

# TOWARDS A TRIBUNAL SERVICES AGENCY

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*The performance of Indian tribunals has been unsatisfactory. Yet, policy-makers continue to rely heavily on tribunals to achieve their end objective. One example of this are the tribunals which will adjudicate in the proposed Insolvency and Bankruptcy Code, 2015. This is premised on the assumption that the tribunals will be able to dispose of cases within hard deadlines. A natural key question that arises is how Indian tribunals can perform better in this matter when they cannot in others? This paper proposes that administrative functions of tribunals should be hived off into a separate agency - Tribunal Services Agency - which will help improve the performance of the administrative functions of tribunals and, in turn, improve their judicial functioning in general.*

## I. INTRODUCTION

It is widely perceived that Indian tribunals are slow in handling litigation because of delays and pendency.<sup>1</sup> Debt Recovery Tribunals ('DRTs') have been criticised for their dismal performance.<sup>2</sup> Yet, policy makers keep relying heavily on tribunals to achieve their policy objectives. For instance,

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<sup>1</sup> Recently, the Minister of Law and Justice himself recognised that though tribunals were supposed to address the issue of delays and pendency in the existing Indian judicial system, there are concerns that tribunals themselves are bogged down with the same problems. See Press Release, PRESS INFORMATION BUREAU, January 25, 2016, available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=135781> (Last visited on January 26, 2016); See also Arvind P. Datar, *Tribunals: a tragic obsession*, February, 2013, available at [http://india-seminar.com/2013/642/642\\_arvind\\_p\\_datar.htm](http://india-seminar.com/2013/642/642_arvind_p_datar.htm) (Last visited on January 27, 2016).

<sup>2</sup> Somasroy Chakraborty, *Debt Recovery tribunals: More pain than gains for banks*, BUSINESS STANDARD (Kolkata) December 17, 2014.

the Insolvency and Bankruptcy Code, 2015 ('IBC'), as recently introduced in the Lok Sabha, vests jurisdiction over personal and corporate insolvency on the Adjudicating Authority - DRTs and National Company Law Tribunals ('NCLTs') respectively.<sup>3</sup> In this backdrop, this paper argues that a basic institutional reform is necessary in the current tribunal architecture to help improve their performance. It proposes that the administrative functions of tribunals should be hived off into a separate agency - Tribunal Services Agency ('TSA') - which will help improve performance of administrative functions supporting the tribunals, and in turn, will help improve performance of their judicial functions.

The paper assumes that any judicial institution, a court or a tribunal, has two functions: judicial and administrative. Judicial functions involve passing orders and judgments, allocation and listing of matters.<sup>4</sup> All other functions are administrative functions. While judicial functions are the exclusive domain of the judges, allocation of administrative functions in Indian judicial institutions have been more nebulous, often being performed by judges themselves. Although *ad hoc* attempts have been made from time to time to reduce administrative burden on judges and improve performance of administrative functions in judicial institutions, the precise institutional reforms needed to achieve such improved administrative performance of Indian judicial institutions have not been adequately addressed in the current literature.<sup>5</sup> This paper seeks to fill this lacuna in the existing debate on judicial reforms in India with a focus on the ongoing bankruptcy reforms.

Overall, this paper is divided into five main parts. Part II of the paper situates this discussion in the backdrop of the ongoing bankruptcy reforms and the IBC, as introduced in the Lok Sabha. Part III explains the front-end features that are necessary for any modern Indian tribunal. It identifies five principal front-end features that the end-users of an ideal tribunal should get to experience: independence, efficiency, accessibility, transparency and user-friendliness. To enable and sustain these front-end features, back-end institutional reforms are crucial. Accordingly, Part IV of the paper reviews the back-end institutional framework supporting judicial institutions across other common law jurisdictions like U.K., Canada, Australia and U.S. It finds that all these jurisdictions have moved towards setting up a separate agency which

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<sup>3</sup> The IBC uses the term 'Adjudicating Authority' to refer to these tribunals. Besides the Adjudicating Authority, the IBC also proposes setting up a regulator, an insolvency practitioner profession and information utilities. See Reuters, *India eyes bankruptcy reform to ease decades of gridlock*, THE ECONOMIC TIMES (Mumbai) October 30, 2015.

<sup>4</sup> See HM Courts and Tribunal Service, *Framework Document*, July, 2014, ¶2.5, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/384922/hmcts-framework-document-2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384922/hmcts-framework-document-2014.pdf) (Last visited on January 25, 2016) (This is based on the allocation of responsibilities followed by HMCTS. HMCTS is subject to the directions of the judiciary in relation to the conduct of the business of the courts and tribunals in matters such as listing, case allocation and case management).

<sup>5</sup> See Part V for existing literature in India on this issue.

supports the administrative functions of their judicial institutions. Even in India, the idea of a separate agency providing administrative support to judicial institutions has been deliberated upon for almost three decades. Part V reviews the developments in India in this regard and traces the evolution of the idea of a separate agency since 1988. It concludes by proposing the setting up of a TSA to support the back-end administrative functions of Indian tribunals including the tribunals envisaged under the IBC. Part VI proposes a detailed template of the organisation design, board structure, legal form and finances needed to establish the TSA, along with a brief implementation road map.

## II. THE BACKGROUND

The reforms envisaged in the IBC are far-reaching and if implemented properly, would be a game-changer for the Indian economy.<sup>6</sup> One of the most crucial institutional reforms suggested in this bill is the streamlining of the adjudication mechanism related to insolvency resolution, bankruptcy and liquidation.<sup>7</sup> The present adjudication framework being fragmented and dispersed has been one of the major stumbling blocks to timely resolution, bankruptcy and liquidation. The IBC proposes to completely overhaul this chaotic adjudication architecture.

The IBC vests DRTs with jurisdiction over matters concerning insolvency resolution and bankruptcy of individuals and partnership firms while NCLTs are vested with jurisdiction over matters concerning insolvency resolution and liquidation of corporate persons.<sup>8</sup> From DRT, there is a statutory appeal to the Debt Recovery Appellate Tribunal ('DRAT') and then to the Supreme Court, while from NCLT, there is a statutory appeal to the National

<sup>6</sup> Various expert committees have explained the importance of a robust bankruptcy framework for the Indian economy. For instance, Raghuram Rajan Committee report mentions that "if India is to have a flourishing corporate debt market, corporate public debt, which is largely unsecured, needs to have value when a company becomes distressed. This means a well-functioning bankruptcy code, that neither protects the debtor at the expense of everyone else including employees, as our current system does, nor one that allows secured creditors to drive a well-functioning firm into the ground by seizing assets. A good bankruptcy code is especially needed for large complex infrastructure projects, which typically have many claim-holders". See COMMITTEE ON FINANCIAL SECTOR REFORMS, *Report of the Committee on Financial Sector Reforms*, Proposal 34 (September 12, 2008); Similarly, Percy Mistry Committee report cited 'absence of a sound legal framework governing bankruptcy, with a well-developed "bankruptcy code" with adequate supporting institutions' as one of the impediments faced by commercial banks in India. See MINISTRY OF FINANCE, *Report of the High Powered Expert Committee on Making Mumbai an International Financial Centre*, Appendix E (February 10, 2007).

<sup>7</sup> See generally Aparna Ravi, *Indian Insolvency Regime in Practice: An Analysis of Insolvency and Debt Recovery Proceedings*, 50(51) EPW (2015) (A sampling study of case laws on this subject found that almost "all the cases reviewed involved proceedings in at least two forums and more often than not proceedings going on in parallel").

