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EXECUTIVE OVERREACH IN CONTEMPORARY ERA WITH SPECIAL REFERENCE TO CONSUMER PROTECTION ACT, 2019

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INTRODUCTION

The anti-thesis between the executive and the judiciary have deep roots in the history of India. The two organs of the state have been sharing the bitter bond ever since the very First Amendment of the Constitution way back in the year 1951 wherein the land reform statutes were taken beyond the scope of judicial review. However, the judiciary fought back by delivering a landmark judgment in *Golaknath v. State of Punjab*[2], which barred Parliament from curtailing any fundamental right assured by the Constitution. Later in the year 1971, after attainment of the power by Indira Gandhi, targeted the judiciary and blamed it to be anti-socialist and anti-poor. Another milestone which ripened the bitter relationship between the two organs was the Twenty-Fourth Amendment which reversed the *Golaknath judgment*. And to much of the surprise, Justice A.N. Ray who dissented in the *Kesavananda Bharati case* was made the CJI, superseding three senior judges. Justice H.R. Khanna—the lone dissenter in a *habeas corpus case* during the 1975-77 Emergency, who was next in line to become the CJI—was superseded by justice M.H. Beg. Thus, the tussle between the two has been long going since then.

In the recent times the judiciary has been attacked and critised for its encroaching role which has been famously known as *Judicial Overreach.* The allegation of judicial overreach is a matter of mere perception and biased views. An act of a judiciary which on the one hand might be welcomed by many and seen as a welfare and protective measure could be considered as an act of overreach and overstepping on the other hand. However, certain glaring instances where the judiciary has been attacked on the ground of judicial overreach are- the compulsion of national anthem in cinema halls, liquor ban on highways, striking of National Judicial Appointments Commission (NJAC) bill, Proactive Censorship in case of Jolly LLB 2.

The courts in India and particularly, the Supreme Court has been bestowed with the most pious obligation of protecting the human rights and is considered as a custodian of

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[2] AIR 1967

fundamental rights and due to this significant role, the courts have always been in the limelight and targeted for its actions. At the same time, the executive organ of the state which is working behind the curtains, is trying to take advantage of its position and is making all possible attempts to become an ever powerful political executive. But one must remember if the Judicial overreach is contrary to the doctrine of separation of power so is the executive overreach.

THE COLLAPSE OF THE DOCTRINE OF SEPERATION OF POWER

The Doctrine of Separation of Power was first envisaged by Montesquieu which emphasised that there should be demarcation of the functions between the three organs of the state.

Montesquieu believed that if all the powers are concentrated in a particular group of people then it results in a tyrannical form of government. To check the arbitrariness of the government he suggested that there should be clear-cut division of power between the three organs of the state.

The doctrine of separation of power is imperative to ensure democracy in the country. Our Constitution explicitly provides for separate and demarcated role of each organ of the state. The Hon'ble Supreme Court has also on various occasions prohibited the encroachment of functions by one organ into another organ of the state. Independence of each organ is paramount for the efficient discharge of its functions. In the same context, the independence of judiciary is also necessary for its effective and unbiased working.

However, ever since the Forty-Second Amendment in the Constitution the dividing line between the various organs of the state has become indistinct. The amendment has bestowed upon the Parliament by incorporating Article 323A and 323B in the Constitution the power to systematically take away judicial functions from the judiciary and transfer the same to the quasi-judicial bodies. And therefore, ever since there has been mushrooming growth in the tribunals in the country. But unfortunately, there have been instances where tribunals have failed to achieve the sole purpose for which they were established, i.e. speedy disposal of cases.[3]

Though in the initial phase of its establishment these tribunals were manned by the people with judicial knowledge or background but quiet recently this trend has witnessed a radical

[3] Arvind P. Datar *Tribunals: A tragic obsession* July 20, 2018 available http://www.india-seminar.com/2013/642/642_arvind_p_datar.htm

change. The executive organ of the state in its guise to control the entire functioning and to become an ever powerful political executive has obliterated the sacred doctrine of separation of power and has been bestowing judicial functions to the executive members of the government. Thus, these quasi-judicial bodies are no more independent in their functioning and are mere the puppets of the executive organ.

