members of the Bar to man the Tribunals as well as the working system by the Tribunals need fresh look and regular monitoring is necessary. Except body like the Law Commission of India would make an indepth study in this behalf including the desirability to bring CEGAT under the control of law and justice department in line with Income Tax Appellate Tribunal and to make appropriate urgent recommendations to the Govt. of India who should take remedial steps by an appropriate legislation to overcome the handicaps and difficulties and make the tribunals effective and efficient instruments for making Judicial review efficacious, inexpensive and satisfactory."

Proceeding further the Supreme Court observed that these tribunals are not wholly independent bodies like courts in view of their constitution, of members and the administrative control over them by the executive. The Supreme Court directed the Law Commission of India to undertake an intensive and extensive study in regard to the constitution of the tribunals under the various statutes with a view to ensuring their independence so that the public confidence in such tribunals may increase and the quality of their performance may improve.

Pursuant to the directions of the Supreme Court the Law Commission of India has undertaken indepth study of the tribunals with a view to submit its suggestions to the Government to make the functioning of the tribunals effective and efficient and provide speedy and inexpensive justice to the litigant public. Even though a number of tribunals are functioning, the Law Commission has for the present confined its exercise with regard to administrative tribunals dealing with service matters and the Income Tax Appellate Tribunal and the CEGAT. In this context the Commission has prepared two sets of questionnaires, one relating to the functioning of the service tribunals and the other relating to ITAT and CEGAT, to elicit views of the Hon'ble Judges, lawyers, jurists, academicians and officers of the department, as their response would provide valuable assistance to the Commission in formulating its recommendations. We are enclosing a copy of the two questionnaires to you for your kind perusal and study.

I would, therefore, request you to kindly spare some of your precious time in giving your valued opinion to the issues raised in the questionnaire at your earliest convenience, preferably within one month.

Looking forward to your cooperation.

With regards,

Yours sincerely,

QUESTIONNAIRE ON SERVICE TRIBUNALS

1. Are you satisfied with the functioning of the Central and State Administrative Tribunals? If not, kindly state your reasons for the same.

2(a). Do you think that the present system of constitution of the Tribunals having Judicial and Administrative Members is satisfactory and working efficiently? If not, please give your reasons and suggestions.

2(b). Do you agree with the suggestion that these tribunals should be manned only by the Judges and judicial officers to the exclusion of the administrative members? If so, state your reasons.

3. Do you think that the service tribunals as they are constituted presently are satisfactorily catering to the needs of the litigants? Is it correct to say that the tribunals as constituted at present, are good substitutes for the High Courts? If not, kindly state your reasons.

4(a). At present there is no appeal against the order of the tribunal but appeals are straightaway being filed before the Supreme Court under

Article 136 of the Constitution which is increasing the workload on the apex constitutional court. Should this system be continued? If not, what modification you would suggest in this regard.

4(b). Any party filing appeal before Supreme Court under Article 136 of the Constitution against the order of the tribunal has to incur exorbitant cost and even for trivial service matters arising out of disputes relating to increment, seniority, promotion, interpretation of service rules etc., a litigant has to travel to Delhi from far off places by incurring considerable cost. Does this requlre a change in the system by devising any other appellate forum? If so, in what manner?

5(a). Do you agree with the suggestion that there should be one appeal on facts as well as on questions of law against orders of the tribunal? If so, before which authority, the High Court, the Supreme Court or a separate Appellate Tribunal.

5(b). Do you agree that appeals against the order of tribunals should be maintainable before the High Court on questions of fact and law and in order to ensure speedy disposal the High Courts should be required to constitute permanent service benches for the Central Government and the State Government servants to deal with the service matters exclusively?

5(c). If you do not agree with the appeal being filed before the High Court, do you agree with the suggestion for the constitution of appellate tribunals with Benches on regional basis to entertain and hear appeal against the orders of the tribunals?

6. Do you agree with the view that the multiplicity of the tribunals is destructive of the uniformity of law in India? If so, please state your reasons.

7. Do you agree with the suggestion that the selection of Chairman/Vice-Chairman and Members of the tribunal, be made by the Chief Justice of India in case of CAT and in the case of SAT by the Chief Justice of respective High Court or a Committee appointed by the respective Chief Justice. If not, please state your reasons.

8. Do you agree with the suggestion that the Administrative Ministry for the CAT and SAT should be Ministry of Law?

9. Do you suggest any change in the definition of "service matters"?

10. Have you any other suggestions to make?

ADDITIONAL QUESTIONNAIRE ON SERVICE TRIBUNALS

Whether the existing provisions under Section 6 read with Section 8 of the Administrative Tribunals Act, 1985, prescribing qualification for appointment of a Judicial Member that "a person is, or has been, or is qualified to be a Judge of a High Court .....

"and he shall not hold the office after he has attained .....

