Vidhi
Centre For Legal Policy
BETTER LAWS. BETTER GOVERNANCE

# STATE OF THE NATION'S TRIBUNALS

## INTRODUCTION

## AND

## PART 1: TELECOM DISPUTES SETTLEMENT AND APPELLATE TRIBUNAL

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June 2014

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## Acknowledgments

We would like to thank Aradhya Sethia, Chinmay Deshmukh, Subhaprada Mohanty and Raktima Roy, whose valuable assistance was instrumental in the writing of this report. We particularly want to thank Ritin Rai and Shayak Sarkar for their insightful comments, feedback and ideas. Errors, if any, are of course ours alone.

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# I. INTRODUCTION: STATE OF THE NATION'S TRIBUNALS

## A. Problems with the Tribunalisation of Justice

Ever since the first tribunal, the Income Tax Appellate Tribunal ("ITAT"), was set up in 1941[1] to decide Income Tax cases under the Income Tax Act, 1922, the process of tribunalisation of the justice system has slowly, but inexorably, grown to cover more and more areas of dispute resolution. This is true of both the Centre and the States. In 1996, Professor S.P. Sathe counted about 197 tribunals and agencies set up by the State and Central Governments.[2] Sathe enumerated 95 (ninety five) tribunals under 88 (eighty eight) central legislations, of which 78 (seventy eight) have been set up by the Central Government and 17 (seventeen) by State Governments. However, between 1996 and July 2013, at least 690 Bills, including Constitutional Amendments and Appropriation bills, have been passed by Parliament,[3] and at least 18 (eighteen) new tribunals have been set up by the Central Government. In light of this expansion, a new study must therefore be carried out to enumerate and examine the functioning of the Tribunals.

The reasons for rapid tribunalisation are evident. The process of tribunalisation of justice picked up pace since the 1990s because of two factors, the first being the litigation explosion and the consequent inability of the regular court system to handle the docket. The second factor being the judgment of a Constitution Bench of seven Judges of the Supreme Court of India in *L Chandra Kumar v Union of India*,[4] which upheld the power of Parliament to set up tribunals and vest in them the power to decide cases on any subject matter.

In addition, whereas the ITAT was under the administrative control and supervision of the Ministry of Law and Justice, most other tribunals have subsequently been set up by different ministries, with little coordination or coherence in the manner in which such tribunals are administered and supervised. Indeed, when efforts were made to bring all the Tribunals under the Ministry of Law and Justice in the Inter-Ministerial Group, there was strong opposition from all the Ministries, who preferred to keep each tribunal under their own administrative control and supervision.[5] In spite of directions of the Supreme Court of India and the Punjab and Haryana High Court, in *Union of India v Madras Bar Association*[6] ("*Madras Bar Association*") and *Navdeep Singh v Union of India*[7] respectively, to bring the National Company Law Tribunal ("NCLT"), the National Company Law

[1] Website of the Income Tax Appellate Tribunal <http://www.itatonline.in:8080/itat/site/AboutITAT.htm> (accessed 20 May 2014).

[2] Noor Mohammad Bilal, *Dynamism of Judicial Control and Administrative Action* (Deep and Deep Publications, New Delhi 2004); SP Sathe, *The Tribunal System in India* (NM Tripathi, 1996).

[3] Full list of Lok Sabha Government Bills as on 20 July, 2013 <http://data.gov.in/resources/lok-sabha-Government-bills-20th-july-2013/download> (accessed 13 June 2014).

[4] *L Chandra Kumar v Union of India*, (1997) 3 SCC 261 ("*L Chandra Kumar*").

[5] Affidavit of Mr. RK Pandey on behalf of the Union of India in Unnumbered Interlocutory Application seeking Modification of Judgment in Civil Appeal 3067 of 2004, *Union of India v R Gandhi, President, Madras Bar Association*, paras 9-11 ("Affidavit in *R Gandhi*").

[6] *Union of India v Madras Bar Association*, (2010) 11 SCC 1 ("*Madras Bar Association*").

[7] *Navdeep Singh v Union of India*, CWP No. 10751 of 2012 (P&H H.C.) (20 November 2012) (Unreported).

Appellate Tribunal ("NCLAT") and the Armed Forces Tribunal ("AFT") under the control and supervision of the Ministry of Law and Justice, no steps have been taken to implement either the High Court or Supreme Court order by the Central Government. Although an appeal in the *Navdeep Singh* case[8] is pending in the Supreme Court, the High Court's directions still stand as of now. Till date, however, both judgments have not been complied with.

At the same time, concerns have been raised about the manner and functioning of tribunals across the board. Apart from the concerns in the aforementioned cases, stakeholders have also expressed the view that the Tribunals have not really functioned as they were intended to, and have in fact served the contrary purpose for which they were set up.[9] In interactions with us, some stakeholders, mainly Senior Advocates and advocates who have practiced before the Tribunals, even suggested the drastic measure of winding up all the Tribunals and re-vesting the appropriate civil court or high court with their jurisdiction.[10]

Three complaints are generally raised by stakeholders in the functioning of the Tribunals:

(1) Tribunals are perceived as acting favourably towards the Ministries and Government departments which are the appointing authorities for the Members of the Tribunals. This is so for two reasons: the Tribunals themselves are composed of Members who are current or former Members of the ministry, and the Tribunals are entirely dependent on the administrative ministries for their daily functioning including staffing and financing.

(2) Though tribunals were supposed to address the issue of delays and pendency in the existing judicial system, they seem to be bogged down in the same problems. Although there is no mandate for tribunals to follow the procedure laid down in the Code of Civil Procedure, or to be bound by the provisions of the Evidence Act, it seems as though tribunals follow them nonetheless, leading to delays and inefficiency. Further, staffing inadequacies mean that cases are not disposed of in time.

(3) While tribunals are supposed to provide an effective dispute resolution mechanism to litigants, the quality of judges is not satisfactory, as reflected in the quality of the judgments delivered by the Tribunals, which are often challenged and set aside by superior courts. This has to do with the fact that the 'expert Members' who are appointed to these tribunals are often not suitably qualified.

This project has therefore been undertaken both to address macro level issues with the functioning of tribunals and tribunalisation *per se*, and also to analyse the concerns raised by stakeholders and suggest reform where necessary. The Report on the State of the Nation's Tribunals will be released as a series of reports, each focussing on one tribunal, and will try to examine the issues and problems with each tribunal through a common analytical framework. We hope to be able to draw

[8] *Union of India v Navdeep Singh*, SLP (C) CC No. 11647 of 2013.

[9] Ajay Sura, 'High Court sets aside majority of the orders of the Armed Forces Tribunal' (*The Times of India*, Chandigarh, 13 June 2014) <http://timesofindia.indiatimes.com/city/chandigarh/High-court-sets-aside-majority-of-orders-passed-by-Armed-Forces-Tribunals/articleshow/36476213.cms> (accessed 17 June 2014).

[10] Interview at 6 pm on 9 May 2014 with Senior Advocate who practices regularly at the TDSAT and did not wish to be named.

broader conclusions on the issues affecting tribunals at large, and to narrowly suggest reform measures to tackle specific problems individual tribunals face at present, as we have discussed.

## B. Research Method

### 1. Aims and Objectives

This report was envisioned with the following aims and objectives:

(1) to identify and prepare a comprehensive list of tribunals set up by the Central Government;
(2) to analyse the legal framework in which tribunals operate, and its strengths and weaknesses; and
(3) to analyse the functioning of selected tribunals, and recommend necessary statutory and administrative reform in their functioning.

### 2. Methodology

This report has been prepared on the basis of both doctrinal and empirical research. We have looked at statutes passed by Parliaments, and judgments of the Supreme Court of India and other judicial bodies to examine the legal framework within which tribunals operate. This analysis will be used to determine the normative independence of the Tribunal in question. What we mean by normative independence, and what we use as parameters to determine 'independence' of the Tribunal, will be explained in the next chapter.