<sup>8</sup> See The Insolvency and Bankruptcy Code, 2015 ('Corporate person' is defined in clause 3(7) to include a company, limited liability partnership or any other person incorporated with limited liability under any law but not a financial service provider).

Company Law Appellate Tribunal ('NCLAT') and then to the Supreme Court.<sup>9</sup> The IBC uses the term 'Adjudicating Authority' to refer to NCLT for corporate insolvency as well as to DRT for insolvency resolution and bankruptcy of individuals and partnerships.

A crucial feature of the IBC is a time limit of 180 days, extendable by a further ninety days, for the completion of corporate insolvency resolution process.<sup>10</sup> The purpose of this hard time-limit is to nudge the parties involved to quickly decide the future course of action – to liquidate or not to liquidate. If the decision is not taken within the time limit, then the corporate person automatically goes into liquidation. The IBC presumes that the tribunals will not compromise the rigidity of this time limit.

In addition to the time bound resolution process, there are various other hard timelines to which the tribunals must adhere to. For instance, in corporate insolvency, within fourteen days from receipt of corporate insolvency resolution application, the tribunal must ascertain the existence of default, admit or reject the application and appoint an interim resolution professional.<sup>11</sup> Similarly, for individual and partnership insolvency, the tribunal needs to decide on the following applications within fourteen days: an application for a fresh start order; an application challenging the action taken by a resolution professional; an application for replacement of resolution professional; application to initiate insolvency.<sup>12</sup>

The most basic objective of the proposed IBC is minimisation of time taken to resolve disputes, especially for resolution on happening of a default, with a hard limit of 270 days being imposed overall. To nudge the behaviour of the players in the system, hard time limits have been provided for in the IBC for disposing of various applications by the tribunal.<sup>13</sup> Therefore, the entire IBC is based on the assumption that the tribunals will be able to consistently conduct adjudication proceedings in a time bound manner and deliver timely output in the form of orders and judgments.

### III. THE FRONT-END FEATURES

Similar to the assumption under IBC, the endeavour for every tribunal should be to deliver justice in a time bound manner in each proceeding, and uphold rule of law at a macro-level. To achieve these outcomes, this Part

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<sup>9</sup> See *id.*, Cls. 61, 62, 181 & 182.

<sup>10</sup> See *id.*, Cl. 12.

<sup>11</sup> See *id.*, Cls. 7(4), 9(5) & 10(4).

<sup>12</sup> See *id.*, Cls. 84, 87, 94, 95 & 98.

<sup>13</sup> Putting hard time limits in the law is not always desirable since it may create perverse incentives too. Neither is it always required since there are other ways of influencing human behaviour.

identifies and elaborates upon the most crucial front-end features of a tribunal that a user should ideally experience.<sup>14</sup>

### A. INDEPENDENCE

Independence is the hallmark of a judicial institution. It originates from the doctrine of separation of powers.<sup>15</sup> According to this doctrine, the legislative, the executive and the judicial organs of the state must be kept separate. Separation of powers as well as independence of judiciary are recognised as intrinsic parts of the basic structure of the Indian constitution.<sup>16</sup> The Supreme Court has in multiple cases reviewed the constitutionality of setting up of tribunals on this ground. In *Madras Bar Assn. v. Union of India* ('Madras Bar Assn.')<sup>17</sup>, the Supreme Court struck down the National Tax Tribunal Act, 2005, for being repugnant to the principle of independence of judiciary.<sup>18</sup> Consequently, it is crucial that the independence of the tribunal satisfies the standards of independence laid down by the Supreme Court.<sup>19</sup> Litigants should see the tribunal as an impartial and independent arbiter of disputes.

### B. EFFICIENCY

Efficiency in the context of a tribunal means its ability to maintain a steady desirable disposal rate without compromising on the quality of adjudication and orders. In other words, efficiency must be compatible with justice delivery in individual proceedings and upholding the overall rule of law. This

<sup>14</sup> The essential features required in building an effective Adjudicating Authority have been elaborated by the Bankruptcy Law Reforms Committee ('BLRC') in its report. See generally BANKRUPTCY LAW REFORMS COMMITTEE, *The Report of the Bankruptcy Law Reforms Committee: Volume 1 - Rationale and Design*, Chapter 4.2.4, (November, 2015).

<sup>15</sup> Originally proposed by the French political philosopher Montesquieu. See generally MONTESQUIEU, *THE SPIRIT OF THE LAWS* (1748).

<sup>16</sup> The Constitution cannot be amended to remove these features. See *State of Bihar v. Bal Mukund Sah*, (2000) 4 SCC 640 : AIR 2000 SC 1296.

<sup>17</sup> *Madras Bar Assn. v. Union of India*, (2014) 10 SCC 1.

<sup>18</sup> See *id.* (The Supreme Court observed that section 5 of the NTT Act, 2005 allowed the Central Government to determine the sitting of NTT benches, notify the area on which NTT benches would have jurisdiction and power to transfer the NTT members. The Court held this inappropriate since the Central Government will be a stakeholder in each and every appeal before the NTT. This would impede on the independence of the NTT. Further, it observed that section 7 dealt with the composition of the selection committee for NTT members. The committee was outweighed by the executive including Secretaries of Departments in the Central Government. The Court held that not only the stature but also the conditions of service as well as the manner of appointment, removal and transfer, and tenure of the NTT members must be the same as High Court judges. Accordingly, it found section 7 unconstitutional. Lastly, section 8 allows for reappointment of NTT members after their 5 year tenure. The Court held that this provision would undermine the independence and fairness of the members of the NTT since they will be constrained to decide matters in a manner that would ensure their reappointment. Therefore, section 8 was struck down as unconstitutional).

<sup>19</sup> See *id.* (More recently, the Supreme Court has upheld the validity of the National Company Law Tribunal and the National Company Law Appellate Tribunal).

in turn would require a mechanism for efficient allocation of the work as well as resources and streamlining of the present judicial and administrative processes relating to dealing with every type of matter before the tribunal. Therefore, the ultimate objective should be to maximise utility of judges' time in performing the sophisticated judicial functions and not spending it unnecessarily on administrative functions. Litigants should be comfortable approaching a tribunal with a positive perception that it will provide fair remedy efficiently.

A scientific mechanism for forecasting future caseload before the tribunal needs to be designed. Once there is a reasonable estimate of the future caseload, resources can be allocated in advance. At the very inception, this would require a judicial impact assessment of how many cases are likely to arise under the new insolvency framework. The Supreme Court in *Salem Advocate Bar Assn. (2) v. Union of India*,<sup>20</sup> has already considered the utility of judicial impact assessment in judicial budgeting.<sup>21</sup> For the present purpose, judicial impact assessment would help in systematically calculating the total number of judges and administrative support staff that would be required immediately at the inception of the new insolvency regime, to achieve the target disposal rate. Forecasting judicial workload should be made a regular feature of administration of DRT and NCLT so as to ensure that the budget estimate is updated every year based on the latest data. A clear scientific budgetary allocation coupled with release of the tribunals' performance statistics in public domain will help improve accountability within the institution without compromising its independence.<sup>22</sup>

The procedural rules of the tribunal need to be drafted with a view to minimise wastage of judicial time. This may involve fundamental rethinking of the present processes. For example, most of the interactions between the Adjudicating Authority and insolvency practitioner would require the former to sanction actions proposed by the latter. Some of these standard functions, which primarily involve review of technical documents, may be done through paper-based hearings and need not require oral hearings.<sup>23</sup> This would require detailed standardisation of the format of the written representations. But if oral hearings can be minimised, judicial time can be allocated more efficiently, minimising wastage and costs.<sup>24</sup>

<sup>20</sup> *Salem Advocate Bar Assn. (2) v. Union of India*, (2005) 6 SCC 344.