(b) in the case of Member, the age of sixty two years."

provide any incentive to a working High Court Judge to join the CAT?

1(a) Whether the words "or is qualified to be a Judge of the High Court" in the aforequoted section 6, have advanced the objective of making the present forum of CAT, really a substitute of High Court?

1(b) Whether the provisions under Section 6 of the Act making persons other than the High Court Judges eligible for appointment have maintained the standard of the fora of CAT regarding its efficiency, effectiveness, efficacy as that of a High Court not only in form and dejure but in content and de facto?

1(c) Should the existing administrative Members be only assessors or continue to be members of the CAT?

2. Do you agree with the suggestion that existing justice delivery system through CAT and SAT has inspired faith and confidence in litigants? If not, please elaborate causes.

3. Whether in your opinion, the members of Tribunal enjoy the repute of independence from executive pressures or influence, fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which they belong?

4. Whether there should be a statutory forum to keep under review the constitution and working of the tribunals: also to consider and report on such particular matters and may be referred to such fora? If so, what should be the nature of the composition of the said forum?

-: Vide a :-

QUESTIONNAIRE ON INCOME-TAX AND CEGAT TRIBUNALS

1. Do you agree with the suggestion that existing justice delivery system through CEGAT/ITAT has inspired faith and confidence in litigating public that these are competent and expert mechanism with judicial approach and objectivity? If not, please elaborate causes/reasons.

2. Whether in your opinion, the members of the Tribunal enjoy the repute of independence from executive pressures or influence, fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which they belong?

3. Composition:

(a) Do you think that the present composition of the Tribunals whereunder one Member is a Judicial Member and the other is a non-judicial one, is sound in principle and satisfactory to secure the ends of justice? Please give reasons for your view and suggestions, if any.

(b) Would you agree to the suggestion that the Tribunals in question should consist of exclusively persons with judicial experience?

(c) Whether the existing technical members/accountant members under the CEGAT or ITAT respectively be only assessors or continue to be Members of the Tribunals?

(d) In regard to judicial members, what, in your opinion, should be the minimum qualifications or experience requisite for appointment to the Tribunals?

(e) Rule 10 of the CEGAT Members (Recruitment and Conditions of Service) Rules, 1987 prescribes qualifications for

....2....

appointment as Member and President, it states:

"serving judge of a High Court....shall hold office as President.....till he attains the age of 62 years....."

The Rule does not provide any incentive to a serving High Court Judge to join the CEGAT in view of constitutional provision under Article 217 that he holds office until he attains the age of 62 years. This runs counter to common inclination why a sitting judge would opt to serve CEGAT as its President, if he is to retire at the same age without any benefit. In your opinion, what suitable changes should be made to make the terms and conditions of service more attractive so that sitting High Court Judges may opt for appointment as the President of the CEGAT and even for post of Member of the CEGAT to raise its standard.

(e)(i) Would you suggest, in the light of the above, that, as in the case of the Central Administrative Tribunal (CAT), the retiring age of the President and Vice-President should be raised to 65 years while in the case of other members it may continue at 62 years?

(ii) As a corollary to the above, would you suggest that the post of President and/or Vice-President of these Tribunals should be restricted only to a sitting/or retired Judge of a High Court or would you make it available for promotion to judicial and/or technical or accountant Members of the Tribunals as well? Would you restrict the eligibility of Members only to the posts of Vice-President and that too only to a proportion of such posts?

.....3...

(f) Whether the existing section 129(2) of the Customs Act, 1962 providing for qualifications of a judicial member that -

> "A judicial member shall be a person who has for at least ten years held a judicial office in the territory of India or who has been a member of the Central Legal Service and has held a post in Grade I of that service or any equivalent or higher post for at least three years, or who has been an advocate for at least ten years....."

and similarly section 252(2) of the Income-Tax Act, 1961, need amendment in the context of the qualifications of the President of the CEGAT quoted above.

Do you agree that merely raising the status of the President of the Tribunals is not sufficient but the status of the members of the Tribunals as well should be raised correspondingly?

Considering that two of the three qualifications referred to earlier are also qualifications which make a person eligible to be considered for appointment as a High Court Judge, in what way do you consider it possible to raise the status of the members consistent with the status to be prescribed for the President and/or Vice-President."

4. Whether a litigant is able to get his case decided expeditiously? If not, how much period is normally consumed for final disposal before the Tribunals?

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5. Administrative Authority:

Do you agree that there should be an authority to have administrative control with power to issue administrative instructions in the functioning of the Tribunals.

If so, which authority, you would prefer: The Supreme Court of India/Ministry of Law/Ministry of Finance of Government of India.

Please indicate reasons for your preference.

6. Which authority should hold selection of Chairman, Vice-Chairman and Members of the Tribunals in question?

(a) The Chief Justice of India, or

(b) a Committee appointed by the Chief Justice of India, or

(c) the Central Government.