TRIBUNAL SYSTEM : SUPPLEMENTING THE IGNOBLE INTENTION OF THE EXECUTIVE?

Administration of Justice is the sine qua non for any civilised society. The traditional method of adjudication of disputes by the Courts still dominates the Adjudication process. However, due to increase in litigation and complexity of matters, it has given birth to various alternative dispute adjudication including Arbitration, Concilliation, Lok Adalats and Tribunals. These modes have also been granted Constitutional Recognition. Adjudication through Administrative Tribunals has become an indispensable phenomenon, practically in every legal system of the modern world. Today, the bulk of decisions affecting the life, liberty and property of the individuals, comes not from the courts but, from these quasi-judicial bodies.

With the insertion of Article 323-A and 323-B by 42nd Amendment, Tribunals (Quasi-judicial bodies) have been granted with Constitutional recognition. This systematic transfer of judicial functions from the courts to the quasi-judicial bodies may be seen as a welcoming step as it gives the hope of providing speedy adjudication of disputes. But the closer scrutiny of the rules which forms the very foundation of these quasi-judicial bodies raises a very serious and pertinent concerns. By analysing the rules which govern the establishment and functioning of these quasi-judicial bodies, one would definitely reach to the most unfortunate and the inevitable conclusion that now we are heading towards an era of Executive overreach which certainly is the death warrant of our institution of Democracy. In spite, of the repeated concern of the Supreme court of this on going trend no heed has been given to stop the executive tyranny.

The recently framed rules titled the '*Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2020'*, by the executive in pursuance of powers under Section 184 of the Finance Act, 2017 to streamline the appointment process of the tribunals manifestly reflects the intention of the executive to become an ever-powerful political executive. Prior to the framing of these rules the Centre had framed another set of Rules for Tribunals, with the same name as the new rules -

'Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017'. However, these rules were struck down by the Supreme Court in *Rojer Mathew vs South Indian Bank and others*[4] as unconstitutional on the ground of too much of the executive dominance in the matters of appointment and Centre was ordered to re-frame the rules. But to the utter dismay the 2020 rules are substantially on the similar lines as that of the 2017 rules.

One of the primary concerns of the Supreme Court in 2017 Rules was the excessive role of the executive in the appointment of the members of the commissions, thus, compromising the independence of judiciary. The court observed in *Rojer Mathew's case*[5] "The lack of judicial dominance in the Search-cum-Selection Committee is in direct contravention of the doctrine of separation of powers and is an encroachment on the judicial domain". The Court further observed "We are of the view that the Search-cum-Selection Committee as formulated under the Rules is an attempt to keep the judiciary away from the process of selection and appointment of Members, Vice-Chairman and Chairman of Tribunals. The Court has explicitly observed in *Supreme Court Advocates on-Record Assn. v. Union of India (Fourth Judges Case),* wherein it was held that primacy of judiciary is imperative in selection and appointment of judicial officers including Judges of High Court and Supreme Court. Cognisant of the doctrine of Separation of Powers, it is important that judicial appointments take place without any influence or control of any other limb of the sovereign. The Executive is a litigating party in most of the litigation and hence cannot be allowed to be a dominant participant in judicial appointments".

Unfortunately, the executive has given deaf ears to the observations of the Hon'ble Supreme Court and has manifestly retained the control of appointment and removal of the Tribunal members to itself in the new rules. For instance, let us compare the composition of committee for CAT under the 2017 Rules and 2020 Rules.