Empirical research has been carried out to analyse the actual manner of functioning of tribunals. Data on the filing and disposal of cases has been obtained from the website of the Tribunal in question where possible. Where such data has not been put out in the public domain, applications under the Right to Information ("RTI") Act, 2005 have been filed to obtain such data. In response to such RTI applications, some tribunals have provided the relevant data, whereas others have replied that the data is not maintained in the format asked for, or that such records are not kept. We have noted these responses accordingly.

Apart from collecting such data, we also interviewed key stakeholders in the functioning of tribunals, such as retired and serving Chairpersons and Members, advocates who practice regularly before tribunals and Government officials from the concerned Ministries, in order to obtain their views on the functioning of tribunals and their insights into how best to improve the same.

### 3. Chapters

The project will analyse individual tribunals on the basis of certain metrics applicable to all tribunals. Each individual tribunal will be dealt with, in a separate report. Each of these reports will contain two Sections.

The first Section will introduce the project broadly. In this Section, the first chapter will introduce the topic and outline the research method used. The second chapter will outline the scope of the project, focusing on defining tribunals and which tribunals we are concerned with. The third chapter will focus on the metrics by which we hope to measure the functioning of the Tribunals.

The second Section of each report will contain an analysis of the individual Tribunal in question. In the present report, the second Section comprises an analysis of the Telecom Disputes Settlement and Appellate Tribunal ("TDSAT"), on the basis of the metrics set out in the first Section of this report. This second Section on the TDSAT is divided into three chapters. The first chapter provides an introduction to the Tribunal, describing its structure, jurisdiction and powers. The second chapter analyses the independence, efficiency and efficacy of the Tribunal, based on the metrics described earlier. We also briefly discuss the Tribunals, Appellate Tribunals and Other Authorities Bill of 2014 ("Tribunals Bill"), and the effect it is likely to have on the functioning of the TDSAT. Finally, in the third chapter, we draw our conclusions from the above analysis and provide certain specific recommendations on the functioning of the TDSAT.

### 4. Limitations

The empirical part of research for this project obviously depends on the quality of the data maintained by the Tribunal in question. This, in turn, depends on the proper maintenance of files by the Tribunal and the compilation of statistics by the registry of the Tribunal. The quality of data available has thus restricted our choice of tribunals. We have limited our analysis to tribunals which maintain data properly, in order to be able to advance substantive recommendations fairly.

## C. Definitional Scope

Articles 323A and 323B of the Constitution of India empower the Legislature to set up administrative and other tribunals respectively, and describe the powers and functions that may be vested in such tribunals. The Legislature has the power to take away the jurisdiction of all courts except that of the Supreme Court of India under Article 136 (as stated in sub-clause (d) of clause (2) of Article 323A and sub-clause (d) of clause (3) of Article 323B). However, applying the basic structure doctrine, the Supreme Court clarified in *L Chandra Kumar* that the said clauses would be unconstitutional, insofar as they seek to empower the Central and State Legislatures to exclude the jurisdiction of the High Court under Article 226, and that of the Supreme Court under Article 32.[11] The position of the law, as it stands therefore, is that while the Legislatures can take away the jurisdiction of any court, they cannot seek to replace the jurisdictions of the High Court and Supreme Court, under Article 226 and Article 32 respectively. Tribunals may, at best, supplement the jurisdiction of the High Courts and the Supreme Court in these matters.

However, neither Article 323A nor 323B of the Constitution, nor any other article, defines what a 'tribunal' is for the purposes of the Constitution. No law currently in force defines what a 'tribunal' is either. The recent Tribunals Bill introduced by the Union Government in the Rajya Sabha, does not provide a comprehensive legal definition of 'tribunal' but seeks to define the term by enumeration in sub-clause (i) of clause 2, by referring to the Tribunals in the First Schedule to the Tribunals Bill. However, the First Schedule does not contain an exhaustive list of all tribunals set up by the Central Government.[12] The First Schedule to the Bill lists only twenty six such bodies,

[11] *L Chandra Kumar* (n 4), para 99.

[12] See The Tribunals, Appellate Tribunals and Other Authorities (Conditions of Service) Bill, 2014 (the "Tribunals Bill"), First Schedule <http://164.100.47.4/BillsTexts/RSBillTexts/asintroduced/Tribnul-E.pdf> (accessed 28 February 2014).

including the Coastal Aquaculture Authority, Press Council of India and the National Industrial Tribunal, all three of which, strictly speaking, are not 'tribunals'.[13] At the same time, the list also excludes certain key tribunals, which we shall discuss presently.[14]

The approach of the Tribunals Bill seems similar to that of the UK Tribunals, Courts and Enforcement Act, 2007, where 'tribunals' are not defined exhaustively, but only defined by way of enumerating five categories of Tribunals, namely, First-Tier Tribunals, Upper Tribunals, Employment Tribunals, the Employment Appeal Tribunal and the Asylum and Immigration Tribunal. Broadly, First Tier Tribunals and Upper Tribunals seem analogous to trial courts and appellate courts, which have supervisory jurisdiction over the trial courts. In addition, Upper Tribunals also exercise the power of judicial review in their respective subject-matter jurisdictions.

In order to get a grip on the term 'tribunals', we must therefore turn to the law laid down by the Supreme Court and other judicial bodies.

It is trite to say that all courts are tribunals but not all tribunals are courts. Judgments have tried to define what a 'court' is and what a 'tribunal' is, and the circumstances under which a tribunal is not a court.[15] In *Harinagar Sugar Mills v Shyam Sunder Jhunjhunwala*[16], Justice Hidayatullah, in his concurring judgment, held:

> "The word "courts" is used to designate those tribunals which are set up in an organised State for the administration of justice. By administration of justice [it] is meant the exercise of judicial power of the State to maintain and uphold rights and to punish "wrongs". Whenever there is an infringement of a right or an injury, the courts are there to restore the *vinculum juris*, which is disturbed." [17]

In contradistinction, a tribunal was defined in the same judgment as follows:

> "With the growth of civilisation and the problems of modern life, a large number of Administrative Tribunals have come into existence. These tribunals have the authority of law to pronounce upon valuable rights; they act in a judicial manner and even on evidence on oath, but they are not part of the ordinary courts of civil judicature. They share the exercise of the judicial power of the State, but they are brought into existence to implement some administrative policy or to determine controversies arising out of some administrative law. They are very similar to courts, but are not courts." [18]

The judgment did recognise that it is not always easy to separate the two strictly, and in the facts of that case, it found that the decision of the Central Government was taken in the capacity of that of a 'tribunal', and was therefore amenable to appeal in the Supreme Court of India under Article 136 of the Constitution.

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[13] See below pp 8-9.

[14] See below p 10.

[15] See the concurring judgment of Hidayatullah J (as he was then) in *Harinagar Sugar Mills v Shyam Sunder Jhunjhunwala*, (1962) 2 SCR 339 ("*Harinagar*"), paras 29-33.

[16] *Harinagar* (n 15).

[17] *Harinagar* (n 15), para 29.

[18] *Harinagar* (n 15), para 31.

Likewise, in *Durga Shankar Mehta v Raghuraj Singh*,[19] *All India Hill Leaders Conference, Shillong v Captain WA Sangma*[20] and *CIT v BN Bhattacharjee*,[21] the very wide definition of tribunal, as essentially any body which exercises a dispute resolution function, is not helpful in understanding the Tribunal system in India and the problem of tribunalisation of justice in India. This definition of a tribunal as any body which performs quasi-judicial functions, while valid for the purposes of Article 136, also does not help us in this respect. Applying this definition, there is no basis for the 'independence' of tribunals if they can be conflated with the Central Government.