(6A) Do you agree that whichever authority for selection is constituted, it should be in charge of selection of all members - both judicial and technical members - of the Tribunals?

(6B) Should such Selection Board be also constituted as Promotion Committee to decide, from time to time, on the promotion of members of the Tribunal as Vice-President/President, if eligible under the rules?

(6C) Would you suggest any other powers to the Selection Board in matters of administration of the Tribunal?

7. Appeals: General

Should there be a provision for second appeal against the order of Tribunal?

(i) If so, should the second appeal be on facts as well as on law or only on questions of law. Please indicate your reasons.

.....5...

(ii) If you suggest an appeal against the order of the Tribunal should lie, what in your opinion, should be the forum for appeals against the judgments of the Tribunals in question? Would you favour an appeal to the -

(a) Supreme Court,

(b) High Court,

(c) any other National Tax Court/Appellate Tribunal to be newly constituted?

8. Do you agree with the view that procedure for reference by the Tribunal to the High Court (under Section 256, Income-Tax Act, 1961; Section 130 of the Customs Act, 1962) should be abrogated, instead appeal should lie to the High Court on substantial questions of law against the order of the Tribunal.

8A. Another suggestion is that a partial abrogation of the reference procedure - by eliminating the need to apply to the Tribunal for reference to the High Court in the first instance and, on failure, to apply to the High Court for a mandamus - and substituting it by a simple procedure of seeking a direction from the High Court for a reference only on substantial questions of law arising out of the Tribunal's order would -

(i) eliminate a step in the present law which only causes delay and is perhaps unnecessary; and

(ii) make the system almost as good and effective as a direct appeal to the High Court from the Tribunal's order.

What are your views on these suggestions?

.....6...

9. In case you favour appeal to the High Court in place of reference, do you agree with the suggestion that the High Courts should be required to constitute permanent Benches for hearing appeals from the Tribunals in question? In case you favour the continuance of the present system of reference, do you consider it useful to constitute permanent Benches for disposing of such reference?

10. (i) Do you agree that the jurisdiction of the High Court be abrogated under Articles 226/227 of the Constitution of India against the decisions of the authorities under the Income-tax Act, 1961, or under the CEGAT by constituting an equally efficacious, effective forum like National Tax Court or Appellate Tribunals? If so, what should be its composition?

(ia) Will not the provision of such a Court or tribunal be really the repetition of a provision for tax assessees of a third tier of appeal while litigants in other branches of law have, in general, only two tiers of appeal available to them?

(ii) In case you favour the creation of a separate Appellate Tribunal like National Tax Court or Tribunal against judgments of the Tribunals in question, should the tribunal hold its sittings through Benches functioning in, say, four regions (North, South, East and West)?

(iii) How far do you think such regional Benches will be able

(a) to cope up with the workload involved which at present is distributed among several High Courts and

(b) to fulfil the objective of carrying justice nearer

.....7.....

to the doorstep of the assessees?

(iv) Do you agree that the proposed National Court or Appellate Tribunal should also be vested with jurisdiction to deal with constitutionality of tax legislation. Could there be any objection to this course if the Tribunal proposed either consists - only of judicial members or, if it is provided that only Benches of the Tribunal consisting of such members will deal with such questions?

(v) There is a view that unless the original jurisdiction of determining the constitutionality of tax legislation is conferred upon the proposed forum of National Tax Court or other Appellate Tribunal litigants will be able to resort to High Courts under Articles 226 of the Constitution of India and frustrate the objective of expeditious disposal of matters? How to meet the situation, indicate your reasons.

11. Should the National Tax Court or Appellate Tribunal be constituted exclusively by judges, under the administrative control of Supreme Court?

12. Under the present system, provision for appeals with special leave to the Supreme Court under Article 136 of the Constitution against the judgments of the Tribunals in question, is increasing the workload of the Supreme Court and is causing hardship to litigants who have to travel to Delhi from far off places. Would you favour any amendment in this regard, and if so, in what direction?

.....8...

13. Have you any changes to suggest regarding the jurisdiction of the Tribunals in question? If so, kindly give your suggestions in detail with reasons.

14. Do you agree with the view that the multiplicity of Tribunals to deal with various matters is destructive of the uniformity of law in India? If so, please make any concrete suggestions that you may like to be considered in this regard.

15. There is a proposal to abolish the ITAT and the CEGAT as constituted at present and to substitute these Tribunals by a National Tribunal having a number of Benches in the country to deal with the appeals arising out of the Income-Tax Act and the Customs Act. Do you agree to this proposal?

(a) Do you agree that the constitution of a single National Tax Court or National Tribunal (in place of the existing tribunals) will effectively solve the vexed problem of a conflict of judicial opinion and promote certainty in the law or would you suggest that the existence of conflicts is necessary and healthy to promote a full discussion of all points of view open on any question?