<sup>21</sup> *See id.* (the Court directed the Central Government to constitute a Task Force to examine the feasibility of judicial impact assessment in India); *See generally* TASK FORCE ON JUDICIAL IMPACT ASSESSMENT, *Judicial Impact Assessment* (June 15, 2008) (In its report, the Task Force explained the possibility of conducting judicial impact assessment in the Indian context and making budgetary provisions accordingly).

<sup>22</sup> *See* BLRC, *supra* note 14, Chapter 4.2.4.

<sup>23</sup> *See* The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules, 2014, Rules 20 & 25 (U.K.) (Paper-based hearings are common in other advanced common law jurisdictions. For example, appeals in the Asylum and Immigration Chamber of the UK are usually decided on paper-based hearings).

<sup>24</sup> *See* BLRC, *supra* note 14, Chapter 4.2.4.

Similarly, courts in various other jurisdictions have shifted to different case management softwares to manage, schedule and track the progress of cases, including filing of pleadings and documentary evidences. Advanced interactive softwares allow judges to mark, highlight and add notes to relevant portions of the electronic record, akin to a paper file. Maintaining an electronic case file and conducting the case with it reduces wastage of time due to incomplete pleadings. Moreover, it leaves an electronic record which can be used to automatically generate data on the progress of the case. Using such advanced court management softwares would help the Adjudicating Authority in minimising the use of judicial time.<sup>25</sup>

### C. ACCESSIBILITY

The Supreme Court has interpreted access to justice as a human right, imposing on the Government a constitutional duty to provide the citizens of the country with the judicial infrastructure and means of access to justice, so that every person is able to receive an expeditious, inexpensive and fair trial.<sup>26</sup> In the context of DRTs, the principle of access to justice has been invoked in support of pro-debtor statutory interpretations.<sup>27</sup> In this backdrop, it is necessary to envisage the creation of adequate infrastructure for a tribunal which will be able to facilitate access to justice for potential debtors across the country.<sup>28</sup> More generally, ease of access to a tribunal is absolutely essential for each and every litigant.

Accessibility could be improved through creation of extra benches as well as by creation of virtual court rooms through hearing centres spread across the country. Moreover, online interactions with agencies reduce transaction costs by minimising human intervention. Physical location becomes immaterial. Consequently, in the interest of accessibility to tribunals, all filings in the registry should be online, with minimum human intervention. This 'e-filing' system should allow litigants to file all the possible applications and pay the fees online. Where possible, notice could also be issued to the other side by instantaneous electronic means. The respondent should also be allowed to reply online. Necessary documentary evidence can also be submitted online subject to a subsequent verification process, if necessary. Consequently, an effective 'e-filing' system could substantially reduce the cost and time taken to file all the pleadings and documentary evidence before the tribunal. It will enhance accessibility to litigants by being operational 24x7 across all the 356 days in a year.<sup>29</sup>

<sup>25</sup> *See id.*

<sup>26</sup> *See* Brij Mohan Lal v. Union of India, (2012) 6 SCC 502.

<sup>27</sup> *See* Saroj Devi v. Bank of India, 2013 SCC OnLine Del 3159 : (2013) 203 DLT 534; Dhileep v. Debts Recovery Tribunal, 2007 SCC OnLine Ker 170 : AIR 2008 Ker 141.

<sup>28</sup> In fact, this factor motivated vesting of the individual insolvency jurisdiction with DRTs, which are more accessible because of their wider presence in the country in comparison to NCLT. *See* BLRC, *supra* note 14, ¶4.2.1.

<sup>29</sup> *See id.*, Chapter 4.2.4.

#### D. TRANSPARENCY

Transparency in the functioning of judicial institutions is essential for building public trust. It is necessary in both judicial and administrative functioning. Trials in secret militate against the very root of liberal democracy. Judicial proceedings are held in public in all modern democracies. With the advent of technology, it is now possible to open court rooms to public viewing, by using live transmission of audio-visual recordings.<sup>30</sup> Moreover, transcripts and petitions could also be made available to the public online. On the administrative side, transparency is necessary to achieve accountability. Annual performance reporting is the best way to achieve this. At the inception of each financial year, the administration must set performance targets and metrics. Throughout the year, the necessary data to measure each of the metrics must be collected and at the year end, the actual performance should be measured. This will enable efficient allocation of resources for the future and also bring in more accountability. The draft Indian Financial Code ('IFC') drafted by the Financial Sector Legislative Reforms Commission ('FSLRC') provided detailed provisions to institutionalise transparency in the functioning of tribunals.<sup>31</sup> In short, litigants should perceive a tribunal to be transparent in its day to day operations as well as overall performance.

#### E. USER-FRIENDLINESS

User-friendliness refers to enhancing the ease of using and understanding the systems and processes of the tribunal, both by external parties and the staff members. This could be in relation to virtual interaction over the web or physical interaction with the infrastructure of the tribunal. Most Indian courts and tribunals are not designed for the convenience of the ultimate user - the litigant. Neither has adequate planning gone into designing courts as workplaces for the staff. The Fourteenth Finance Commission took a step towards correcting this approach and recommended re-designing existing court complexes to make them more litigant friendly.<sup>32</sup> New tribunals like the NCLT have the advantage of starting from a clean slate. Its virtual as well as physical infrastructure should be designed keeping in view the ultimate aim of improving its user-friendliness quotient. Litigants should perceive the tribunals as friendly to their needs.

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<sup>30</sup> Different jurisdictions have progressed at varying pace in allowing audio-visual recording of court proceedings. While in United States, only audio recording is permitted, Supreme Court of Victoria, Australia, webcasts certain proceedings. For a comparative overview, *see generally* DANIEL STEPNIAK, *AUDIO-VISUAL COVERAGE OF COURTS* (2008).

<sup>31</sup> *See generally* FINANCIAL SECTOR LEGISLATIVE REFORMS COMMISSION, *Report of the Financial Sector Legislative Reforms Commission* (March 22, 2013).

<sup>32</sup> *See* FINANCE COMMISSION, *Report of the Fourteenth Finance Commission*, ¶11.44 (December 15, 2014).



#### IV. BACK-END INSTITUTION TO SUPPORT FRONT-END FEATURES

For these front-end features to be enabled and sustained, robust back-end institutions are necessary. Institutions are crucial for development of a nation.<sup>33</sup> But emerging economies often have poor institutions. Consequently, they get caught up in *capability traps*, where capability of the state to implement is both severely limited and improving, if at all, only very slowly.<sup>34</sup> In a bid to usher in institutional reforms, emerging countries like India often give in to the temptation of imitating the front-end features of liberal Western democracies without fully appreciating the back-end institutional support system necessary to support and sustain the front-end features.<sup>35</sup> This is especially so in case of legal transplants, which encourage *isomorphic mimicry* - the adoption of forms of other functional states and organizations to gain similar legitimacy, without actually attaining their functionality.<sup>36</sup> It should hardly come as a surprise that legal transplants often fail to provide the desired output, because of such *isomorphic mimicry*.<sup>37</sup>

To avoid such capability trap and isomorphic mimicry, while building new tribunals, it is crucial that the front-end features of the tribunal are backed by adequate back-end institutional support. This Part finds that most advanced common law jurisdictions have shifted towards a separate agency to provide back-end administrative support services to their judicial institutions. Such institutions help standardise and streamline internal processes of judicial institutions much like Business Process Reengineering ('BPR'), which is commonly used to streamline work flow in big organisations.<sup>38</sup> Consequently,

<sup>33</sup> See generally DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* (2012).