A slightly more specific definition of a 'tribunal' was proposed and adopted by the Supreme Court of India in *Kihoto Hollohon v Zachillhu*,[22] where the Court held that:

> "Where there is a *lis* — an affirmation by one party and denial by another — and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is an exercise of judicial power. That authority is called a Tribunal, if it does not have all the trappings of a Court."[23]

To appreciate the problems of the system a focussed definition therefore needs to be adopted that helps us address the issues facing tribunals and their functioning rather than focus on the larger justice delivery system. The best definition may therefore be found in those cases which deal specifically with the issue of tribunalisation.

A more instrumental definition was adopted by the Supreme Court of India in *Madras Bar Association* where it was distinguished from a Court as follows:

> "Though both courts and tribunals exercise judicial power and discharge similar functions, there are certain well-recognised differences between courts and tribunals. They are:
>
> (*i*) Courts are established by the State and are entrusted with the State's inherent judicial power for administration of justice in general. Tribunals are established under a statute to adjudicate upon disputes arising under the said statute, or disputes of a specified nature. Therefore, all courts are tribunals. But all tribunals are not courts.
>
> (*ii*) Courts are exclusively manned by Judges. Tribunals can have a Judge as the sole Member, or can have a combination of a judicial Member and a technical Member who is an "expert" in the field to which the Tribunal relates. Some highly specialised fact-finding tribunals may have only technical Members, but they are rare and are exceptions.
>
> (*iii*) While courts are governed by detailed statutory procedural rules, in particular the Code of Civil Procedure and the Evidence Act, requiring an elaborate procedure in decision making, tribunals generally regulate their own procedure applying the provisions of the Code of Civil Procedure only where it is required, and without being restricted by the strict rules of the Evidence Act."[24]

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[19] *Durga Shankar Mehta v Raghuraj Singh*, (1955) 1 SCR 267.

[20] *All India Hill Leaders Conference, Shillong v Captain WA Sangma*, (1977) 4 SCC 161.

[21] *CIT v BN Bhattacharjee*, (1979) 4 SCC 121.

[22] *Kihoto Hollohon v Zachillhu*, 1992 Supp (2) SCC 651 ("*Kihoto*").

[23] *Kihoto* (n 22), p. 707, para 99.

[24] *Madras Bar Association* (n 6), p. 35, para 45.

Keeping in mind the pitfalls of an overbroad definition and the need for a working, instrumental definition, for the purposes of this paper, a definition has been adopted as follows — a tribunal is a permanent and independent body set up by the Legislature, to solely decide a *lis* between parties in the context of specific jurisdiction vested upon it by statute, and which is not part of the regular judiciary.

The definition of a tribunal can therefore be split up into six criteria, which collectively are necessary and sufficient to designate a body as a tribunal. These are:

(1) Permanency;
(2) Independence from the Executive;
(3) Set up by or under law made by Parliament;
(4) To solely decide a *lis* between parties;
(5) Specific jurisdiction vested by statute;
(6) Not part of the regular judiciary.

This definition is in line with the instrumental definition adopted by the Supreme Court in *Madras Bar Association*, where it examined the constitution of tribunals which have been vested with jurisdiction that would otherwise vest in Courts. It also follows the distinction between 'tribunals' and 'quasi-judicial authorities' as recently explained by the Supreme Court in *State of Gujarat v Gujarat Revenue Tribunal Bar Association*, where it held that:

> "**18.** …Where there is a *lis* between two contesting parties and a statutory authority is required to decide such dispute between them, such an authority may be called as a quasi-judicial authority i.e. a situation where, (*a*) a statutory authority is empowered under a statute to do any act; (*b*) the order of such authority would adversely affect the subject; and (*c*) although there is no *lis* or two contending parties, and the contest is between the authority and the subject; and (*d*) the statutory authority is required to act judicially under the statute, the decision of the said authority is a quasi-judicial decision. An authority may be described as a quasi-judicial authority when it possesses certain attributes or trappings of a "court", but not all. In case certain powers under CPC or CrPC have been conferred upon an authority, but it has not been entrusted with the judicial powers of State, it cannot be held to be a court."[25]

In addition, this definition expressly excludes those courts which are 'designated' tribunals under certain statutes, such as High Courts and District Courts. These are sometimes designated 'Company Courts', 'Election Tribunals' or 'National Industrial Tribunals', and are not 'tribunals' *per se*, simply because they continue to be part of the regular judiciary under the Constitution, but only exercise certain additional jurisdictions under specific legislations.

Based on this definition, and on an examination of all current Central legislation for current and extant tribunals, the following final and exhaustive list of tribunals was arrived at:

(1) Appellate Authority for Industrial and Financial Reconstruction
(2) Airports Economic Regulatory Authority Appellate Tribunal
(3) Appellate Tribunal for Electricity
(4) Appellate Tribunal for Foreign Exchange
(5) Appellate Tribunal for Forfeited Property
(6) Appellate Tribunal for Forfeiture of Property

[25] *State of Gujarat v Gujarat Revenue Tribunal Bar Assn*, (2012) 10 SCC 353, p. 365 para 18.

(7) Appellate Tribunal for Prevention of Money Laundering
(8) Armed Forces Tribunal
(9) Authority for Advance Rulings (Income Tax)
(10) Authority for Advance Rulings (Central Excise, Customs and Service Tax)
(11) Board for Industrial and Financial Reconstruction
(12) Central Administrative Tribunal
(13) Central Excise Service Tax Appellate Tribunal ("CESTAT")
(14) Central Sales Tax Appellate Authority
(15) Company Law Board
(16) Competition Appellate Tribunal ("COMPAT")
(17) Cyber Appellate Tribunal
(18) Debts Recovery Appellate Tribunal
(19) Debts Recovery Tribunal
(20) Employees' Provident Fund Appellate Tribunal
(21) Film Certification Appellate Tribunal
(22) Income Tax Appellate Tribunal
(23) Intellectual Property Appellate Board
(24) National Consumer Disputes Redressal Commission
(25) National Green Tribunal
(26) National Highways Tribunal
(27) Railway Claims Tribunal
(28) Securities Appellate Tribunal
(29) Telecom Disputes Settlement and Appellate Tribunal

Of the twenty nine tribunals listed above, it must be noted that there are at least three instances of one tribunal exercising the jurisdiction and performing the functions of two or more tribunals. These are the Authority for Advance Rulings (for Income Tax, Central Excise, Customs and Service Tax cases, and for Central Sales Tax cases, separately), Appellate Tribunal for Forfeited Property (for Narcotic Drugs and Psychotropic Substances Act, 1985 and Seizure and Attachment of Property of Foreign Exchange Manipulators Act, 1976 cases, separately) and the COMPAT (which also acts as the Airports Economic Regulatory Authority Appellate Tribunal, separately). These should not be confused with tribunals which deal with cases under multiple legislations, such as the CESTAT (Central Excise Act, 1944, Customs Act, 1962, and the Finance Act, 1994) and the ITAT (Income Tax Act, 1961 and the Wealth Tax Act, 1957). The three instances referred to here are actually cases where despite legislations providing for separate tribunals with separate jurisdictions, both the jurisdictions are being exercised by one tribunal alone as chosen by the Central Government.

The ambit of this report is limited only to Central Government tribunals set up under Central legislation. We are not focussing on tribunals set up by the State Governments under State legislation. We are also not looking at tribunals set up by State Governments under a Central statute, such as the State and District Consumer Forums or the State Administrative Tribunals.