16. The proposed National Tribunal is to be constituted under Article 323B of the Constitution excluding the jurisdiction of the High Court under Articles 226 and 227 of the Constitution as well as abrogating the reference procedure. Do you agree to this proposal?

17. If the High Court jurisdiction is taken away, will it not increase the workload in the Supreme Court under Article 136

.....9...

of the Constitution as the aggrieved party will approach the Supreme Court under that provision against the order of the proposed tribunal.

18. The proposed National Tribunal, in the absence of a Constitutional amendment, cannot have any jurisdiction to determine the question of constitutionality of laws and the jurisdiction of the High Court under Article 226 would be likely to be invoked to challenge the constitutional validity of the Income-Tax Act and the Customs Act and the rules framed thereunder. Will this not frustrate the object and purpose of the constitution of the National Tribunal and cause delay?

19. Have you any other suggestions to make in this matter.

...

SUPPLEMENTARY QUESTIONNAIRE ON INCOME TAX AND CEGAT TRIBUNAL

1. After Question 3(e), we add:

"(e)(i) Would you suggest, in the light of the above, that, as in the case of the Central Administrative Tribunal (CAT) the retiring age of the President and Vice-President should be raised to 65 years while in the case of other members it may continue at 62 years?

(e)(ii) As a corollary to the above, would you suggest that the post of President and/or Vice President of these Tribunals should be restricted only to a sitting/or retired Judge of a High Court or would you make it available for promotion to judicial and/or technical or accountant Members of the Tribunals as well? Would you restrict the eligibility of Members only to the posts of Vice-President and that too only to a proportion of such posts?

2. At the end of the second part of Question 3(f), we add:

"Considering that two of the three qualifications referred to earlier are also qualifications which make a person eligible to be considered for appointment as a High Court Judge, in what way do you consider it possible to raise the status of the members consistent with the status to be prescribed for the President and/or Vice President."

3. After Question No. 6, insert the following:

"(6A) Do you agree that whichever authority for selection is constituted, it should be in charge of selection of all members - both judicial and technical members - of the Tribunal?

(6 B) Should such Selection Board be also constituted as Promotion Committee to decide, from time to time, on the promotion of members of the Tribunal as Vice-President/ President, if eligible under the rules?

(6 C) Would you suggest any other powers to the Selection Board in matters of administration of the Tribunal?"

5. After Question 8, we insert the following question:

"8A. Another suggestion is that a partial abrogation of the reference procedure - by eliminating the need to apply to the Tribunal for reference to the High Court in the first instance and, on failure, to apply to the High Court for a mandamus - and substituting it by a simple procedure of seeking a direction from the High Court for a reference only on substantial questions of law arising out of the Tribunal's order would -

(i) eliminate a step in the present law which only causes delay and is perhaps unnecessary ; and

(ii) make the system almost as good and effective as a direct appeal to the High Court from the Tribunal's order. What are your views on these suggestions".

6. After Question 10(i), insert the following:

"(ia) Will not the provision of such a court or tribunal be really the repetition of a provision for tax assessees of a third tier of appeal while litigants in other branches of law have, in general, only two tiers of appeal available to them?"

7. In Question 10, add after (ii)

(iii) How far do you think such regional Benches will be

able (a) to cope up with the workload involved which at present is distributed among several High Courts and (b) to fulfil the objective of carrying justice nearer to the doorstep of the assessees?

7. In Question 10(iii) add:
"Could there be any objection to this course if the Tribunal proposed either consists - only of judicial members or, if it is provided that only Benches of the Tribunal consisting of such members will deal with such questions?"

8. After Question 15 we add:
"(a) Do you agree that the constitution of a single National Tax Court or National Tribunal (in place of the existing tribunals) will effectively solve the vexed problem of a conflict of judicial opinion and promote certainty in the law or would you suggest that the existence of conflicts is necessary and healthy to promote a full discussion of all points of view open on any question?"

ANNEXURE - II

D. O. NO. 6(3)(21)/93-LC(LS).

Dr. S. C. Srivastava
Joint Secretary & Law Officer

GOVERNMENT OF INDIA
MINISTRY OF LAW, JUSTICE
& COMPANY AFFAIRS
DEPARTMENT OF LEGAL AFFAIRS
LAW COMMISSION
SHASTRI BHAWAN, NEW DELHI - 110 001
Tel. : 383682

Dated August, 1995

Dear Sir,

The Law Commission had circulated a Questionnaire on Service Tribunals vide its letter of even number dated September 4, 1994, soliciting views from Hon'ble Judges, Chairman/Vice-Chairman of various tribunals, lawyers, jurists, academicians and State Governments etc. The Law Commission has been benefited immensely through various responses projected by many eminent persons. After perusing those views, it is felt to enlarge the scope of the Questionnaire on Service Tribunals so that the working of the tribunals may be dealt with in a broader perspective keeping in view the responses and observations of the Supreme Court, particularly with regard to the concept of judicial review, a basic feature of the Constitution. A detailed Questionnaire on Service Tribunals has been prepared, which is enclosed herewith. This Commission solicits your valuable views on the Questionnaire enclosed to enable the Commission to prepare a comprehensive report on the subject. It is likely that some of the questions might have found place in the previous Questionnaire on Service Tribunals, and you might have already sent your valuable views on those issues. In such a situation, you may not repeat it.