As per the 2017 Rules, the Search Cum Selection Committee for the appointment of judicial member of CAT comprised five persons :

1. CJI or CJI's nominee - Chairperson
2. CAT Chairperson - member.

[4] Special Leave Petition (Civil) No.15804 of 2017
[5] *Ibid*

3. Secretary to the Govt of India, Dept of Personnel and Training.
4. Secretary to the Govt of India, Ministry of Law and Justice
5. One expert nominated by the Central Government.

When it comes to the 2020 Rules, except for the omission of the expert nominee, nothing has changed with respect to the composition of the Search cum Selection Committee for CAT. The new composition is as follows :

1. CJI or CJI's nominee.
2. CAT Chairperson.
3. Secretary to the Govt of India, Dept of Personnel and Training.
4. Secretary to the Govt of India, Ministry of Law and Justice.

This 4-member composition pattern can be found in the Search cum Selection Committees for other Tribunals as well.

In *Madras Bar Association* (2010), a Constitution Bench dealing with the validity and appointment of members to the National Company Law Tribunal (NCLT) under the Companies Act, 1956, held that the selection committee should comprise the Chief Justice of India or his nominee (chairperson, with a casting vote), a senior judge of the Supreme Court or Chief Justice of the High Court, and secretaries in the Ministry of Finance and Ministry of Law and Justice respectively. Subsequent Constitution Bench decisions in *Madras Bar Association* (2014), *Rojer Mathew* and the decision of the Madras High Court in *Shamnad Basheer* have repeatedly held that the principles of the *Madras Bar Association* (2010) are applicable to the appointment process and constitution of all the tribunals in India.

The ratio decendi of these decisions is explicit that the judiciary should have an equal say in the appointment process of the members of the tribunals. And also giving executive the dominant position in the appointment process is also violative of the principles of natural justice. But in the 2020 Rules, the executive has made a smart move by modifying and changing the qualification rules for the president/chairman/chairperson of the tribunal. For instance, now, in the Income Tax Appellate Tribunal (ITAT), Customs Excise and Service Tax Appellate Tribunal (CESTAT), Central Administrative Tribunal (CAT), Debt Recovery Appellate Tribunal (DRAT), National Green Tribunal (NGT) etc., a non-judicial member can become the president/chairman/chairperson, as the case may be. Therefore, when a non-

judicial member becomes a member in the selection committee, the Supreme Court judge will be in minority, giving primacy to the executive, which is impermissible and mockery of the entire system.

The story of this executive control is not limited only to the appointment process but also extends in regard of the removal of the tribunal members. The security of tenure is of paramount importance for the independence of judiciary but, unfortunately this cardinal principle is compromised in 2020 Rules and so is the independence of judiciary. Unlike the Judges of High Courts and the Supreme Court who can be removed only by a vote of each House of Parliament, the removal of the members of the Tribunal is left entirely in the hands of the Central government. According to the new rules, the procedure is as follows[6]: a written complaint against any judge on the tribunal is to be scrutinised by the "ministry or department of the government of India" under which the tribunal has been constituted. After a preliminary scrutiny, if the relevant ministry or department is of the opinion that there are reasonable grounds for an inquiry, it shall make a reference to a committee constituted under Rule 7 to conduct an inquiry. The rules are entirely silent on the composition of the committee but once an inquiry is conducted by the committee, it may make a recommendation to the Central government, which may then remove the judge from the tribunal. It is difficult to understand that when some of the powers of High Courts are shifted to tribunals, then why similar safeguards were not implemented for the judges manning these tribunals. In most cases, the power to remove judges of tribunals was vested with the government, provided an inquiry was conducted by a Supreme Court judge.

These provisions are clearly reflective of the intentions of the executive to completely takeover the judicial function in the guise of providing speedy justice to the litigants. Thus, the repeated contempt of the Hon'ble Supreme Court's direction is indicative of the executive's intention to tilt the balance of power in its favour resultantly violating the sacred doctrine of separation of power.

The latest area where the executive has made an attempt to overreach its authority is the Consumer Protection Act, 2019. The next section of the paper will address as to how the executive is controlling the working and functioning of the quasi-judicial bodies established under the Act.