Broadly, four categories of bodies created and administered by the Central Government that might otherwise have some trappings of a court, or exercise some sort of quasi-judicial function, have been excluded from this list, primarily for not meeting one of the criteria listed out above.

a. Inter-State Water Dispute Tribunals, which are ad hoc tribunals governed specifically under the Inter-State Water Disputes Act, 1956, and are specific to each dispute that they are

resolving. In essence, they are best described as Arbitral Tribunals for Inter-State Water Disputes, and become *functus officio* once the Report under section 5(2) of the ISWDA is given. At present, five inter-state water dispute tribunals are functional. These are:

(i) Ravi & Beas Water Disputes Tribunal
(ii) Cauvery Water Disputes Tribunal
(iii) Krishna Water Disputes Tribunal – II
(iv) Mahadayi Water Disputes Tribunal
(v) Vansadhara Water Disputes Tribunal

b. Commissions of Inquiry set up under the Commissions of Inquiry Act, 1952 by the Central Government, since they neither decide a *lis* between parties despite having the trappings of a Court, nor are they permanent bodies, being set up only to inquire into specific disputes.

c. Statutory, sectoral regulators such as the Securities Exchange Board of India, the Competition Commission of India, and others who may have some quasi-judicial functions in passing and enforcing orders, but cannot be considered to be deciding any *lis* between parties. Indeed, in the case of *Brahm Dutt v Union of India*,[26] the Supreme Court observed that it would be in the interests of the separation of powers if the Government provided for an appellate body exercising judicial functions over an expert body such as the Competition Commission of India. Therefore, while the regulator may have to act in a quasi-judicial manner in some instances, this would not, by itself turn the regulator into a 'tribunal'. Likewise, even though the National Human Rights Commission and the Railways Rates Tribunal set up under section 33 of the Railways Act, 1989 do perform some quasi-judicial functions, they also perform regulatory and other statutory functions as well. Consequently, they do not fall within the definition outlined above.

d. Statutory authorities, such as the Coastal Aquaculture Authority, the Law Commission of India, National Minorities Commission et al., which have retired Supreme Court and High Court judges as Members/Chairpersons, have also been excluded from this particular report. This is because such statutory authorities do not exercise judicial power in deciding any *lis* between parties. Some such authorities have been brought under the Tribunals Bill simply due to the fact that their Chairpersons are retired Supreme Court judges, and the Bill was introduced because of a pending PIL relating to appointment of Supreme Court judges to certain bodies.[27]

Applying the aforementioned criteria, we find that the Tribunals Bill erroneously includes the Press Council of India, the National Industrial Tribunal and the Coastal Aquaculture Authority. These are not tribunals — the Press Council of India performs other regulatory functions as well; the National Industrial Tribunal is a designated court and the Coastal Aquaculture Authority, under the Coastal Aquaculture Authority Act, 2005, does not perform any quasi-judicial functions. However, these three bodies may be designated 'other authorities', a term that is not used in the body of the Tribunals Bill, though it is mentioned in its title.

[26] *Brahm Dutt v Union of India*, (2005) 2 SCC 431.

[27] Affidavit in *R Gandhi* (n 5), pp. 6-7, para 6.

At the same time, we find that six tribunals have been excluded, for no evident reason, from the First Schedule to the Tribunals Bill. These are:

(1) The Employees Provident Fund Appellate Tribunal
(2) Appellate Tribunal for Forfeited Property
(3) Appellate Tribunal for Forfeiture of Property
(4) Debts Recovery Tribunal
(5) Central Sales Tax Appellate Authority
(6) Authority for Advance Rulings (Central Excise, Customs and Service Tax)

Even assuming that the Authority of Advance Rulings is covered, insofar as it exercises Income Tax jurisdiction, the Act leaves too much scope for confusion in the absence of a clear indication that separate legislations provide for different tribunals whose functions are, in fact, being performed by one.

Tribunals may be further classified on the basis of the number of benches and the kind of jurisdiction that they exercise. The classification on the basis of benches is done keeping in mind that the issues faced by larger tribunals may not necessarily be the same as those faced by smaller tribunals. In classifying tribunals based on jurisdiction, one can sub-classify them on the basis of whether the Tribunals exercise original or appellate function or both, and whether the Tribunals adjudicate disputes between citizens, between citizens and the State or both kinds of disputes. The nature of the Tribunal's jurisdiction will also affect the independence of the Tribunal from the Executive, and will help us assess whether the delay is due to the nature of the cases being handled by the Tribunal or their complexity.

The chart below describes the classification of the Tribunals:

**TABLE 1**

| | TRIBUNAL | BENCHES | JURISDICTION | NATURE OF DISPUTES |
|---|---|---|---|---|
| 1. | Appellate Authority for Industrial and Financial Reconstruction | Single | Appellate | Citizen-Citizen |
| 2. | Airports Economic Regulatory Authority Appellate Tribunal | Single | Appellate | Citizen-State |
| 3. | Appellate Tribunal for Electricity | Single | Appellate | Both |
| 4. | Appellate Tribunal for Foreign Exchange | Single | Appellate | Citizen-State |
| 5. | Appellate Tribunal for Forfeited Property | Single | Appellate | Citizen-State |
| 6. | Appellate Tribunal for Forfeiture of Property | Single | Appellate | Citizen-State |
| 7. | Appellate Tribunal for Prevention of Money Laundering | Single | Appellate | Citizen-State |
| 8. | Armed Forces Tribunal | Multiple | Both | Citizen-State |
| 9. | Authority for Advance Rulings (Income Tax) | Single | Original | Citizen-State |
| 10. | Authority for Advance Rulings (Central Excise, Customs and Service Tax) | Single | Original | Citizen-State |
| 11. | Board for Industrial and Financial | Multiple | Original | Citizen-Citizen |

| | | | | |
|---|---|---|---|---|
| | Reconstruction | | | |
| 12. | Central Administrative Tribunal | Multiple | Both | Citizen-State |
| 13. | Central Excise Service Tax Appellate Tribunal | Multiple | Appellate | Citizen-State |
| 14. | Central Sales Tax Appellate Authority | Single | Appellate | Citizen-State |
| 15. | Company Law Board | Multiple | Original | Citizen-Citizen |
| 16. | Competition Appellate Tribunal | Single | Appellate | Citizen-State |
| 17. | Cyber Appellate Tribunal | Single | Appellate | Citizen-State |
| 18. | Debts Recovery Appellate Tribunal | Multiple | Appellate | Citizen-Citizen |
| 19. | Debts Recovery Tribunal | Multiple | Original | Citizen-Citizen |
| 20. | Employees' Provident Fund Appellate Tribunal | Single | Appellate | Citizen-State |
| 21. | Film Certification Appellate Tribunal | Single | Appellate | Citizen-State |
| 22. | Income Tax Appellate Tribunal | Multiple | Appellate | Citizen-State |
| 23. | Intellectual Property Appellate Board | Single | Appellate | Both |
| 24. | National Consumer Disputes Redressal Commission | Multiple | Appellate | Citizen-Citizen |
| 25. | National Green Tribunal | Multiple | Appellate | Citizen-State |
| 26. | National Highway Tribunal | Multiple | Appellate | Citizen-State |
| 27. | Railway Claims Tribunal | Multiple | Original | Citizen-State |
| 28. | Securities Appellate Tribunal | Single | Appellate | Citizen-State |
| 29. | Telecom Disputes Settlement and Appellate Tribunal | Single | Both | Both |

## D. Parameters of Analysis

To assess whether the criticism of tribunals in India found in Chapter A of this Section is valid, the Tribunal in question will be examined under these three metrics:

### 1. Independence

This metric will first examine whether the Tribunal enjoys normative autonomy, that is to say, whether the appointment and removal criteria of its Chairpersons and Members, which are provided in the Act, are designed to provide for independent adjudication of disputes. Second, we will examine whether the Tribunal enjoys functional autonomy, that is, whether it is free to make appointments to posts within itself (obviously excluding appointments of Members), finance its functioning, decide its budget and spend accordingly.