Some of the excerpts from the judgment of the Supreme Court in R.K. Jain V. Union of India, (1993)4 SCC 119, which impelled the Commission to undertake the exercise, are enclosed for your reference.

In view of the above, we request you to kindly spare some of your precious time in giving your valuable opinion on the issues raised in the Questionnaire enclosed, at the earliest, preferably by 15th September, 1995.

Dr. S. C. Srivastava
Joint Secretary & Law Officer

D. O. NO.

GOVERNMENT OF INDIA
MINISTRY OF LAW, JUSTICE
& COMPANY AFFAIRS
DEPARTMENT OF LEGAL AFFAIRS
LAW COMMISSION
SHASTRI BHAWAN, NEW DELHI - 110 001
Tel. : 383682

Dated .....

Since the Commission is intending to hold a Workshop on Administrative Tribunals and their working in October, 1995, your valuable views will be of great assistance to this Commission for further deliberations in the said Workshop.

Looking forward to your co-operation.

With regards,

Yours sincerely,

Encl: As above

(S.C. Srivastava)

Extracts taken from the Judgment of R.K. JAIN v. UNION OF INDIA (1993) 4 SCC 120

8. Lastly, the time is ripe for taking stock of the working of the various tribunals set up in the country after the insertion of Articles 323-A and 323-B in the Constitution. A sound justice delivery system is a sine qua non for the efficient governance of a country wedded to the rule of law. An independent and impartial justice delivery system in which the litigating public has faith and confidence alone can deliver the goods. After the incorporation of these two Articles, acts have been enacted whereunder tribunals have been constituted for dispensation of justice. Sufficient time has passed and experience gained in these last few years for taking stock of the situation with a view to finding out if they have served the purpose and objectives for which they were constituted. Complaints have been heard in regard to the functioning of other tribunals as well and it is time that a body like the Law Commission of India has a comprehensive look-in with a view to suggesting measures for their improved functioning. That body can also suggest changes in the different statutes and evolve a model on the basis whereof tribunals may be constituted or reconstituted with a view to ensuring greater independence. An intensive and extensive study needs to be undertaken by the Law Commission in regard to the constitution of tribunals under various statutes with a view to ensuring their independence so that the public confidence in such tribunals may increase and the quality of their performance may improve. We strongly recommend to the Law Commission of India to undertake such an exercise on priority basis. A copy of this judgment may be forwarded by the Registrar of this Court to the Member-Secretary of the Commission for immediate action.

66. In S.P. Sampath Kumar v. Union of India this Court held that the primary duty of the judiciary is to interpret the Constitution and the laws and this would predominantly be a matter fit to be decided by the judiciary, as judiciary alone would be possessed of expertise in this field and secondly the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action. The Constitution has, therefore, created an independent machinery i.e. judiciary to resolve disputes, which is vested with the power of judicial review to determine the legality of the legislative and executive actions and to ensure compliance with the requirements of law on the part of the executive and other authorities. This function is discharged by the judiciary by exercising the power of judicial review which is a most potent weapon in the hands of the judiciary for maintenance of the rule of law. 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 rule of law would become a teasing illusion and a promise of unreality. The judicial review, therefore, is a basic and essential feature of the Constitution and it cannot be abrograted without affecting the basic structure of the Constitution. The basic and essential feature of judicial review cannot be dispensed with but it would be within the competence of Parliament to amend the Constitution and it provide alternative institutional mechanism or arrangement for judicial review, provided it is no less efficacious than the High Court. It must , therefore, be read as implicit in the constitutional scheme that the law excluding the jurisdiction of the High Court under Articles 226 and 227 permissible under it,

