EVOLUTION OF ADMINISTRATIVE COURTS IN FRANCE AND INDIA : A COMPARATIVE ANALYSIS

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ABSTRACT

As administrative law is a growing domain in Indian judicial system, it is necessary to understand how it evolved and where it has reached. The structure of tribunals largely decides its effectiveness. A study into its evolution would shed light on reason of its effective working. An inspiration can be drawn from French system to make Indian administrative courts more efficient and thereby reducing the burden of judiciary which is already reeling under colossal pressure of pendency with more than 4.2 crore cases pending in courts. Furthermore, administrative matters involve technical matters which demand technical expertise and specialized hearing. This warrants for an effective system of administrative tribunals in India that will make Indian judicial system more efficient, speedy and will add more sheen to it. But this can only be done when the foundation is strong. Therefore, the paper aims to map this evolution of administrative tribunals in both countries and study its structure to understand what more changes can be imbibed in Indian administrative courts setup.

Keywords: Evolution, French Administrative Courts, Indian Administrative tribunals, Comparative analysis

INTRODUCTION

The concept of administrative law in France which is a civil law country is much different from the administrative law in a common law country like India. The French administrative law covers a wide range of issues which in common law countries falls within the domain of public administration. In France administrative law is of ancient origin but in India it is a new entrant. Rather India was not comfortable with the tribunal system considering it to be violative of doctrine of separation of powers. While Civil law countries relies much on special administrative courts, the common law countries have ordinary courts with general jurisdiction

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which deal with administrative disputes. And even where administrative tribunals are there then also they are amenable to the jurisdiction of ordinary courts.

The paper endeavours to unfold the evolution of administrative courts in France and India. It aims to examine the structure of these courts and how they both are same and different from one another. Part I of the paper maps the terrain of establishment of administrative courts in France and their structure. Part II throws light on the evolution of Indian administrative courts. Part III of the paper aims to examine the similarities and differences between two systems and finally Part IV enshrines the conclusion.

PART I

FRENCH ADMINISTARTIVE COURTS

Introduction

One of the most striking feature of French administrative law is *droit administratif*. Eventhough part of civil law country, *droit administratif* is a judge-made law. Thus, this is a rare phenomenon in a civil law country— an uncodified branch of civil law system.[1] The French administrative law is grounded on a misconstrued notion that 'judging the acts of administration tantamount to administration'. Resultantly the administrative cases are decided by administration.[2] This trend of adjudication of administrative disputes by special administrative courts has also invited criticism. It has been contended that French jeopardise rule of law because public officials are judged by their own colleagues sitting as administrative judges. But this criticism has been refuted by French as they claim that these officials do not hobnob with other public servants. They are selected for judicial work immediately after their recruitment in civil services and are given special training.[3] The French claim this system to be more fair as the personnel sitting as judge in administrative tribunal is more aware of what they are adjudicating upon being civil servant himself.[4] This legal arrangement in France can be designated as *regime administratif*. It has two components, one that administrative actions are not amenable to ordinary court jurisdiction and second that there are a separate special administrative courts to deal with these matters.[5]

[1] L. Neville Brown, John S. Bell & Jean-Michel Galabert, *French Administrative Law* 45 (1998).
[2] David Annoussamy, French Administrative Tribunals, 26 *JILI*, 80-88 (1984).
[3] Joseph Minattur, French Administrative Law, 16 *JILI*, 364-376 (1974).
[4] *Ibid.*
[5] *Ibid.*

Historical Background

From the earlier times there has been a power tussle between the administrative courts and judicial courts in France. Initially there was a Conseil du Roi which acted as an advisory body to monarch and gave advise on legal and administrative matters. When the power of monarch strengthened, it restricted judicial courts from interfering in the matters of administration. But with the weakening of monarchy again this power struggle ensued. The gravity of this tussle can be assumed from the fact that it was exclaimed during French Revolution that Judiciary is the rival of Administration and it is causing trouble to Administration by impeding its work and causing harassment to its officers. It was thus, proclaimed that these two wings of state, the judiciary and administration would work separately and none would encroach upon the sphere of other. Thus, by the law of 16-24 August 1790 judiciary cannot intervene in the matters of administration. If judges intervened in the matters of administration, they would be guilty of misprision. The reason given for such proclamation was separation of powers. In the year 1799 Napolean established French administrative tribunals to adjudicate the cases of administration. He established *Conseil d' Etat* and district courts with limited local jurisdiction and placed himself as a central administrative tribunal. Later this council assumed the authority to take decisions without getting them approved from executive. Therefore, evolved a separate legal institution of administrative tribunals as distinct from administration and judiciary.[6] And this institution was *Conseil d' Etat.* Eventually it gained immense popularity among the French people.