<sup>34</sup> Lant Pritchett, Michael Woolcock & Matt Andrews, *Capability Traps? The Mechanisms of Persistent Implementation Failure*, July 12, 2010, available at [http://www.cgdev.org/files/1424651\\_file\\_Pritchett\\_Capability\\_FINAL.pdf](http://www.cgdev.org/files/1424651_file_Pritchett_Capability_FINAL.pdf) (Last visited on January 25, 2016).

<sup>35</sup> See Pratik Datta & Ajay Shah, *How to make courts work?*, February 22, 2015, available at <http://ajayshahblog.blogspot.in/2015/02/how-to-make-courts-work.html> (Last visited on January 27, 2016) (For example, e-filing is a front-end feature that Indian courts have emulated from foreign courts although its success has been limited because of the absence of similar back-end institutional support system in India).

<sup>36</sup> This is especially so with judicial reforms. For example, India borrowed the concept of tribunals from the French system of *droit administratif*. Similarly, the position of law clerks in Indian courts have been borrowed from US. Computerisation of courts have also been nudged by similar developments in Western countries. However, hardly any attention is paid to the back-end institutional support system in those jurisdictions which support these features, probably because the back-end institutions are not evidently visible to an outsider.

<sup>37</sup> See Lant Pritchett, *Background Paper on World Development Report, Fragile States: Stuck in a Capability Trap?*, September 3, 2010, available at [http://siteresources.worldbank.org/EXTWDR2011/Resources/6406082-1283882418764/WDR\\_Background\\_Paper\\_Pritchett.pdf](http://siteresources.worldbank.org/EXTWDR2011/Resources/6406082-1283882418764/WDR_Background_Paper_Pritchett.pdf) (Last visited on January 25, 2016); For further details on why legal transplants do not work, see generally KENNETH DAM, *THE LAW-GROWTH NEXUS* (2006).

<sup>38</sup> See Datta & Shah, *supra* note 35; See also Institute for Court Management, *Ecourts opportunity for business process changes*, May, 2015, available at <http://www.ncsc.org/~media/Files/>

judges are not burdened with administrative work. And being a dedicated agency for court support services, these agencies are best positioned to take advantage of economies of scale to nurture expertise in court administration and develop valuable institutional memories in the subject over time.

#### A. HM COURTS AND TRIBUNALS SERVICE ('HMCTS') (UK)

The Leggatt Committee was constituted on May 18, 2000, to review the delivery of justice by tribunals. At that time, the Lord Chancellor's Department ('LCD') already contained a substantial executive agency, responsible for the administration of the ordinary courts in the Court Service. The Committee debated on whether tribunals should also be administered by the Court Service but ultimately decided against it, since it was felt that different procedural rules, skills and Information Technology systems would be required for tribunals. Accordingly, the Leggatt Committee Report suggested creation of a Tribunal Service as an executive agency with autonomy in running the day-to-day business of the organisation, within the limits set by the governing framework document.<sup>39</sup>

Pursuant to this report, the UK Government released another white paper in 2004, laying down the implementation plan.<sup>40</sup> Accordingly, in April 2006, the Tribunal Service was created. Subsequently in 2010, after the enactment of the Tribunals, Courts and Enforcement Act, 2007, the UK Cabinet Office led a cross government review of all Arm's Length Bodies ('ALBs') in order to increase the transparency and accountability of public bodies and to reduce their number and costs.<sup>41</sup> Accordingly, it was decided that the Court

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PDF/Education%20and%20Careers/CEDP%20Papers/2015/ECourts%20Opportunity%20for%20Business%20Process%20Changes.ashx (Last visited on January 25, 2016).

<sup>39</sup> See Sir Andrew Leggatt, *Tribunal for users: One system, one service: Report of the review of Tribunals by Sir Andrew Leggatt*, March, 2001, available at <http://webarchive.nationalarchives.gov.uk/+/http://www.tribunals-review.org.uk/leggatthtm/leg-fw.htm> (Last visited on January 25, 2016) (The Leggatt Committee was of the view that a common administration system for the tribunals across UK would bring greater administrative efficiency, a single point of contact for users, improved geographical distribution of tribunal centres, common standards, an enhanced corporate image, greater prospects of job satisfaction, a better relationship between members and administrative staff, and improved career patterns for both on account of the size and coherence of the Tribunals Service).

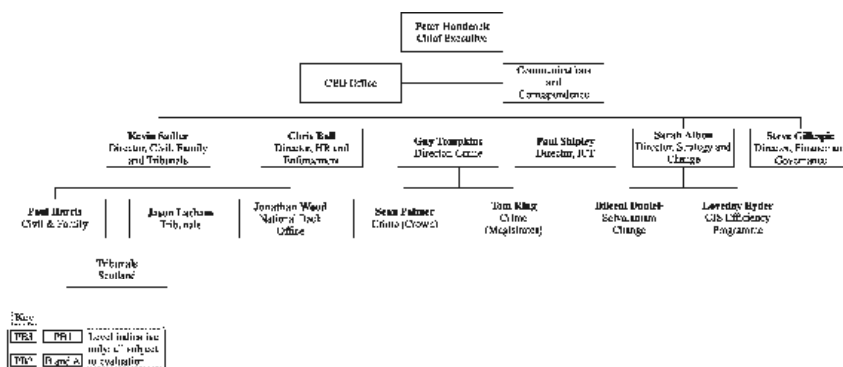
<sup>40</sup> See Department for Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals*, July, 2004, 55, available at <http://webarchive.nationalarchives.gov.uk/20041109030152/http://www.dca.gov.uk/pubs/adminjust/adminjust.htm> (Last visited on January 25, 2016) (The White Paper reiterated that the tribunals' judiciary should be supported by a separate executive agency to provide necessary administrative backup in partnership where appropriate with other organisations and the private sector. This executive agency would have its own CEO with his or her own management team. Like other executive agencies, the Tribunals Service will have a framework document setting out its aims and objectives. It will publish an annual business plan and present its accounts via an annual report. It will set and publish annually its targets for performance against a set of agreed key performance indicators and its subsequent achievements against them).

<sup>41</sup> See Ministry of Justice, *Abolition of Administrative and Tribunals Council (AJTC)*, November 14, 2011, 4, available at <https://consult.justice.gov.uk/digital-communications/>

Service and Tribunal Service could be merged to establish a stronger and more efficient governance structure for administrative tribunals.<sup>42</sup>

In 2011, the Court Service and Tribunal Service were merged to establish the HM Courts and Tribunals Service ('HMCTS') as an agency of the Ministry of Justice. It is structured like a corporation and operates on the basis of a partnership between the Lord Chancellor and the Lord Chief Justice.<sup>43</sup> By virtue of the Framework Agreement, the Lord Chancellor and the Lord Chief Justice agreed not to intervene (whether directly or indirectly) in the day-to-day operations of the agency and have placed the responsibility for overseeing the leadership and direction of HMCTS in the hands of its Board. The Chief Executive is responsible for the day-to-day operations and administration of the agency.<sup>44</sup>

Figure 1: The organisation structure of the HMCTS



## B. COURT ADMINISTRATION SERVICE (CANADA)

The Court Administration Service ('CAS') was set up by the Courts Administration Service Act, S.C. 2002. This legislation consolidated the former registries of the Federal Court of Canada and the Tax Court of Canada. The role of the CAS is to provide administrative services to four courts of law: the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court of Canada and the Tax Court of Canada.