must not leave a void but it must set up another effective institutional mechanism or authority and vest the power of judicial review in it which must be equally effective and efficacious in exercising the power of judicial review. The tribunal set up under the Administrative Tribunals Act, 1985 was required to interpret and apply Articles 14, 15, 16 and 311 in quite a large number of cases. Therefore, the personnel manning the administrative tribunal in their determinations not only require judicial approach but also knowledge and expertise in that particular branch of constitutional and administrative law. The efficacy of the administrative tribunal and the legal input would undeniably be more important and sacrificing the legal input and not giving it sufficient weightage would definitely impair the efficacy and effectiveness of the Administrative Tribunal. Therefore, it was held that an appropriate rule should be made to recruit the members; and to consult the Chief Justice of India in recommending appointment of the Chairman, Vice-Chairman and Members of the Tribunal and to constitute a committee presided over by the Judge of the Supreme Court to recruit the members for appointment. In M.B. Majumdar v. Union of India when the mebers of CAT claimed parity of pay and superannuation as is available to the Judges of the High Court, this Court held that they are not on a par with the judges but a separate mechanism created for their appointment pursuant to Article 323-A of the COnstitution. Therefore, what was meant by this Court in Sampath Kumar case ratio is that the tribunals when exercise the power and functions, the Act created institutional alternative mechanism or authority to adjudicate the service disputations. It must be effective and efficacious to exercise the power of judicial review. This Court did not appear to have meant that the tribunals are substitutes of the High Court under Articles 226 and 227 of the Constitution. J.B. Chopra v. Union of India merely followed the ratio of Sampath Kumar.

76. Before parting with the case it is necessary to express our anguish over the ineffectivity of the alternative mechanism devised for judicial reviews. The judicial review and remedy are fundamental rights of the citizens. The dispensation of justice by the tribunals is much to be desired. We are not doubting the ability of the members or Vice-Chairman (non-Judges) who may be experts in their regular service. But judicial adjudication is a special process and would efficiently be administered by advocate Judges. The remedy of appeal by special leave under Article 136 of this Court also proves to be costly and prohibitive and far-flung distance too is working as constant constraint to litigant public who could ill afford to reach this Court. An appeal to a Bench of two Judges of the respective High Courts over the orders of the tribunals within its territorial jurisdiction on questions of law would assuage a growing feeling of injustice of those who can ill afford to approach the Supreme Court. Equally the need for recruitment of members of the Bar to man the tribunals as well as the working system of the tribunals need fresh look and regular monitoring is necessary. An expert body like the Law Commission of India would make an in-depth study in this behalf including the desirability to bring CEGAT under the control of Law and Justice Department in line with Income Tax Appellate Tribunal and to make appropriate urgent recommendations to the Government of India who should take remedial steps by an appropriate legislation to overcome the handicaps and difficulties and make the tribunals effective and efficient instruments for making judicial review efficacious, inexpensive and satisfactory.

LAW COMMISSION OF INDIA

REVISED ADDITIONAL QUESTIONNAIRE ON ADMINISTRATIVE TRIBUNALS

C O N T E N T S

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REVISED ADDITIONAL QUESTIONNAIRE ON ADMINISTRATIVE TRIBUNALS

PART-I: Central/State Administrative Tribunal

SECTION I WORKING OF ADMINISTRATIVE TRIBUNALS: PROPOSED CHANGES IN STRUCTURE AND MEASURES TO BE TAKEN FOR PROVIDING AN EFFICACIOUS FORUM

1. Do you think that the existing arrangements of having Administrative and Judicial Members under the Administrative Tribunals Act, 1985 are satisfactory and working effectively?

2. Should the Administrative Member always sit in a Bench alongwith the Judicial Member?

3. Whether Administrative Member's help is necessary in dealing with the complex administrative matters more effectively by using his expertise on the subject?

4. Do you think that the provisions of Section 6 (2)(b) of the Administrative Tribunals Act, 1985, namely, a person shall not be qualified for appointment as a Judicial Member unless "he has been a Member of the Indian Legal Service and has held a post in Grade I of that Service for at least three years" has really helped in achieving

effectiveness, efficacy, standard and status as that of High Court? If not, what are your suggestions on it?

5. Would you suggest for enlarging the ambit of source of personnel for eligibility as Judicial Members by including personnel from all departments of Ministry of Law of Government of India and of Law Departments of State Governments, who are holding the rank equal to the rank of a Joint Secretary to the Government of India dealing with law?

6. Should the Tribunal constituted under the Administrative Tribunal Act, 1985 be placed under the administrative control of the Ministry of Law and Justice?

7. Should the necessary rules be framed governing the matters which will be heard by a Single Member Bench of the Central Administrative Tribunal or State Administrative Tribunal respectively?

8. What suggestions would you make in respect of allocation of cases for disposal by a Bench comprising a Single Member and by a Division Bench in regard to the matters falling within the jurisdiction of the Central/State Administrative Tribunal in order to bring uniformity and facilitate proper exercise of jurisdiction?

9. Do you agree that in cases where the Benches of the Central Administrative Tribunal or the State Administrative Tribunal are required to comprise only one member, he should necessarily be a judicial member?

10. Should the Administrative Member while sitting in a Bench along with a Judicial Member act only in the capacity of an assessor? Should his role be confined only to assessment of facts?

11. Do you think that if the Bench is to consist of two members then it should be presided over only by Judicial Member?

12. should an appeal lie against the decision of the Bench of Tribunal comprising a single member, to a larger Bench of the Central Administrative Tribunal or State Administrative Tribunal respectively?