[6] *'Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2020', Rule 8*

CONSUMER PROTECTION ACT, 2019

In the exercise of its Constitutional Power under Article 247 of the Constitution and the enabling provisions of Article 323-A and Article 323-B the Parliament enacted the Consumer Protection Act, 1986.

Now, this brings us to the question as to *Who is a Consumer?* The answer to this pertinent question is very simple as *everybody is a consumer.* Anybody who purchases commodities to satisfy his/her wants and wishes or who avails the services of others for personal benefit is a consumer. Another pertinent question that rises is *Why is there a need to protect consumers?* Prior to the enactment of the Consumer Protection Act, 1986 ,"*Caveat Emptor*" i.e. let the buyer be aware was the general principle that ruled the Consumer legislation. But, with the increase in complexity of matters and more particularly, increasing exploitation of the consumers, this principle was abandoned and replaced by the theory of Consumerism. Consumerism is related to the idea of protection of consumer rights. Thus, with the change in socio-economic conditions and increasing exploitation of the consumers it became imperative to protect the rights of consumers and provide them with efficient machinery to redress their grievances.

The Consumer Protection Act, 1986 is a milestone in the history of socio-economic Legislation in the country enacted with the objective to protect the rights of the consumers and expeditious grievance redressal mechanisms. To provide speedy and simple redressal to consumer disputes, *quasi judicial* machinery are set up at the District, State and Central levels each with its own pecuniary and territorial jurisdiction.

With the introduction and notification of Consumer Protection Act, 2019 today we have the consumer law in consonance with the changing demands of the society and the latest technological developments. The Act repeals the three decades old consumer legislation incorporated under Consumer Protection Act, 1986.

Some of the distinctive features of the Consumer Protection Act, 2019 are :

- Establishment of *Central Consumer Protection Authority* (CCPA) to promote, protect and enforce the rights of the consumers.
- Prohibition and Penalty for *Misleading Advertisement*

- Increase in the pecuniary jurisdiction of Consumer Dispute Redressal Commissions.
- *Enlarging the scope of definition of consumers* by including online transactions.
- Introduction of the concept of *'unfair contract'*
- Consumer can seek hearings from *video conferencing*.
- Provision of *Mediation* incorporated in the Act
- Provision of *Product Liability* added wherein consumers have right to seek compensation for any harm caused from the manufacturer or product service provider or product seller.
- Strict penal provisions for non-compliance of its orders**.**

Though, manifestly, the Act seems to display the work of great intellect which has given due consideration to the evolving issues in the modern society. But, the provisions of the Act which form the foundation of the Act are very thought provoking and shakes the footing of the doctrine of separation of power and the principles of natural justice.

The first and the foremost provision of the Act which is a matter of great concern is regarding the adjudicating bodies. The very purpose of enacting Consumer legislation is to protect the rights of the consumers by providing speedy and fair adjudication of the disputes. The Act establishes Consumer Disputes Redressal Commissions at District, State and National level as quasi-judicial bodies to adjudicate disputes. But, very surprisingly the Act does not specifically lay down that these adjudicating bodies are to necessarily have a judicial member. On the contrary, the Act empowers the Central Government to appoint and decide the composition of these adjudicatory bodies. If these adjudicatory bodies were to have members only from the executive are these Commissions created as the post-retirement jobs for the bureaucrats? Another major concern that arises is whether these Commissions would really be quasi-judicial in nature if the persons manning them do not have the requisite legal knowledge and expertise? In such a situation can one really expect disposal of the cases in accordance with the law? The answer is certainly No. As all one can expect is the adjudication meeting the whims and the fancies of the executive, thereby, changing the entire landscape of the adjudicating bodies from protecting the interests of the consumers to protecting the interests of the government.