The Chief Administrator, or deputy head, is responsible for providing services to the four courts. The Chief Administrator is the Chief Executive

public\_bodies\_bill/results/public-bodies-bill-abolition-ajtc-ia.pdf (Last visited on January 25, 2016).

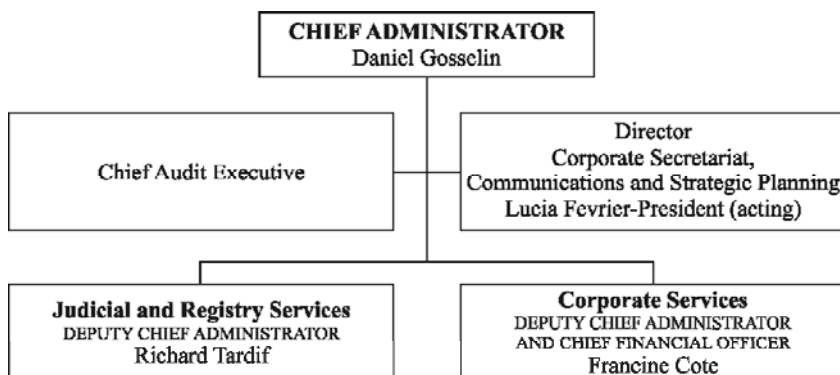
<sup>42</sup> See Chris Skelcher, *Reforming the oversight of administrative justice 2010-2014: Does the UK Need a New Leggatt Report?*, PUBLIC LAW 215-224 (2015).

<sup>43</sup> The partnership is in the form of a Framework Agreement. See HM Courts and Tribunal Service, *supra* note 4.

<sup>44</sup> See *id.*

Officer ('CEO') of the CAS and supervises its staff. The Chief Administrator has all the powers necessary for the overall effective and efficient management and administration of all court services, including court facilities and libraries and corporate services and staffing. The Chief Administrator, in consultation with the Chief Justices of the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court of Canada and the Tax Court of Canada, maintains the registry or registries for those courts in any organizational form or forms. It also prepares budgetary submissions for their requirements and for the related needs of the CAS. The powers of the Chief Administrator do not extend to any matter assigned by law to the judiciary.<sup>45</sup>

Figure 2: The Organisation Structure of the CAS



### C. COURT SERVICES VICTORIA (AUSTRALIA)

Court Services Victoria ('CSV') has been set up by the Court Services Victoria Act, 2014. The primary purpose of CSV is to provide, or arrange for the provision of administrative facilities and services to the courts, the Victorian Civil and Administrative Tribunal ('VCAT') and the Judicial College of Victoria ('JCV'). While the courts, VCAT and JCV themselves remain as separate and distinct entities and their governing councils, internal arrangements and rule-making responsibilities remain unchanged. Their executives now come together with the Chief Executive Officer to manage CSV as a whole. The Chief Executive Officer has all of the functions of a public service body head, as defined in the Public Administration Act, 2004, in relation to all of the members of the staff of CSV other than judicial employees. The benefit of the new organisational arrangement is that it strengthens judicial independence

<sup>45</sup> For more information, see Courts Administration Service, *History and Mandate*, available at [http://cas-cdc-www02.cas-satj.gc.ca/portal/page/portal/CAS/mandate-mandat\\_eng](http://cas-cdc-www02.cas-satj.gc.ca/portal/page/portal/CAS/mandate-mandat_eng) (Last visited on 26 January, 2016).

in Victoria through the provision of corporate services for Victorian courts and tribunals by CSV, free from the executive arm of government.<sup>46</sup>

#### *D. ADMINISTRATIVE OFFICE OF US COURTS (USA)*

Recognizing that an independent judiciary requires a substantial degree of administrative independence, Congress passed the Administrative Office Act of 1939. The Administrative Office assumed the administrative duties (e.g. procurement, personnel and payroll, budget and accounting, statistics collection and reporting) that the Department of Justice, an executive branch agency, had previously been performing for the judiciary.

The Administrative Office is the agency within the judicial branch that provides a broad range of legislative, legal, financial, technology, management, administrative, and program support services to federal courts. Judicial Conference committees, with court input, advise the Administrative Office as it develops the annual judiciary budget for approval by Congress and the President. The Administrative Office is responsible for carrying out Judicial Conference policies. A primary responsibility of the Administrative Office is to provide staff support and counsel to the Judicial Conference and its committees.

The agency is a unique entity in government in that neither the Executive Branch nor the Legislative Branch has any one comparable organisation that provides the broad range of services and functions that the Administrative Office does for the Judicial Branch. The lawyers, public administrators, accountants, systems engineers, analysts, architects, statisticians, and other staff of the Administrative Office provide a wide variety of professional services to meet the needs of judges and over 32,000 Judiciary employees working in more than 800 locations throughout the United States.<sup>47</sup>

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<sup>46</sup> For more information, see Court Services Victoria, *About CSV*, available at <https://www.courts.vic.gov.au/about-csv> (Last visited on January 26, 2016).

<sup>47</sup> See Cornell University Law School, *Administrative Office of the United States Courts*, available at [https://www.law.cornell.edu/wex/administrative\\_office\\_of\\_the\\_united\\_states\\_courts](https://www.law.cornell.edu/wex/administrative_office_of_the_united_states_courts) (Last visited on January 26, 2016).



## V. TOWARDS A TRIBUNAL SERVICES AGENCY: THE INDIA STORY

India saw a spate of tribunalisation, post liberalisation. It was widely believed that tribunals will address the problems of delay and pendency facing the ordinary civil courts. Of late, there is growing realisation that tribunals themselves are bogged down by the same problems that they were originally meant to solve.<sup>48</sup>

At present, Indian tribunals are largely dependent on their respective sponsoring Ministries for administrative support.<sup>49</sup> There is a growing consensus to streamline the existing plethora of tribunals.<sup>50</sup> Recently, the Supreme Court has directed the Central Government to consider if a common nodal ministry for all tribunals could be established.<sup>51</sup> The need for a separate administrative support services agency for Indian judicial institutions has been felt for quite some time now. This Part traces this evolution in Indian policy thinking.

### A. LAW COMMISSION OF INDIA ('LCI') REPORT (1988)

As early as 1988, the One hundred twenty-seventh report on resource allocation for infrastructural services in judicial administration by the LCI had observed that “the haphazard manner in which administration of courts is conducted has contributed its own mite to the problem”.<sup>52</sup> To remedy the situation the LCI made detailed recommendations on streamlining of staffing patterns, introduction of management experts and new technology to ensure that courts can carry out their functions more efficiently.<sup>53</sup> The Commission, in 1988, foresaw the immense benefits in computerising courts and using data processing to enhance court efficiency. In this context, it realised the need for

<sup>48</sup> The Law Minister himself recognised this concern recently. See Press Information Bureau, *supra* note 1.

<sup>49</sup> See *Union of India v. Madras Bar Assn.*, (2010) 11 SCC 1, ¶23.