13. Whether the concerned larger Bench of the Central/State Administrative Tribunal can post the appeal for admission after due notice and dispose of the same at the admission stage if the appeal is not maintainable?

SECTION II PROPOSALS TO MAKE THE CENTRAL/STATE ADMINISTRATIVE TRIBUNAL A REAL SUBSTITUTE TO THE HIGH COURT FOR THE PURPOSES OF SATISFYING THE REQUIREMENTS OF JUDICIAL REVIEW, A BASIC FEATURE OF THE CONSTITUTION

14. Do you think that if the status of the present Central/State Administrative Tribunal is raised to that of a High Court in all respects, including composition, service conditions eligibility criteria and disposal of cases hereinafter suggested and by also providing -

i) that these Tribunals are manned only by judicial members who are equally competent as that of a High Court Judge;

(ii) the role of Administrative Member is limited to that of an assessor;

(iii) the power of making decision would rest only with the Judicial Member, whether sitting in a Single Member Bench or in a Division Bench as per the allocation of the cases?

15. If so, whether the proposed constitution of such a Central or State Administrative Tribunal does become a real substitute to the High Court satisfying the requirements of basic feature of the Constitution, as

laid down in Keshvananda Bharati v. State of Kerala, AIR 1973 SC 1461 and Minerva Mill Ltd. v. Union of India, (1980) 3 S.C.C. 625.

16. If the answer of the above questions is in affirmative, whether the exclusion of jurisdiction of the High Court under Articles 226 and 227 of the Constitution of India is valid and justifiable and the requirements of judicial review, a basic feature of the Constitution remain unaffected?

SECTION III - PORPOSED CHANGES IN STRUCTURE AND FUNCTIONING

17. (a) Should such proposed Central Administrative Tribunal at Delhi consist of:-

(a) Chairman;

(b) Judicial Members; and

(c) Administrative Members (to act as assessors only.)

(b) Should such proposed Bench of the Central Administrative Tribunal at various places consist of:-

(a) Vice-Chairman;

(b) Judicial Members; and

(c) Administrative Members (to act as assessors only.)

18. Should every such proposed State Administrative Tribunal consist of:-

(a) Chairman;

(b) Vice-Chairman;

(c) Judicial Members; and

(d) Administrative Members (to act as assessors).

19. Should a person be eligible to be appointed as Chairman of the Central/State Administrative Tribunal, if he -

(a) is, or has been the Chief Justice of a High Court, or

(b) has, for at least 2 years, held the office of Vice-Chairman appointed as suggested in question No.20.

20. Should a person be eligible to be appointed as a Vice-Chairman of the Central/State Administrative Tribunal if he -

(a) is, or has been, a judge of a High Court, or

(b) has, for at least two years, been a Judicial Member appointed as suggested in question No.21.

21. Should a person be eligible to be appointed as a Judicial Member of the Central/State Administrative Tribunal if he is, or has been, a Judge of a High Court or has been a

District Judge and held judicial office for a period of not less than 10 years or is qualified to be a judge of the High Court?

22. Should the appointments of Chairman, Vice-Chairman and Members of the Central Administrative Tribunal be made by a permanent High Powered Selection Committee headed by the Chief Justice of India or a sitting Judge of the Supreme Court nominated by him and in the case the State Administrative Tribunal by the Chief Justice of the State High Court or any other sitting Judge nominated by the Chief Justice of the State High Court concerned, as suggested in S.P.Sampath Kumar v. Union of India, (1987) 1 SCC 124.

23. Should there be a time-limit within which proposals for appointment of members of tribunals ought to be processed, and periodic review of optimum strength of members in each tribunal be undertaken so that delay in disposal of cases may be avoided because of lack of appointment of a Member?

24. Should a person be eligible to be appointed as an Administrative Member of the Central/State Administrative Tribunal to act as assessor in the aforesaid manner if he has held the post of a Secretary to the Government of

India or any other post under the State Government carrying the scale of pay which is not less than that of a Secretary to the Government of India?

25. Do you agree that if aforesaid changes in the structure and functioning of Central/State Administrative Tribunal are made, would they not become a real substitute to the High Court in all respects satisfying the requirement of judicial review, a basic feature of the constitution.

PART II - THE CREATION OF AN APPELLATE FORUM

26. Do you agree with the suggestion that a regular appeal should lie against the orders of the Central/State Administrative Tribunal? If yes, what should be the nature and structure of the appellate forum?

SECTION I APPEAL TO THE SPECIAL BENCH OF THE HIGH COURT

27. Do you agree that appeals against the order of the tribunals should be maintainable before the High Court on questions of fact and law, and in order to ensure speedy disposal, the High Courts should be required to constitute permanent Servide Benches for the Central Government and the State Government servants to deal with the service matters exclusively?