Normative autonomy here means that the legislation establishing the Tribunal in question meets the constitutional standard of independence of judiciary that is applicable to the forum(s) that the Tribunal is supposed to replace or supplement. This standard of independence has in fact been laid down by the Supreme Court of India in *Madras Bar Association*, where it held:

> "The Legislature is presumed not to legislate contrary to the rule of law and therefore know that where disputes are to be adjudicated by a judicial body other

> than courts, its standards should approximately be the same as to what is expected of mainstream judiciary. The rule of law can be meaningful only if there is an independent and impartial judiciary to render justice. An independent judiciary can exist only when persons with competence, ability and independence with impeccable character man the judicial institutions. When the Legislature proposes to substitute a tribunal in place of the High Court to exercise the jurisdiction which the High Court is exercising, it goes without saying that the standards expected from the judicial Members of the Tribunal and standards applied for appointing such Members, should be as nearly as possible as applicable to the High Court Judges, which are apart from a basic degree in Law, rich experience in the practice of law, independent outlook, integrity, character and good reputation. It is also implied that only men of standing who have special expertise in the field to which the Tribunal relates, will be eligible for appointment as technical Members. Therefore, only persons with a judicial background, that is, those who have been or are Judges of the High Court and lawyers with the prescribed experience, who are eligible for appointment as High Court Judges, can be considered for appointment as judicial Members."[28]

For a tribunal to be considered 'independent', therefore, it should approximately meet the same standards as the 'mainstream judiciary', or as the Court clarifies, the forum it seeks to replace. What this means for tribunals is that the legislations providing for tribunals should provide for qualifications that are the same as, if not higher than, the qualifications required to be a High Court judge in India. This also implies that the procedure for appointment of tribunal Members should be as close as possible to the appointment of judges in the forum the Tribunal is supposed to replace or supplement.

### (a) Formal Independence

The formal independence of a tribunal may be assessed on the basis of the appointment of judges (*i*), their terms and conditions of service (*ii*), as well as grounds of removal and suspension (*iii*).

#### *(i) Appointments*

The qualifications for High Court judges are prescribed in clause (2) of Article 217 of the Constitution of India. In order to be eligible for appointment as a High Court judge, a person must be:

(1) A citizen of India; and
(2) Have ten years of practice as an advocate of a High Court or two such High Courts in succession; or have held a judicial post in India for at least ten years.

It is worthwhile to note that sub-clause (aa) of the Explanation to clause (2) of Article 217 clarifies that holding the post in a tribunal is counted towards 'practice' as an advocate, and not towards holding a 'judicial post', for the purposes of the ten year eligibility criterion.

In addition to these criteria, the Supreme Court has evolved a third criterion concerning appointments to tribunals, in light of the fact that Members need not be persons who have training in the law. In the *Madras Bar Association* case, the Supreme Court held that a provision in the then Companies Bill, which permitted the appointment of a Joint Secretary level officer to the NCLT, would be unconstitutional, because a Joint Secretary level officer did not enjoy the same rank as that of a High Court judge. Since the NCLT was supposed to replace the jurisdiction of High Courts,

[28] *Madras Bar Association* (n 6), p. 58, para 108.

it was held that persons who are appointed Members of such a tribunal must have the same rank and status as that of a High Court judge, in order to preserve their independence and integrity. The Court held:

> "As far as technical Members are concerned, the officer should be of at least Secretary level officer with known competence and integrity. Reducing the standards, or qualifications for appointment will result in loss of confidence in the Tribunals. We hasten to add that our intention is not to say that the persons of Joint Secretary level are not competent. Even persons of Under-Secretary level may be competent to discharge the functions. There may be brilliant and competent people even working as Section Officers or Upper Division Clerks but that does not mean that they can be appointed as Members. Competence is different from experience, maturity and status required for the post. As, for example, for the post of a Judge of the High Court, 10 years' practice as an advocate is prescribed. There may be advocates who even with 4 or 5 years' experience, may be more brilliant than advocates with 10 years' standing. Still, it is not competence alone but various other factors which make a person suitable. Therefore, when the Legislature substitutes the Judges of the High Court with the Members of the Tribunal, the standards applicable should be as nearly as equal in the case of High Court Judges. That means only Secretary level officers (that is those who were Secretaries or Additional Secretaries) with specialised knowledge and skills can be appointed as technical Members of the Tribunal."[29]

Therefore, where the Tribunal is taking over the functions of the High Court or supplementing it, the statute and rules have to state that expert Members must be officers at the level of Additional Secretary or higher. In other cases, it may be acceptable to appoint a lower ranking officer as an 'expert Member' of the Tribunal.

As far as the procedure for appointment of a judge to the High Court is concerned, appointment of a judge is made by the President of India, in 'consultation' with the Chief Justice of India, the Governor of the State, and the Chief Justice of that High Court.[30] Of course, when a judge is being appointed as the Chief Justice of that High Court, there is no consultation with the sitting Chief Justice of the High Court.

When it comes to consultation with the Chief Justice of India, the Supreme Court has interpreted this to mean concurrence.[31] The Chief Justice of India essentially exercises a veto over the appointment of judges, but this veto is not exercised solely by him or her. The 'consultation' with the Chief Justice of India means consultation with a collegium of judges comprising the Chief Justice of India and the four senior-most judges of the Supreme Court.[32] Similarly, 'consultation' with the Chief Justice of the High Court means concurrence of the Chief Justice of the High Court, along with two senior most judges of that High Court.[33]

The underlying rationale for such an elaborate procedure of appointment is the importance of the function of the High Court in ensuring that executive and legislative actions are in accordance with

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[29] *Madras Bar Association* (n 6), p. 59, para 111.

[30] Constitution of India, Article 218(1).

[31] See *Supreme Court Advocates on Record Association v Union of India*, (1993) 4 SCC 441 ("*SCARA*"); *Special Reference No. 1 of 1998, Re*, (1998) 7 SCC 739 ("*Spl Ref 1 of 1998*").

[32] *Spl Ref 1 of 1998* (n 31), p. 763, para 15.

[33] *Spl Ref 1 of 1998* (n 31), p. 763, para 15.

the Indian Constitution, in exercise of its jurisdiction under Article 226.[34] Given that Article 226 is part of the basic structure and can never be supplanted through ordinary legislation, any tribunal which exercises a supplemental function need not have the identical set of procedural safeguards when it comes to appointments. However, the constitutional provisions themselves can provide a useful guide in determining what would constitute independence.

Where tribunals have been vested with the power of reviewing or overseeing appeals from the actions of the Executive, the requirement of independence is far greater than, say, in the case of a tribunal which decides only private disputes. This is not to say that tribunals which decide private disputes need not be independent, but tribunals reviewing executive actions must meet a higher standard of independence than those dealing with purely private matters.

Tribunals which do not have the power of review, and which replace regular civil courts, should at least have the level of independence that civil courts enjoy in the Constitutional framework. Under the Constitution, appointments to posts of district judges are made by the Governor in 'consultation' with the High Court.[35] In contrast with the appointment of High Court judges, the appointment of District Court judges requires consultation with the High Court and not just the Chief Justice of the High Court. This has been interpreted to mean that it is not just an 'empty formality',[36] but should be 'real, full and effective consultation'[37]. In effect, State Governments have given primacy to the opinion of the High Court in the selection of district judges, since the High Court is the best placed to determine whether a candidate is suitable for the post of a district judge in the State.

Therefore, what we propose to examine in the context of appointments to a tribunal can be broken down into the following tests:

(1) Is the Executive required to consult with the Judiciary in the appointment of Members to the Tribunal?

(2) If the Tribunal is required to review the decisions of the Executive, does such 'consultation' also mean concurrence?

(3) Are the qualifications of the expert Member with Government service sufficient to ensure independence of the Tribunal?

A clarification is required at this stage. While some tribunals exercise review functions, they need not necessarily review decisions of the Executive. By 'Executive' decisions, we mean those taken by the Ministries or Departments of the Central Government, and not those by other statutory authorities such as the Competition Commission of India, Securities Exchange Board of India or the Telecom Regulatory Authority of India. The reason for this distinction is that these bodies, while performing some executive functions, do not have the power to appoint or even have a say in the appointment process. Therefore, when dealing with the question of independence from the Executive, we are focusing on the independence of the Tribunal from the political Executive alone.

[34] *SCARA* (n 31), p. 702, para 408.

[35] Constitution of India, Article 233(1).

[36] *Chief Justice of AP v LVA Dixitulu*, (1979) 2 SCC 3.