<sup>50</sup> The Supreme Court recently directed the Central Government to consider setting up a nodal agency for administration of tribunals. See *Madras Bar Assn. v. Union of India*, (2015) 15 SCC 657; some time back the Law Ministry issued a fresh reminder to all central ministries and departments to give details of the number of tribunals working under them. It has also sought a response on how many of them can be merged to bring down their number. See PTI, *Fresh move to decrease number of tribunals, Law ministry issues reminder*, THE ECONOMIC TIMES (New Delhi) November 25, 2015.

<sup>51</sup> See Bar and Bench, *Supreme Court Directs Centre to Consider Common Nodal Ministry for all Tribunals*, January 18, 2016, available at <http://barandbench.com/supreme-court-directs-centre-to-consider-common-nodal-agency-for-all-tribunals/> (Last visited on January 25, 2016).

<sup>52</sup> Law Commission of India, *Resource Allocation for Infrastructural Services in Judicial Administration*, Report No. 127 (June 14, 1988) available at <http://lawcommissionofindia.nic.in/101-169/Report127.pdf> (Last visited on January 25, 2016).

<sup>53</sup> See *id.*, ¶3.30.

adequately trained staff, capable of dealing with information generated by a computerised system.<sup>54</sup> To achieve these front-end features, the LCI suggested a 'National Judicial Centre' for coordination and development of court staff and their condition of service, training procedure, standardised court room facilities, recording of cases in computers.<sup>55</sup> However, it did not delve deep into the structure of the National Judicial Centre.<sup>56</sup>

This report provides probably the first list of comprehensive suggestions on both the front-end features as well as the back-end institutional reforms needed to support the Indian judiciary. Evidently, it favoured creation of a separate organisation, the National Judicial Centre, to help support the administrative functions of the Indian judiciary.

### B. SUPREME COURT (1997)

The constitutionality of vesting new jurisdictions to tribunals at the cost of stripping away the judicial review powers of the High Courts has been a widely contested issue in India. In 1997, the Supreme Court delivered an authoritative precedent in *L. Chandra Kumar v. Union of India* ('L. Chandra Kumar')<sup>57</sup> which settled the law. In this judgment, the Court observed that "one reason why these Tribunals have been functioning inefficiently is because there is no authority charged with supervising and fulfilling their administrative requirements". The Court found the current framework where different tribunals constituted under different enactments are administered by different administrative departments of the Central and the State Governments to be unsatisfactory since there was no uniformity in administration. Therefore, taking into account the Indian context, the Court suggested:<sup>58</sup>

"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

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<sup>54</sup> See *id.*, ¶3.32-3.33.

<sup>55</sup> See *id.*, ¶3.30.

<sup>56</sup> For judicial budgeting, it proposed a Financial Consultative Committee comprising of Secretary level officers to finalise the judicial budget proposed by the respective High Courts or the Supreme Court. See *id.*, ¶4.16.

<sup>57</sup> *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261.

<sup>58</sup> See *id.*, ¶97.



to take sufficient interest in the working of the Tribunal, 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.”

Again in *Union of India v. R. Gandhi* (‘R. Gandhi’)<sup>59</sup>, the Supreme Court extensively cited the Leggatt Committee Report and the above portion from L. Chandra Kumar and lamented the lack of independence of tribunals. It concluded by observing:

“But in India, unfortunately Tribunals have not achieved full independence. The Secretary of the concerned ‘sponsoring department’ sits in the Selection Committee for appointment. When the Tribunals are formed, they are mostly dependant on their sponsoring department for funding, infrastructure and even space for functioning. The statutes constituting Tribunals routinely provide for members of civil services from the sponsoring departments becoming members of the Tribunal and continuing their lien with their parent cadre. Unless wide ranging reforms as were implemented in United Kingdom and as were suggested by Chandra Kumar are brought about, Tribunals in India will not be considered as independent.”<sup>60</sup>

Recently, in *Madras Bar Assn.*, a Constitution Bench of the Supreme Court was called upon to consider the contents of the Tribunal, Appellate Tribunals and Other Authorities (Conditions of Service) Bill, 2014. After reviewing the bill, the Court passed an interim order directing the Central Government to consider the observations made in *R. Gandhi*.<sup>61</sup> Evidently, since 1997, the Supreme Court has time and again recommended creation of an independent agency for administration of all tribunals in India.

### C. FINANCE COMMISSION REPORT (2010)

The Thirteenth Finance Commission approved several proposals of the Department of Justice to improve the Indian judiciary. One of the proposals which was accepted was creation of the post of court managers in every judicial district to assist the judiciary in their administrative functions. It was proposed that professionally qualified court managers with MBA degrees, be employed to assist judges. It was envisaged that these court managers will also be useful in feeding the proposed National Arrears Grid that would be set up to

<sup>59</sup> *Union of India v. R. Gandhi*, (2007) 4 SCC 341.

<sup>60</sup> *See id.*, ¶22.

<sup>61</sup> *See generally* *Madras Bar Assn. v. Union of India*, (2014) 10 SCC 1.

monitor disposal of cases in all the courts. The post of a court manager would be created in each judicial district to assist the Principal, District and Sessions Judges in the administrative functioning of the courts. Similarly, posts of two court managers may be created for each High Court and one for each bench of the High Court. The cost for this was estimated to be Rs. sixty crores per year, which were allocated to the states in proportion to the number of judicial districts in their jurisdiction.<sup>62</sup>

The suggested responsibilities of court managers included establishing performance standards applicable to the court including timeliness efficiency, quality of court performance, infrastructure, human resources, access to justice, systems of court management and case management. The court managers were also tasked with holding stakeholder consultations, preparing a court development plan and monitoring its implementation. Recording of statistics of court functioning was another responsibility. They were also supposed to ensure that the processes and procedure of the court, case management systems, access to justice, legal aid, user friendliness, adjudication standards, human resource of ministerial staff and IT systems comply with the standards set down by the High Court. The efficient functioning of the documentation management, utilities management, infrastructure and facilities management, financial systems management (audits, accounts, payments) were also the responsibility of the court managers. And finally, the court managers were expected to feed the case related data on to the National Arrears Grid.<sup>63</sup>

The court managers scheme was a move in the right direction.<sup>64</sup> It rightly recognised the need for supporting the administrative functions of the courts using professional court managers. However, without any institutional reforms supporting the court managers, they may end up being just another set of officers in the registry office.<sup>65</sup>

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<sup>62</sup> See generally THIRTEENTH FINANCE COMMISSION, *Volume I: Report*, 221-222, (December, 2009).

<sup>63</sup> See Ministry of Finance, Department of Expenditure, *Implementation of recommendation of Thirteenth Finance Commission-issue of guidelines-utilisation of grant-in-aid for Improvement in Justice Delivery recommended by Thirteenth Finance Commission*, Annex III, September 20, 2010, available at <http://finmin.nic.in/TFC/Guidelines%20for%20Improvement%20in%20Justice%20Delivery.pdf> (Last visited on January 26, 2016).

<sup>64</sup> The effectiveness of this scheme was supposed to be reviewed after 2015. Therefore, as of now, there is no official evaluation of the court managers' scheme.