Structure Of Administrative Courts

Presently in France there is a three-tier hierarchical structure of administrative courts. At the apex level is *Conseil d' Etat*. Lower to it *is Cours Administratives d' Appel* and at the last level is *Tribunaux Administratifs*. There are special administrative courts for overseas territories also which are *Tribunaux Administratifs* of Antilles, Reunion, Noumea and Papeete.[7]

Conseil d' Etat

Conseil d' Etat is the Supreme Court in the field of administrative law. It exercises three forms of jurisdiction. The first jurisdiction is of court of first and last instance which it may serve in almost 20% of cases settled each year. These cases are generally of important nature such as

[6] David Annoussamy, French Administrative Tribunals, 26 *JILI*, 80-88 (1984).
[7] L. Neville Brown, John S. Bell & Jean-Michel Galabert, *French Administrative Law* 50 (1998).

governmental decrees or decisions of ministers. The second jurisdiction is court of appeal from decisions of *Tribunaux Adminstratifs* from which no appeal lies to *Cours Administratives d' Appel.* And third is court of appeal from both the courts where it serve as *juge de cassation* or final Court of Appeal.[8]

The *Conseil* was established by Napolean in 1799.[9] It was to operate under three consuls. *Conseil* was bifurcated into five sections and was presided over by the head of state as First Consul and thereafter it was Emperor. These five sections were entrusted with the work of drafting new law and administrative rules and most importantly to resolve conflicts which might occur during the course of administration. The five sections were interior, finance, public works, social security and one *section du contentieux.* This last section performs the judicial function.[10] However, the *Conseil* did not have the independence. If any citizen had grievance he was required to lodge a complaint with the appropriate minister. And if still he is unappeased then he can resort to *Conseil.* The *Conseil* had to gain its independence by eliminating two doctrines— 'justice-retenue' and 'minister-juge'. While hearing of appeal from the minister the *Conseil* did not have the authority to decide the case. Rather it was just required to give advice to the head of the state. Though its advice was followed but it lacked autonomy. It was only by the Law of May 24, 1872 that *Conseil d' Etat* was empowered to adjudicate without

formal pretence that is performing advisory function. Thus, it was at the time of Third Republic that *Conseil* got the power to deliver judgments in the name of French people and therefore, it witnessed a shift from theory of '*la justice-retenue'* to *'la justice déléguée'*. The second impediment in *Conseil's* power was minister-juge whereby complaint had to be made to minister first and then it would come to *Conseil.* But in such scenario any case involving misappropriate actions of high officials or government policies would never come before the *Conseil.* Thus, in Cadot case (CE 13 December 1889), *Conseil* did away with this practice and a direct complaint can be made to *Conseil* itself without any intervention of minister.[11] With

[8] http://www.conseil-etat.fr/actualities/discours-et-interventions/the-french-administrative-jurisdictional-system&ved (Visited on July 31, 2022).
[9] David Annoussamy, French Administrative Tribunals, 26 *JILI*, 80-88 (1984).
[10] Joseph Dainow, The Constitutional and Judicial Organisation of France and Germany and Some Comparisons of the Civil Law and Common Law Systems, 37 *INDIANA LAW JOURNAL*, (1961).

[11]L. Neville Brown, John S. Bell & Jean-Michel Galabert, *French Administrative Law* 50 (1998)..

this it became '*juge de droit commun'* (judge of common law). But later this jurisdiction was entrusted upon *Tribunaux Administratif.*[12]

Tribunaux Administratif

The present hierarchical structure of administrative courts was not there. Initially there was only *Conseil d' Etat.* In 1799 *Conseil de Prefecture* was also established by Napolean. They were entrusted with the responsibility of giving advice to Prefect in connection with matters related to direct taxation and public works. It enjoyed limited administrative jurisdiction.[13] In 1926, 86 *Conseils de Prefecture* of the *departements* were replaced by 26 inter-departmental *Conseils.* These *Conseil* were made more independent by removing *Prefect* as their head. Now the *Conseil* had a President who would be a full time member of the Court. Since *Conseil d' Etat* got overburdened with the cases of first instance. It was then necessary to have another tribunal subordinate to it which can lessen the burden of *Conseil.* Thus, these local courts—*Conseil de Prefecture* were made courts of first instance and it was rechristened as *Tribunaux Administratif.* They were established by reforms of 1953 and now *Tribunaux Administratif* acted as *jurisdiction de droit commun.* With the establishment of these tribunals there were very few cases where *Conseil d' Etat* acted as court of first instance. It mostly served as court of appeal or court of cassation for cases which came from special administrative jurisdictions and from *Cours Administratives d' Appel.*[14]