Furthermore, the larger and the greater issue to be addressed is the resultant violation of the doctrine of separation of power. Though, in India we do not follow the rigid doctrine of separation of power, but at the same time, the functions and power of each organ has been sufficiently demarcated. But in the provisions of the Consumer Protection Act, 2019 by empowering executive to appoint and regulate the service conditions, removal of the members of the Commissions the ideology of the *Executive Overreach* has been vehemently embraced and cherished which is in contrast to the doctrine of separation of power and thus, giving a virtual death to the spirit of democracy.

Apart from violating the doctrine of separation of power, another basic threat is the Independence of Judiciary. This sacrosanct principle is embodied and guaranteed by the Constitution of India by making provisions of fixed salaries, security of tenure etc, thus, ensuring non interreference of any organ especially the executive. However, unfortunately, the involvement of executive in the process of appointment of members of commissions is not in consonance with the spirit of the constitution and the most cherished ideology of the independence of judiciary, which is indeed the basic structure of our constitution. Thus, the independence of judiciary which is the sine qua non for the fair administration of justice is being compromised and defeated in the 2019 legislation by empowering executive with the appointments, removal and regulating the services of the members of the commissions. Unlike the fair and transparent appointments which one could expect under the 1986 Act through the selection committee which consisted of members both from the executive and the judiciary, one cannot really expect the same level of fairness in the new 2019 Act, which gives the executive the sole role in the appointments of the members of the commission.

Further, giving control to the executive to regulate these matters would unfortunately, necessitate the members of the commission to please the executive organ of the state to ensure their survival in the commission. This would bring a paradigm shift in their work profile from adjudicating the matters according to the law and principles of nature justice to adjudicating the matters according to the whims and fancies of the executive. And this in turn would defeat the very purpose and the object of the consumer protection legislation.

The Principle of Natural Justice which regulates the entire procedure of adjudication and is in fact, the backbone of the adjudication process shall be deprived of its credibility by vesting the appointment powers solely in the hands of executive as in certain cases where the government holds the monopoly like railways, such adjudication would be a clear breach of

the principles of natural justice as there would certainly be conflict of interest. This makes one question are we creating these commissions to protect the interests of the consumers or are they being created to protect and safeguard the interest of the government?

Another lacuna in the 2019 Act is regarding the Consumer Protection Councils. The Act establishes Consumer Protection Councils as advisory bodies. But, however, it does not specify to whom such councils would render its advice to. And also the Act is unclear about the nature of such advises rendered, whether it would be binding or merely recommendary in nature.

CONCLUSION

If this trend of making all powerful executive continues in India then with the passage of time the popular saying *"Power corrupts absolutely and absolute power corrupt absolutely"* will soon be a reality. This trend of the executive is reflective of its malicious intention of divesting courts of their powers, vest those powers in the quasi-judicial bodies and fill these bodies with civil servants, thereby taking over of the essential judicial functions of the judiciary. Though, superficially the tribunal system and more specifically the latest Consumer legislation incorporated in the form of the Consumer Protection Act, 2019 might be seen as a progressive piece of work and welcomed by many as the Act has incorporated the changing technological advancement in the market but ,unfortunately, the defect in their inherent functioning and the dominant role of the executive is indeed injurious for the survival of democracy. In the guise of providing speedy remedy the quasi-judicial bodies cannot be converted into Executive Courts and be manned by the bureaucrats of the country with no legal knowledge or experience. These quasi-judicial bodies or the commissions have the pious obligation to discharge and such obligation cannot be substituted by providing an opportunity of post retirement jobs for the retired bureaucrats. Furthermore, performing vital judicial functions of adjudicating disputes and imposing fines and penalties by the executive members of the state is certainly over-stepping and transgressing the sphere of the judiciary by the executive and therefore violating the sacred doctrine of separation of power. If this trend continues and the lines of demarcation between the different organs of the state are not made clear and visible then soon we will be in an era of executive dictatorship. The need of the hour is the acknowledgment of self restraint on the part of each organ of the state with the separation of powers as its central characteristic and supremacy of the constitution as the foundation of its edifice.