<sup>65</sup> See Legally India, '*Court management' degree proves a flop in Nalsar MBA: College now scrambles to find corporate jobs for 46 MBA grads*, February 19, 2015, available at <http://www.legallyindia.com/Law-schools/nalsar-hyderabad-mba-program-progress-report> (Last visited on January 26, 2016) (NALSAR Hyderabad was one of the first law schools to start a MBA program on court management. Reportedly, the course did not garner much interest. NALSAR Vice Chancellor Faizan Mustafa mentioned in an interview that "not many people would like to do the job of court management where you have to work along with the registry of the high court. That kind of job does not excite an MBA person. This is my experience. Law graduates can get a job as a law graduate if they are good." He highlighted some unique challenges that the court managers were facing:

#### D. FSAT TASK FORCE (2015)

The *TAGUP Report* drafted under the chairmanship by Mr. Nandan Nilekani observed that managing IT intensive projects supporting Government functions are challenging because the implementation team lacks financial independence, suffers from inability to get the right personnel and retain them, technological obsolescence, lack of speed and productivity in implementation, lack of ownership within the department, all leading to cost and time overruns and failure to fulfil the requirements. To avoid these challenges, the TAGUP Report recommended a class of institutions – National Information Utilities (‘NIUs’) – to handle all aspects of IT systems for such complex projects.<sup>66</sup> The NIUs envisaged by TAGUP Report were private companies with a public purpose which would have an independent management with strategic control being with the Government. It was thought desirable that NIUs be self-financing, make reasonable profits, have professional standards and competitive practices, be transparent, willing to invest in technology and enable new entrants to allow competition.<sup>67</sup>

The Financial Sector Appellate Tribunal (‘FSAT’) Task Force, set up by the Ministry of Finance in 2014, extensively debated whether a NIU as envisaged in the *TAGUP Report* could be used to help provide the IT as well as non-IT back-end support services to tribunals. Taking into account the practice across jurisdictions and the proposed NIU model, in 2015, the FSAT Task Force recommended creation of a separate tribunal services agency to manage FSAT, with the ability to scale up to provide administrative support services for other judicial institutions as may be decided subsequently.<sup>68</sup>

The FSAT Task Force focused on the operational aspects of the tribunal, which is usually referred to as ‘registry’. Like the LCI and the Finance Commission, even the FSAT Task Force was of the view that the skills required to run these operations are very different from the legal and technical skills required of members of the tribunal.<sup>69</sup> In view of the international experience, the

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“there is some amount of reluctance on the part of the judiciary to accept some other class of people participating in the judicial process. Judicial officers do not want to divide their work with MBA people. And MBA graduates are professionals. So they would not like to become subordinate to judicial officers in that sense. So that’s why a marked division of work has not taken place between these judicial officers and the court managers”).

<sup>66</sup> See TECHNOLOGY ADVISORY GROUP FOR UNIQUE PROJECTS, *Report of the Technology Advisory Group for Unique Project*, January 31, 2011, available at [http://finmin.nic.in/reports/tagup\\_report.pdf](http://finmin.nic.in/reports/tagup_report.pdf) (Last visited on January 25, 2016).

<sup>67</sup> See *id.*, 14.

<sup>68</sup> See Pratik Datta & Ashika Dabholkar, *Enabling better judicial outcomes in insolvency*, THE FINANCIAL EXPRESS December 14, 2015.

<sup>69</sup> The LCI had made noted the need for specialised skills for court administration way back in 1988. See LCI, *supra* note 52.

FSAT Task Force envisaged a public sector undertaking specialising in court/tribunal administrative support services.<sup>70</sup>

### *E. NOT A NEW IDEA*

From the above discussion, it is evident that the idea of a separate administrative support services agency for judicial institutions has been taking shape for a long time in India. In fact, both the Indian LCI as well as the Supreme Court had envisaged the idea of a National Judicial Centre and an independent administration agency for tribunals respectively, much before the idea of a separate Tribunal Service was elaborated upon by Sir Andrew Leggatt in Leggatt Committee Report.<sup>71</sup> The idea was further developed by the FSAT Task Force, which took into account the experience gathered in dealing with large scale IT projects supporting government functions. With almost three decades of debates and deliberations on this issue, the ground is now ready for setting up a TSA to support the back-end administrative functions of Indian tribunals, including the tribunals envisaged under the IBC.

## VI. PROPOSED TRIBUNAL SERVICES AGENCY

Parts IV and V elaborates upon the basic back-end institutional reforms needed to support and sustain the front-end features in an ideal tribunal. This Part delves deeper and proposes a detailed organisational design for the TSA and its interactions with the tribunal under IBC. The design also enables the TSA to scale up and support other Indian tribunals in the future.

### *A. ORGANISATION DESIGN*

Organisation design is the outcome of shaping and aligning all the components of an enterprise towards the achievement of an agreed mission.<sup>72</sup> The mission in designing a tribunal is to enable it to achieve all the front-end features: independence, efficiency, accessibility, transparency and user-friendliness. The design is based on the key idea that judges' time is precious and must be used judiciously. Therefore, the overall objective is to maximise use of the judges' time in resolving sophisticated legal issues and minimise use of the judges' time in administrative matters without in any way compromising with the front-end features including judicial independence. This demands that the organisation design clearly identify all the functions of the tribunal; which functions can be hived off into the TSA; which functions cannot be hived off into to the TSA. Figure 4 proposes a suitable organisation design for an ideal tribunal and the TSA based on these considerations as well as international best practices.

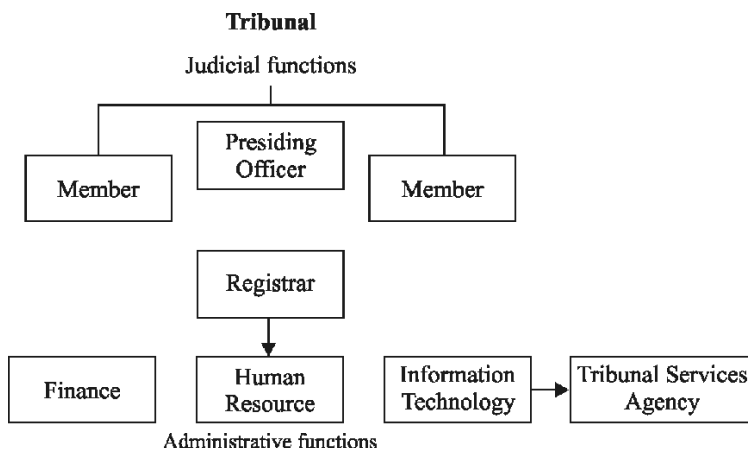
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<sup>70</sup> The FSAT Task Force drafted a Request for Proposal to hire a primary consultant through which consulting and IT companies would be utilised to build this organisation.

<sup>71</sup> See Leggatt, *supra* note 39.

<sup>72</sup> See NAOMI STANFORD, GUIDE TO ORGANISATION DESIGN 4 (2009).

Figure 4: Proposed Organisation Design



In Figure 4, the Presiding Officer and the Members are responsible for purely judicial functions leading to outputs in the form of orders and judgments. Naturally, these judicial functions cannot be delegated.

The Registrar is envisaged as the administrative head of the tribunal with the power to enter into Service Level Agreement ('SLA') with the TSA. Tribunal members should inform the Registrar if they need any administrative service. The Registrar is however devoid of any judicial function and is envisaged to not pass any judicial order or judgment. The main responsibility of the Registrar is to ensure that the administrative functions hived off to TSA are being performed properly according to the terms of the SLA. Naturally, the Registrar's function cannot be delegated to the TSA either.

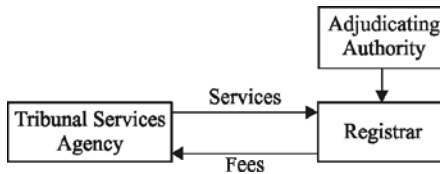
In Figure 4, the administrative functions related to finance, human resource and information technology are not core judicial functions and can be hived off into the TSA. In the future, if TSA has to support any other tribunal of any other sponsoring Ministry, these resources can be expanded and utilised to support that tribunal without the sponsoring Ministry having to replicate the entire administrative set-up from scratch.