[37] *State of Kerala v A Lakshmikutty*, (1986) 4 SCC 632, p. 647 para 22.

Appointments are merely one aspect of the independence of tribunals. Service conditions and the procedure for removal of Members is equally relevant and here, again, we can draw guidance from the Constitution.

### *(ii) Terms and conditions of service*

The service conditions of judges of the High Court are determined by the Parliament and not the State Government, and cannot be varied to the disadvantage of the judge after appointment.[38] In the case of district judges, the High Court of the State controls all district and subordinate courts, and has jurisdiction over all matters related to posting, promotion, leave, et al.[39]

Although there are basic differences between tribunals, and the High Courts and District Courts, the relevant point here is that the conditions of service of judges are not determined by the Executive, and are fixed by the law made by Parliament or by the High Court through appropriate Rules. Tribunals, therefore, must also be similarly insulated from the Executive, under the statute.

Therefore, we will examine whether the provisions of the parent statute provide sufficient protection from Executive interference in the terms and conditions of service of tribunal Members, and whether there is any protection from unfair variation to the disadvantage of a Member.

### *(iii) Removal and suspension*

A judge of a High Court, like a judge of the Supreme Court, can only be removed by the President after a motion of impeachment is passed by both Houses of Parliament, with a two thirds majority on grounds of proven misbehaviour or incapacity.[40] In the context of district judges, removal is considered part of the 'conditions of service', i.e., the High Court is the only body which has the power to conduct relevant enquiries and order the removal of district judges.[41]

The method of removal of a tribunal Chairperson and Member must be akin to that of High Court judges, and must be clearly distinct from the removal procedures of other Government employees, where the person who appoints usually has the power to remove as well.[42]

As far as the removal of High Court and Supreme Court judges is concerned, the Judges (Inquiry) Act, 1968 lays down the procedure by which the inquiry into the judge's conduct takes place. Under this legislation, upon notice of an impeachment motion being given by the appropriate number of Members of Parliament in either House, the Speaker or Chairman constitutes a Committee to inquire into and send a report on the charges of impeachment against the judge.[43]

This is in contrast with the procedure for the removal of Government servants by the Executive. Although the applicable civil service rules, such as the Central Civil Services (Classification, Control

[38] Constitution of India, Article 221.

[39] Constitution of India, Article 235.

[40] Constitution of India, Article 217(1)(b) read with Article 124 (4).

[41] *Rajendra Singh Verma v Lt Governor (NCT of Delhi)*, (2011) 10 SCC 1.

[42] See General Clauses Act, 1896, s. 16.

[43] Judges (Inquiry) Act, 1968, ss. 3, 4.

& Appeal) Rules, 1965, ['CCS (CCA) Rules'], mandate the carrying out of an enquiry while imposing disciplinary punishment against civil servants, they also empower the Central Government to suspend the charged officer pending disciplinary proceedings.[44] While the rationale for suspension pending disciplinary proceedings relates to the loss of confidence of an employer in his employee,[45] and is also constitutionally provided for in the context of Public Service Commission Members,[46] this line of reasoning would not be applicable in the context of a High Court or Supreme Court judge. This is because the judge is not an 'employee' of the Executive, and because the Constitution does not provide for the suspension of a judge pending impeachment.

This issue was also examined, albeit somewhat cursorily, by the Supreme Court in *Madras Bar Association*. Though it did not strike down the relevant provision providing for suspension of the Tribunal Member, it did direct that suspension take place only with the concurrence of the Chief Justice of India, and that the provision be amended suitably.[47]

Two requirements are therefore common and obvious — the necessity of a fair hearing before removal and the elimination of unfettered Executive powers concerning removal or suspension of tribunal Members. This would be in accord with the removal procedures of District and High Court judges, which the Executive does not control. As described earlier, the Legislature has the *de facto* power to remove a High Court judge, and the High Court has the power to remove district judges.

In the context of this report, therefore, we will examine Acts setting up tribunals to assess if there are sufficient procedural safeguards ensuring that the removal or suspension of tribunal Members is not at the sole discretion of the Executive.

### (b) Functional Independence

While the normative autonomy of a tribunal can be examined purely with reference to legislation, our project will also assess the day to day functioning of the Tribunal, and whether the Tribunal has sufficient autonomy to operate independent of the Executive. Some of this analysis will relate to the legislation setting up the Tribunal, since some legislations do deal with this, but we will also examine the functioning of the Tribunal itself.

High Courts enjoy functional autonomy under the Constitution to the extent that it is the High Court's Chief Justice who has the power to appoint other officers and persons to the High Court, and administrative expenses are charged to the Consolidated Fund of the State, including the salaries, allowances and pensions payable to the officers and servants of the High Court.[48] While the conditions of service of such officers are subject to the laws made by the Legislature, the High Court also has the power to make Rules for the same. District courts are under the control of the High Court.

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[44] CCS (CCA) Rules, Rule 10.

[45] See for instance *Ram Kumar Kashyap v Union of India*, (2009) 9 SCC 378, p. 382, para 12.

[46] Constitution of India, Article 317(2).

[47] *Madras Bar Association* (n 6), p. 66, direction (xi).

[48] Constitution of India, Article 229.

The underlying principle, as with the provisions relating to removal of judges, is to ensure that the Judiciary is not under the control of the Executive in its functioning.[49] It is also to prevent the Executive from controlling the judiciary financially.

In our report, therefore, we will examine the following issues:

(1) Does the Tribunal have the power to hire and fire its own staff?
(2) Is the Tribunal entirely dependent on the Executive for its funds?
(3) Does the Tribunal function more efficiently than the court it was supposed to replace or supplement?

## 2. Efficiency

This metric will evaluate the number of cases that have been filed in and disposed by the Tribunal in any given year. We will be looking at all the cases filed and disposed of in each year, either for the last ten years or since the Tribunal started, whichever is earlier. This is to provide an insight into whether the Tribunal, at its given strength, is able to handle its case load. We have thus sought data from tribunals on:

(1) The number of cases filed in a given year;
(2) The number of cases disposed of in a given year; and
(3) The number of cases pending, and the length of time for which they have been pending.

We have also sought to correlate these with the given strength of the Tribunal at any given time, to see if its strength had any bearing on the rates at which cases were disposed. We shall compare this with the publicly available figures of disposal in High Courts, to assess if tribunals are doing a better or worse job than them in disposing of cases. Likewise, in cases where a tribunal is taking over the jurisdiction or ousting the jurisdiction of a civil court, the purpose of the analysis will be to see if it functions more efficiently than the average district court in India.

While publicly available figures indicate how many cases were filed and disposed in a given year, they do not indicate how many of the cases were disposed in the same year they were filed. However, solely to assess how courts manage their workload and pendency, comparing figures for filing and disposal of cases would be sufficient, to see if any progress is being made on the pendency front. In any time frame where disposal is greater than filing, pendency has obviously reduced.

Even though we may not be able to ascertain how long a case has been pending for on the basis of this data alone, we can use the number of cases disposed per judge monthly as a metric of efficiency, based on the public figures available. An analysis of these figures shows that, at the High Court level, a judge manages to dispose about 220 cases in a given month, whereas, at the subordinate court level, a judge manages to dispose about 103 cases per month. The reason for this large discrepancy requires further research, but it can *inter alia* be attributed to the larger workload of subordinate judges, the different kinds of cases which are heard by High Court judges and subordinate judges, and differences in infrastructure between the two kinds of courts.

At the same time, this metric of cases decided by a judge per month should not be considered in isolation. It is possible that in fora where the number of cases is much lower than in others, a

[49] See *M. Gurumoorthy v Accountant General, Assam (Nagaland)*, (1971) 2 SCC 137.

judge may dispose all of them and yet have a lower number of cases disposed per month. For instance, in the initial few years of the TDSAT, the number of cases filed in the TDSAT in a given year did not rise above 200, and there was no case pending beyond one year for the first six years of its existence.[50] For the purposes of assessing the efficiency of a tribunal, especially one which sits *en banc* and not in separate benches, it may thus make more sense to examine the ratio of cases filed to cases disposed.