Cours Administratives d' Appel

Eventhough the reforms of 1953 provided short term respite to *Conseil d' Etat,* it eventually once again got flooded with cases. These cases included those from appeals from *Tribunaux Administratifs* and cassation against administrative courts with special jurisdiction like *Commission des Réfugiés.* Finally by Law of 31 December 1987 a new branch of courts were established called *Cours Administratives d' Appel.* Initially five courts were created in Bordeaux, Lyons, Nancy, Nantes and Paris and another was added in Marseilles. The courts have jurisdiction over appeals from *Tribunaux Administratif* on matters called *le plein*

[12] Ibid.
[13] Joseph Dainow, The Constitutional and Judicial Organisation of France and Germany and Some Comparisons of the Civil Law and Common Law Systems, 37 *INDIANA LAW JOURNAL,* (1961).
[14] L. Neville Brown, John S. Bell & Jean-Michel Galabert, *French Administrative Law* 52 (1998).

contentieux. It consists of disputes on tax, administrative contracts, public liability generally and civil services matters.[15]

Thus, French administrative tribunals have evolved over time attaining greater specialisation and expertise. They have garnered more reputation among masses and despite many revolutions and various regimes, the French administrative courts have held the ground. They have proven themselves worthy of carrying both the advisory and judicial functions efficiently and effectively.

PART II

INDIAN ADMINISTRATIVE COURTS

Introduction

Indian approach of establishment of administrative courts is completely distinct from that of England and America.[16] The Administrative law is not codified. It is based on the Constitution and deals with the structure, powers and functions of organs of administration. As distinct from France where administrative courts developed owing to power tussle between administration and judiciary, the administrative courts in India were developed to reduce the burden of Supreme Courts. These Administrative Courts are subordinate to High Courts and Supreme Court and their decisions are subject to judicial review. Thus, we can find an intricate link between administrative courts and judicial courts in India.

Historical Background

Since the establishment of Constitution of India, it is the judicial courts which dealt with all the disputes and cases. It was only when the burden of administrative matters began augmenting that need for special courts arose. This problem attracted attention in early 1958. The Law Commission has also given recommendations for the creation of the tribunals to adjudicate upon service matters of judicial and administrative members[17]. In 1969 the Administrative Reform Commission also opined that it is necessary to establish civil service tribunals at both Centre and State level.[18] In 1975, a recommendation was again made by Swaran Singh Committee for the establishment of Service tribunal. The Supreme Court in

[15] *Id at* page no. 53.
[16] P.B. Mukharji, Administrative Law, 1 *JILI*, 39-64 (1958).
[17] Law Commission of India, 14th Report on Report Of Reform Of Judicial Administration, (1958).
[18] Government of India, Report: *On Personnel Administration*, (Administrative Reforms Commission, 1969).

K.K. Dutta v. Union of India[19] has opined for establishment of service tribunals so that writ petitions and appeals pertaining to service matters do not flood the judicial courts. On the similar lines various States[20] had established their own service tribunals. Thirty-second Constitution Amendment led to the establishment of service tribunal in Andhra Pradesh in 1973. The Parliament has, therefore, by 42nd Amendment Act, 1976 added Part XIV-A in the Constitution. It included two major Articles 323-A and 323-B that permitted Parliament to setup administrative tribunals. The Articles further empowered the Parliament decide upon various aspects of these constituted tribunals such as jurisdiction, power, authority and procedure.[21] Consequently, Parliament enacted Administrative Tribunals Act, 1985 by virtue of which administrative service tribunals were established for adjudication of service disputes of civil servants of the Centre and States.

Structure of Administrative Courts

Being a common law country with no strict line of separation between judicial and administrative courts, India, has Supreme Court as apex decision making body in administrative matters . At second level is High Court and at last level is administrative courts. Supreme Court is the final court of appeal in service matters. Any order or judgement given by the Administrative Tribunal can be challenged before the apex court. Administrative tribunal is entrusted with judicial functions and is required to decide the matters in accordance with the principles of natural justice. It is a specialized organisation which deals with service matters of Central government employees and of those employees which have been notified. It is not bound by rules of procedure. However, its decisions are subject to judicial review.