## *B. TSA AS A COMPANY*

The TSA is envisaged to be an entity which will provide all kinds of administrative support services to a tribunal. Much of its work is to reorganise the business processes inside the tribunal and manage them. It does not in any way perform any judicial function at all. As is evident from Part IV, most jurisdictions (Canada, Australia and United States) have given statutory status to their respective court administration agencies. In contrast, UK has set up

HMCTS through an intra-governmental agreement.<sup>73</sup> Keeping in view the purpose of the TSA and the practical constraints in setting up a statutory body in India, the Indian TSA could be initially set up as a profit making but not profit maximising company, limited by shares under the Companies Act, 2013. This would help it to attract the best talent from the market into tribunal administration and develop expertise over time. Under the SLA, TSA would charge fees for the services it provides, as illustrated in Figure 5. These features are broadly based on the NIU model as envisaged in the TAGUP Report.<sup>74</sup> However, unlike a NIU, it must not have any private shareholder, neither should it be listed at any point of time. Instead, the shares of the TSA should be held by the Ministry of Law and Justice through the Central Government, subject to the Board composition being encoded into the Memorandum of Association.<sup>75</sup> This is to avoid any conflict of interest and ensure maximum independence of the tribunal, as is required under law. Subsequently, as and when feasible, a suitable legislation could be enacted, converting this company into a statutory corporation, like in Australia, Canada and USA.

Figure 5: Fee Based Model



### C. TSA BOARD

As discussed in Part II, one of the most critical front-end features of the Tribunal is its judicial independence. This could be achieved by ensuring that judicial members always have majority representation on the Board of TSA.

As Figure 6 shows, the TSA Board should comprise of judicial members, a chief executive officer and independent members. The judicial members must always be more than half of the total number of Board members. They should ideally be senior puisne judges of Supreme Court or such other judges as may be nominated by the Supreme Court. The chief executive officer should be a professional manager and need not necessarily have any legal qualifications. The independent members should be nominated by the Central Government and should bring in technical knowledge in non-legal disciplines like finance, accounting and public administration, which would be

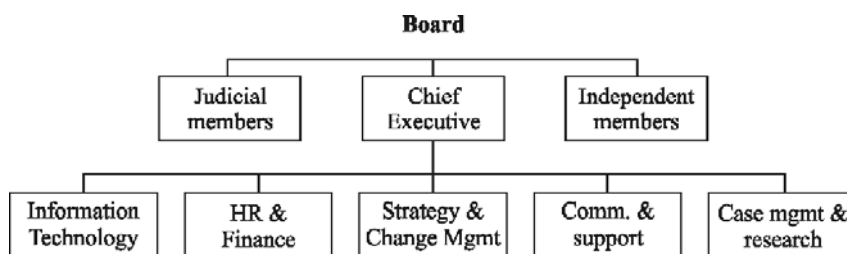
<sup>73</sup> See HM Courts and Tribunal Service, *supra* note 4.

<sup>74</sup> See TAGUP, *supra* note 66, 10-15.

<sup>75</sup> See *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261, ¶97 (The Supreme Court has suggested that the nodal agency for tribunal administration should be with the Ministry of Law and Justice).

needed in running this agency.<sup>76</sup> The technical legal knowledge will naturally be provided by the judicial members. Based on the Board's decisions in the form of board resolutions by majority vote, the CEO will execute the necessary actions required to provide the relevant administrative support services to the Adjudicating Authority. This corporate board model will allow the TSA to scale up its services and support other judicial institutions, if required, in the future.

Figure 6: Proposed Board Structure of the Administrative Support Services Entity



#### D. FINANCE

As explained in Figure 5, TSA will be paid fees by the Registrar, for services provided by it. These fees will be based on the SLA entered into between the TSA and the Registrar. Therefore, while entering into the SLA, the TSA will have to do a judicial impact assessment to forecast the future case load and accordingly decide on its fees. The funding requirement of the TSA will be finalised at Board level, after due deliberations among the judicial members, the Central Government nominees and the CEO of TSA. The Board decision of TSA, along with the detailed break-up based on the judicial impact assessment, will be conveyed to the Registrar of the Adjudicating Authority, who will forward it to the sponsoring department for release of necessary funds. The Board decision and the supporting judicial impact assessment, based on which the funding decision is made, should also be publicly released by the TSA. This transparency will ensure that TSA follows a scientific and rigorous budgeting process to estimate its funding requirements, which in turn will create healthy

<sup>76</sup> See Datta & Shah, *supra* note 35 (The debate on court reforms in India is dominated by judges and legal practitioners, which may be constraining the flow of ideas from non-legal disciplines which could probably provide better solutions to many of the problems being faced by Indian courts. To illustrate, computerisation of filing of Income Tax returns was envisaged in 2006, a global tender was floated, a management consultant appointed and today filing of income tax returns is primarily done online. In contrast, the possibility of e-filing in Indian courts has been debated since 1988 without any concrete result. This is possibly because e-filing in courts have been mainly debated and suggested by judges and lawyers without much involvement of resource persons with public administration and business process re-engineering knowledge and experience).

pressure on the sponsoring department to release the necessary funds to properly administer the Tribunal.

### *E. IMPLEMENTATION ROAD MAP*

Setting up of the TSA will need relevant expertise from different fields and would be a complex task. Therefore, ownership of the project from the inception is absolutely critical. The relevant government department must first start by setting up a Project Management Unit ('PMU') which will be solely responsible for the successful implementation of the project. The PMU must draft a Request for Proposal ('RFP') for procurement of a management consultant with relevant experience to build an organisation like TSA. Accordingly, the government will float a tender and the successful bidder should be engaged to implement the project under the supervision of the PMU. The first task for the management consultant must be to develop a Detailed Project Report ('DPR') with relevant milestones, laying down the exact work plan and the duration of the entire project. The overall task of the management consultant should be to assist the PMU in setting up TSA as per specifications in the DPR and subsequently, handhold TSA through the first three years of its functioning. After three years from the inception of the TSA, the TSA will start functioning on its own as a full-fledged administrative support services entity.

## VII. CONCLUSION

It is widely perceived that the performance of Indian tribunals has been unsatisfactory. Yet, more and more legislations like the IBC are vesting additional jurisdiction on tribunals and relying more heavily on them to achieve the ultimate policy objective. In this backdrop, this paper proposes that administrative functions of tribunals should be hived off into a separate agency – TSA, which will help improve performance of administrative functions of tribunals, and in turn, improve performance of their judicial functions. The paper identifies five principal front-end features that users of any tribunal should ideally experience: independence, efficiency, accessibility, transparency and user-friendliness. It argues that to enable and sustain these front-end features, back-end institutional reforms are crucial. The paper finds that most common law jurisdictions like UK, Canada, Australia and USA have moved towards setting up a separate agency which supports the back-end administrative functions of their judicial institutions. Even in India, the idea of a separate agency providing administrative support to judicial institutions has been deliberated upon for almost three decades. Accordingly, the paper concludes by proposing the setting up of a TSA to support the back-end administrative functions of Indian tribunals including the tribunals envisaged under the IBC. It also proposes a detailed template of the organisational design, board structure, legal form and finances needed to establish the TSA, along with a brief implementation road map.