SECTION II APPEAL TO THE PROPOSED NATIONAL ADMINISTRATIVE APPELLATE TRIBUNAL

28. Would you suggest that an appeal should lie from the decision of the Central Administrative Tribunal and the State Administrative Tribunal to the proposed National Administrative Appellate Tribunal?

29. Would you suggest that the proposed National Administrative Appellate Tribunal should be located at Delhi, having four or more benches in various parts of the country?

30. Should the National Administrative Appellate Tribunal have overall control in administative, financial and other matters over all the Benches of the Tribunal?

31. Should the National Administrative Appellate Tribunal at Delhi consist of -

(a) Chairman; and

(b) One or two judicial Members only.

32. Should every other Bench of the proposed National Administrative Appellate Tribunal consist of a Vice-Chairman and one or two Members, or two or more Members?

33. Should the appointment of the Chairman, Vice-Chairman and Members of the proposed National Administrative Appellate Tribunal be made by a permanent high-powered selection committee headed by the Chief Justice of India or a sitting judge of the Supreme Court nominated by him, as suggested in S.P. Sampath Kumar v. Union of India, case.

34. Should a person be eligible to be appointed as a Chairman of the proposed National Administrative Appellate Tribunal if he has been the Chief Justice of the Supreme Court of India or a Judge of the Supreme Court of India?

35. Should a person be made eligible to be appointed as Vice-Chairman of the proposed National Administrative Appellate Tribunal if he has been either a Judge of the Supreme Court or a Chief Justice of a High Court?

36. Should a person be made eligible to be appointed as a Judicial Member of the proposed National Administrative Appellate Tribunal, if he is or has been a Judge of a High Court?

37. Should the term of appointment of the Chairman, Vice Chairman and Member of the proposed National Administrative Appellate Tribunal be three years with a further provision that they may be re-appointed for a period upto three years as the situation requires?

38. Do you agree with the view that the orders of the proposed National Administrative Appellate Tribunal or Benches thereof shall be final and no appeal shall lie against its order in any court?

39. Do you agree with the suggestion that the appeal to the proposed National Administrative Appellate Tribunal should lie only on the following grounds:-

(a) Violation of Fundamental Rights;

(b) Want or excess of jurisdiction;

(c) Substantial question of law of general importanoe;

(d) Error of law; or error apparent on the face of record; and

(e) Perverse findings.

40. Do you agree that an appeal may be filed in the respective Bench of the Central Administrative and the State Administrative Tribunal as the case may be against whose order the appeal has been preferred? If so, the Registry of the Tribunal shall forward the same to the concerned Bench of the proposed National Administrative

Appellate Tribunal. The Bench of the proposed National Administrative Appellate Tribunal shall fix the tentative date for admission before it and accordingly inform the parties concerned. The appeal may then be heard by the concerned Bench of the National Administrative Appellate Tribunal? However, in urgent matters involving stay of proceedings or other matters, the aggrieved party may directly file the appeal before the concerned Bench of the proposed National Administrative Appellate Tribunal

41. Should the concerned Bench of the National Administrative Appellate Tribunal be empowered to dispose of the appeal at the admission stage, if it is not maintainable?

42. Whether there should be a time limit for the disposal of an appeal? If so, what should be the time limit?

43. Do you agree that no appeal shall lie before the National Administrative Appellate Tribunal against the decision of a Single Member Bench of the Central Administrative Appellate Tribunal or the State Administrative Tribunal in view of the proposed provisions for appeal against the decision of the Single Member Bench to a larger Bench of the Central/State Administrative Tribunal respectively?

44. Whether there should be a time limit for disposal of such an appeal? If so, what should be the time-limit?

SECTION III CREATION OF AN APPELLATE FORUM AND THE REQUIREMENTS OF JUDICIAL REVIEW

45. Whether the provision, either by constituting permanent Service Benches in the High Courts or by constituting proposed National Administrative Appellate Tribunal, would satisfy the requirement of judicial review which is the basic feature of the Constitution as held in the Keshvananda Bharati v. State of Kerala, AIR 1973 SC 1461 and Minerva Mill Ltd. v. Union of India, (1980) 3 S.C.C. 625.

46. If the answer to the above question is in affirmative, whether the jurisdiction of the High Court under Article 226 and 227 of the Constitution of India can be excluded with regard to the decisions of the Central/State Administrative Tribunal because of the availability of an equally efficacious and speedy remedy by way of appeal and would satisy the requirements of the judicial review, the basic feature of the Constitution.

47. Should the present structure subject to modification suggested in question Nos. 4,5,9 and 11 can continue in view of the proposed Appellate Forum being provided against the decision of the Central/State Administrative Tribunal satisfying the requirements of judicial review?

48. Any other suggestions which you propose to offer.