There has been repeated concerns regarding the appellate jurisdiction of High Court over the decisions of administrative tribunals. The primary objective of establishment of tribunals, to bring in expertise and reduce the burden of higher courts, cannot be achieved if all the decisions of tribunals would come in appeal.[22] Furthermore, routine appeals to Supreme Court arising from the decision of tribunals has flooded the Court with cases. These appeals are not only overburdening the Supreme Court but also obstructing the constitutional character of it. This

[19] (1980) 4 SCC 38.
[20] In Gujarat, 1973; Uttar Pradesh, 1975; Rajasthan, 1976; Assam, 1977.
[21] The Constitution of India, art. 323-A(2)(d) and 323-B(3)(d).
[22] Law Commission of India, 215th Report on L. Chandra Kumar be revisited by Larger Bench of Supreme Court of India (December, 2008).

is largely because these cases most often do not comprise of question of general public importance.[23]

In order to bring in more efficiency and confidence in tribunal adjudication, the Law Commission has recommended for the establishment of a high powered tribunal to deal with service matters. Such tribunal should consist of a judge of the status of Supreme Court judge as a presiding officer. He should be assisted by two independent experts and in order to bring in finality, the decision of the tribunal should be final. However, an appeal to Supreme Court will be provided under Article 136 of the Constitution on the ground of breach of fundamental rights. It is further necessary that the terms and conditions of service of these members of tribunal should be similar to that of Supreme Court judges.[24] This would ensure independence of the tribunal and thus, would make it more efficient. It was also noted by Commission that if the supervisory jurisdiction of the High Court and the Supreme Court remains intact, it would not reduce the volume of cases pending within these courts.[25] This continuous process of appeals to higher courts has the effect of delaying the disposal of cases. This pendency causes hardship to parties and inevitably, has the effect of ensnaring the successive generations in litigations instituted by the ancestors.[26]

In its 162nd report[27] Law Commission was of the view that if reliance is placed over the Supreme Court's *L Chandra judgment*[28] (L. Chandra Kumar v. Union of India, 1997) which requires aggrieved party to have recourse to respective High Court under Article 226/227 of the Constitution against the decision of the tribunal. The effect of this would be prolonging the litigation process because after getting decided from the High Court an appeal may go to Supreme Court under Article 136. Rather an appellate tribunal can be created whose status is higher than a High Court but below the Supreme Court. Or where the impression is that atleast one appeal should lie to any forum before it reaches Supreme Court, then an intra-tribunal

[23] Law Commission of India, 272nd Report on Assessment of Statutory Frameworks of Tribunals in India (October, 2017).
[24] Law Commission of India, 58th Report on Structure and Jurisdiction of the Higher Judiciary (January, 1974).
[25] *Ibid.*
[26] Law Commission of India, 79th Report on Delay and Arrears in High Courts and Other Appellate Courts (May, 1979).
[27] Law Commission of India, 162nd Report on Review of Functioning of Central Administrative Tribunal; Customs, Excise and Gold (Control) Appellate Tribunal; and Income Tax Appellate Tribunal (August, 1998).
[28] L. Chandra Kumar v. Union of India, AIR 1997 S.C. 1125.

appeal can be preferred.[29] It has been recommended by Law Commission in its report[30] that appeals against the decisions of tribunal should only reach High Curt where the statute constituting the tribunal does not have the mechanism to constitute the appellate tribunals which could hear appeals challenging the decisions of the concerned tribunal. However, where the appellate tribunal exists then its decision will achieve finality. And for this idea to become reality, it is essential that appellate tribunals must act judicially and they are constituted at an equivalent position of the High Court with its members possessing the qualification equivalent to High Court judges. Lastly, the appeals against the orders of this forum should go to Supreme Court only when it involves questions of 'public or national importance.' The efficiency of whole setup can be achieved pan India when the benches of tribunals are present in different parts of the country so that people from every quarter can bear its fruits. Furthermore, National Tribunals with Regional sittings and State-wise sittings should also be created to reduce the encumbrance of Courts and to accomplish the objectives for which they have been constituted.