Based on publicly available figures,[51] between 1 January 2005 and 31 June 2013, all High Courts in India managed to dispose of 90.50 percent of the cases filed before them, whereas Subordinate Courts managed to dispose of 97.96 percent of the cases filed before them. While this may seem quite impressive, it must be remembered that, in light of the pendency problem already extant in India's courts, it means that the pendency has increased by 9.5 percent of the cases filed in this period in the High Courts, and by 2.04 percent of the cases filed in this period in the subordinate courts.

However, all tribunals are unlikely to have both civil and criminal cases, so it may be more meaningful to compare the Tribunals' figures with those of the civil cases disposed by the High Courts and subordinate courts. Concerning the civil cases disposed, the data reveals that the rate of disposal does not change substantially. In the period examined, we find that High Courts managed to dispose of 90.14 percent of the civil cases filed before them and subordinate courts, 96.82 percent of the civil cases filed. As with High Courts and subordinate courts, tribunals usually have a backlog of transferred cases from the High Courts or civil courts when they are set up. While this is no means ideal, the above figures at least provide a benchmark, however low it may be, to assess whether a tribunal has served its purpose of faster disposal of cases than the court that it was supposed to replace or supplement.

Therefore, with this metric, we will hope to answer the question as to whether the Tribunal has functioned more efficiently than the Court it was supposed to replace.

### 3. Efficacy

This metric will analyse (i) a representative sample of judgments and orders of the Tribunal and (ii) the judgments of the superior courts reviewing or in appeal from the judgments and orders of the Tribunal. The first is to assess whether the Tribunal's decisions meet the standards of judicious decision making, in proper appreciation of the law and the facts of the case. This analysis will be relevant to see if the 'specialised' nature of the dispute settlement ostensibly provided by tribunals is in fact being taking place, or whether the Tribunal is merely carrying out purely general legal functions. In addition, this will also assess whether the judgments themselves are correct on the law and in no way inferior to the standard expected of any court.

The assessment of judgments of relevant superior courts is to see if they have largely agreed, or have found reason to disagree, with the Tribunal on legal and factual questions. We will look at all the judgments of superior courts that examine the correctness of the Tribunals' judgments in

[50] Statement of Institution, Disposal and Pendency of Cases as on 23 May 2014 <http://www.tdsat.nic.in/Statement_of_Disposal.htm> (accessed 9 Jun 2014).

[51] Court News, Vol I, Issue No. 1 – Vol VIII, Issue No. 3 <http://sci.nic.in/courtnews.htm> (accessed 17 June 2014).

detail, whether in exercise of their writ jurisdiction under Article 226 or appeals jurisdiction under relevant statutes.

This approach, however, has certain limitations. At present, there is no data maintained by the Supreme Court, which is usually the first and final appellate body from many tribunals, on how many appeals have been lodged by parties against tribunals' judgments. Such data will have to be collated from the actual appeal files themselves, which are not always preserved by the Supreme Court registry. Therefore, pending cases and cases where the Supreme Court dismissed the appeal *in limine* are unavailable for analysis. In any case, neither of these are likely to shed any light on how the superior court assessed the judgment of the Tribunal. Therefore, the restriction of the analysis to those cases where arguments have been heard in detail and judgments delivered is not a substantive drawback.

We will examine the following:

(1) Do the judgments of the Tribunal reflect sound reasoning and the proper application of the law to the facts?
(2) How do the superior courts deal with the findings of law and fact made by the Tribunal in appeal or in review?

## 4. Summary of Metrics

In conclusion, we will be examining the following questions in assessing each tribunal:

(1) Is the Executive required to consult with the Judiciary in the appointment of Members to the Tribunal?

(2) If the Tribunal is required to review the decisions of the Executive, does such 'consultation' also mean concurrence?

(3) Are the qualifications of the expert Member with Government service sufficient to ensure independence of the Tribunal?

(4) Do the provisions of the parent statute provide sufficient protection from Executive interference in the terms and conditions of service of tribunal Members?

(5) Is there any protection from unfair variation to the disadvantage of a Member?

(6) Are there sufficient procedural safeguards to ensure that the removal or suspension of tribunal Members is not at the sole discretion of the Executive?

(7) Does the Tribunal have the power to hire and fire its own staff?

(8) Is the Tribunal entirely dependent on the Executive for its funds?

(9) Does the Tribunal function more efficiently than the court it was supposed to replace or supplement?

(10) Do the judgments of the Tribunal reflect sound reasoning and the proper application of the law to the facts?

(11) How do the superior courts deal with the findings of law and fact made by the Tribunal in appeal or in review?

The answers to these questions will indicate whether the Tribunal is working as intended, and whether it requires major changes to its functioning. They will shed insight into whether it is an independent and efficient forum for the adjudication of disputes, whether specialised or for general legal disputes, and whether it produces quality adjudication that receives the approval of the superior courts.

# II. TELECOM DISPUTES SETTLEMENT AND APPELLATE TRIBUNAL

The first in the series of tribunals analysed is the Telecom Disputes Settlement and Appellate Tribunal ("TDSAT"). After providing a brief background to the establishment, structure and powers of this Tribunal (*A*), we analyse its functioning based on the methodology described in the introductory Section above (*B*). Finally, we conclude with our findings based on this analysis and specific recommendations (*C*).

## A. Background

Before embarking on an analysis of the mode of functioning of the TDSAT, it is useful to have a brief overview of the background to this Tribunal's establishment (*1*), its structure and composition (*2*), as well as its jurisdiction and powers (*3*).

### 1. History and Rationale

The TDSAT was established through amendments to the Telecom Regulatory Authority of India ("TRAI") Act, 1997 ("the Act") introduced by the TRAI (Amendment) Act, 2000 ("the Amendment Act"). The changes introduced under the Amendment Act were intended to remove certain difficulties that had arisen in implementation of the Act. Specifically, the desired objective in introducing a separate dispute settlement body was to regulate telecommunication service, adjudicate disputes, and dispose of appeals with a view to protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the sector.[1]

The TDSAT was set up under Chapter IV of the TRAI Act, as introduced under the Amendment Act, with new provisions *inter alia* governing its composition, powers, qualifications of Members, and the Tribunal's relationship with other courts. It came into existence on 29 May 2000 and began hearing cases from January 2001.

### 2. Structure and Composition

The TDSAT is composed of a Chairperson and not more than two Members.[2] Subject to the provisions of the TRAI Act, the jurisdiction of the TDSAT may be exercised by its Benches. A Bench may be constituted by the TDSAT Chairperson with one or two Members as the Chairperson may deem fit. The Benches shall ordinarily sit at New Delhi and at such other places as the Central Government may notify, in consultation with the TDSAT Chairperson. However, in practice, the Tribunal functions as a single Bench at New Delhi.

[1] *Union of India v Tata Tele-Services*, (2007) 7 SCC 517, p. 521, para. 6 ("*Tata Tele-Services*").

[2] Telecom Regulatory Authority of India Act, 1997 ("TRAI Act"), s. 14.

## 3. Jurisdiction and Powers

The TDSAT adjudicates disputes between (a) a licensor[3] and licensee[4]; (b) two or more service providers[5]; or (c) a service provider and a group of consumers.[6] This includes the power to entertain counterclaims.[7] It also has the power to hear and dispose of appeals against any direction, decision or order of TRAI under the Act.[8] The Supreme Court has held that the TDSAT, being an expert body, is entitled to exercise its appellate jurisdiction both in fact and in law over a decision or order or direction of TRAI.[9] It has thus been held to have wide powers to examine the correctness, legality or propriety of the order passed by TRAI, as it has in relation to the dispute.[10]

The Supreme Court has also ruled that the TDSAT's jurisdiction extends to adjudicating on matters between a licensor and licensee relating to demands raised by one party against another, but not the validity of the terms and conditions of contract.[11]

The jurisdiction of the TDSAT is, however, excluded in the following cases[12]:

(1) Monopolistic, restrictive and unfair trade practices subject to the jurisdiction of the Monopolies and Restrictive Trade Practices ("MRTP") Commission established under section 5(1) of the MRTP Act, 1969;
(2) Complaint of an individual consumer maintainable before the National and various State Consumer Dispute Resolution Commissions and District Consumer forums established under section 9 of the Consumer Protection Act, 1986; and
(3) Disputes between telegraph authority and any other person referred to in section 7B(1) of the Indian Telegraph Act, 1885.