With regard to the impartiality and independence of tribunals, it was noted by the Law Commission[31] that administrative tribunals are indispensable part of adjudicatory system of a democratic country. Their role will grow with time than diminish. The impression founded in 1985 Act that Tribunals have reliance upon the Government is misconstrued. There functioning is not regulated by the Government in any form and manner. In its 2017 report Law Commission has recommended that since the functions performed by tribunals are judicial in nature, its members should be given same status and capacity as of a judge. Where specialised knowledge or expertise is needed, the tribunal should incorporate technical members in addition to judicial members. However, where any case is transferred to that tribunal but it does not involve any technical matters, in such cases only judicial members should adjudicate. Furthermore, all the tribunals should have uniformity in qualifications, appointments, tenure and service conditions.

[29] Law Commission of India, 215th Report on L. Chandra Kumar be revisited by Larger Bench of Supreme Court of India (December, 2008).
[30] Law Commission of India, 272nd Report on Assessment of Statutory Frameworks of Tribunals in India (October, 2017).
[31] Law Commission of India, 215th Report on L. Chandra Kumar be revisited by Larger Bench of Supreme Court of India (December, 2008).

In India, thus, the concept of administrative law and courts is not so developed as it is developed in France. It is, however, continuously evolving and introducing specialised decision making in judicial arena.

PART III

A COMPARATIVE ANALYSIS OF FRENCH AND INDIAN ADMINISTRATIVE COURTS

On tracing the evolution of establishment of administrative courts in both countries it is evident that both countries had their own requirements which led to the birth of these courts. While French administrative courts were established to immune administration from attacks of judiciary, in India administrative courts were established mainly to effectuate speedy trial of cases and reducing the burden of courts. French administrative courts erect a complete wall of separation between themselves and judicial courts. For this reason they have *Conseil D' Etat* as their supreme decision making body and not *Conseil Constitutionnel*. But in India the administrative courts being subordinate to judicial courts do not enjoy such independence. Their supreme decision making body is none other than Supreme Court. There exists an intertwined relation between these courts. And their relationship can be understood from the fact that all courts are tribunals but the converse need not necessarily be true.

Their reasons of origin also influences their jurisdiction. On one hand French tribunals deal mainly with the disputes between state and individuals. While in India tribunals also take into its purview disputes between two private parties. The French Administrative tribunals especially *Conseil D' Etat*, which is supreme administrative decision-making body, performs dualist functions. It acts as an advisory body as well as judicial body. But no such advisory functions are associated with Indian tribunals. There is a lot of stature and eminence of French administrative courts and *Conseil D' Etat* is considered as an elite institution. While Indian administrative courts are considered ordinary with no such special significance attached to it. People in India look forward to Supreme Court as an elite institution. In India more prominence is given to High Courts and Supreme Court. The administrative courts' decisions are infact subject to judicial review of these Courts.

The structure of administrative courts is also entirely different. While French tribunals recruit members directly from National School of Administration who are Civil Servants, in India tribunals consist of both judicial as well as non-judicial members. However, this French

recruitment system cannot be said to be beneficial in India owing to generalisation of knowledge of civil servants who are not experts.

But one of striking similarity between the two systems is dynamic nature of administrative law. Despite of being a civil law country, France does not lay much emphasis on codification of administrative law. It has been given wide ambit to fully realise and develop itself according to changing needs of the society. This glaring feature is represented by *Droit Administratif*. In India also administrative law is evolving. Eventually the administrative courts have started gaining prominence and independence. More and more tribunals are established and they are given wider powers. Their role and significance has come to be realised.

PART IV

CONCLUSION

A close perusal of establishment of administrative courts in both countries manifests the need of administrative courts. In present times the relationship between state and its people is not restricted to police state or welfare state. They are becoming partners and state is entering into private domain by establishing contractual relationship with its citizens. In such scenario disputes are bound to arise and they generally involve technical matters. Adjudication of these disputes by a judicial court can at times be unfair as courts lack technical expertise. Tribunals, on other hand, constituted of members from administration could better realise the subject matter. The French model has also illustrated that it is not necessary that establishment of administrative courts as distinct from judicial courts would always invite nepotism and discrimination. Indian administrative courts can be seen walking on these lines. The powers and functions of administrative courts have been increased. Supreme Court has also opined in case of *R. Mohajan V. Shefali Sengupta*[32], that the High Courts do interfere with the orders or judgements passed by the Central Administrative Tribunals but it clear that the only forum to challenge the orders of Central Administrative Tribunal passed while exercising its contempt jurisdiction is the Supreme Court. Thus, efforts are being made to grant more independence to administrative courts in India. Court's decision can be seen to have appreciate the fact that even if no complete separation of judicial courts and administrative courts is possible in India but it can definitely be given more freedom.

[32] (2012) 4 SCC 761.