The Supreme Court has held that in exercise of the power vested in the TDSAT under section 14(b) of the TRAI Act, it does not have the jurisdiction to entertain challenges to the regulations framed by TRAI under section 36 of the TRAI Act.[13]

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[3] A licensor is defined in s. 2(1)(ea) of the TRAI Act (n 2) as "the Central Government or the telegraph authority who grants a licence under s. 4 of the Indian Telegraph Act, 1885". However, the term has been given a broad interpretation in *Tata Tele-Services* (n 1), to mean the intention to grant license and including situations with only letter of intent or pre-grant or actual license.

[4] A licensee, as defined in s. 2(1)(e) of the TRAI Act (n 2), is "any person licensed under s. 4(1) of the Indian Telegraph Act, 1885 for providing specified public telecommunication services".

[5] Under s. 2(1)(j) of the TRAI Act (n 2), this means the Government as a service provider and includes a licensee.

[6] TRAI Act (n 2), s. 14(a).

[7] *Tata Tele-Services* (n 1).

[8] TRAI Act (n 2), s. 14(b).

[9] *Cellular Operators Association of India v Union of India*, (2003) 3 SCC 186 ("*Cellular Operators*").

[10] *Ibid*.

[11] *BSNL v TRAI*, (2014) 3 SCC 222 ("*BSNL v TRAI*").

[12] TRAI Act (n 2), s. 14(a).

[13] *BSNL v TRAI* (n 11).

The jurisdiction and the powers of the TDSAT and the rationale for its establishment suggests that it is supposed to supplement the jurisdiction of the High Court, insofar as its review of TRAI decisions is concerned, and also replace the jurisdiction of the civil court insofar as consumer disputes and contractual disputes between licensors and licensees, and between service providers is concerned. It has been set up with the explicit intention of providing not just speedy, but also specialised dispute resolution of telecom disputes.

## B. Analysis

In this Chapter, we assess the functioning of the TDSAT specifically with respect to its independence (*1*), efficiency (*2*) and efficacy (*3*), based on parameters mentioned earlier.[14]

### 1. Independence

As described in the previous Section, the TDSAT's 'independence'[15] has been assessed both in a normative or formal sense (*a*), as well as from the functional perspective (*b*).

#### (a) Formal Independence

The formal independence of the TDSAT may be discerned from its Chairperson and Member appointments (*i*), the terms and conditions of service (*ii*), and grounds of removal and suspension of Chairperson and Members (*iii*).

##### *(i) Appointments*

The Chairperson and Members of the TDSAT are appointed, by notification, by the Central Government, in consultation with the Chief Justice of India.[16] The consultation process seems to begin with the Chief Justice of India recommending the name of a suitable candidate to the Government, with the Government indicating its approval or disapproval of the name. There has been at least one reported instance of the Central Government expressing disapproval of the Chief Justice of India's recommendation.[17] In this case, the recommendation was reconsidered and a fresh name proposed.

A TDSAT Chairperson must be a sitting or retired judge of the Supreme Court or Chief Justice of a High Court.[18] All TDSAT Chairpersons so far have been retired judges of the Supreme Court.[19] A

[14] See Section I(C).

[15] See Section I(C)(1).

[16] TRAI Act (n 2), s. 14B(1).

[17] Business Standard Reporter, "CJI recommends Aftab Alam for the post of TDSAT Chief" (*Business Standard*, New Delhi, 22 May 2013) <http://www.business-standard.com/article/current-affairs/cji-recommends-aftab-alam-for-post-of-tdsat-chief-113052101125_1.html> (accessed 16 June 2014).

[18] TRAI Act (n 2), s. 14C(a).

[19] Website of the Telecom Disputes Settlement and Appellate Tribunal, Resume of Former Chairpersons <http://tdsat.nic.in/FormerChairperson.htm> (accessed 19 May 2014); Website of the Telecom Disputes Settlement and Appellate Tribunal, Resume of Chairperson and Members <http://tdsat.nic.in/resumes.htm> (accessed 19 May 2014).

TDSAT Member must have held the post of Secretary to the Government of India or any equivalent post in the Central Government or the State Government for a period of not less than two years or be a person well-versed in the field of technology, telecommunication, industry, commerce or administration.[20] Among the past and present non-judicial Members, apart from fulfilling the minimum requirements, few have had specific experience in the technical area, though almost all have worked previously in the Department of Telecommunications ("DoT").[21]

As mentioned above, TDSAT Chairpersons and Members are appointed by the Central Government in consultation with the Chief Justice of India. A list of the professional background of all previous and current TDSAT Members, as available on the website of the TDSAT is reproduced in Annex I to this Section.

In the context of appointment, therefore the questions are answered as follows:

(1) Is the Executive required to consult with the Judiciary in the appointment of Members to the TDSAT?

Ans: **Yes, it is required to by virtue of section 14B(1) and this has been carried out in practice as well.**

(2) If the TDSAT is required to review the decisions of the Executive, does such 'consultation' also mean concurrence?

Ans: **Since the jurisdiction of the TDSAT does not extend to the review of decisions taken by the Department of Telecommunications, but only to review decisions of the TRAI, which is itself a regulatory authority separate from the Executive, such a requirement is not necessary.**

(3) Are the qualifications of the expert Member to the TDSAT with Government service sufficient to ensure independence of the TDSAT?

Ans: **Yes, since the basic qualification for a Member who has been a Government Servant is that he or she has served at the rank of Secretary to the Government of India.**

### *(ii) Terms and Conditions of Service*

The term of office of the Chairperson and Members of TDSAT expires after 3 (three) years from the date of entering office, subject to maximum age limit of 70 (seventy) years for the Chairperson and 65 (sixty five) years for other Members.[22] The salary and allowances of the Chairperson and the Member are not provided for in the TRAI Act itself, but may be prescribed by Rules made by the

[20] TRAI Act (n 2), s. 14C(b).

[21] Website of the Telecom Disputes Settlement and Appellate Tribunal, Resume of Former Members <http://tdsat.nic.in/FormerMember.htm> (accessed 19 May 2014); Website of the Telecom Disputes Settlement and Appellate Tribunal, Resume of Chairperson and Members <http://tdsat.nic.in/resumes.htm> (accessed 19 May 2014).

[22] TRAI Act (n 2), s. 14D.

Central Government.[23] Under the TRAI Act, the Rules are subject to Parliamentary veto within a month of being placed before Parliament.[24]

Under the TRAI Act, the terms and conditions of service, including the pay and allowances cannot be varied to the disadvantage of the Chairperson or the Members during their tenure.[25]

The salary and terms and conditions of service have been fixed at present under the Telecom Disputes Settlement and Appellate Tribunal (Salaries, Allowances and other Conditions of Service of Chairperson and Members) Rules, 2000 ("the TDSAT Salaries Rules"). Under the TDSAT Salaries Rules the pay and emoluments of the Chairperson of the TDSAT is linked to that of a sitting Supreme Court judge.[26] A Member of the TDSAT on the other hand receives pay and emoluments at par with a Group 'A' officer of the Central Government.[27]

While it would have been ideal to have the salaries and emoluments fixed in the legislation itself, as it is for High Court judges, the aim of protecting the Tribunals from Executive interference will also be equally served if there was sufficient Parliamentary oversight over Executive action built into the law itself. However, the issue of whether or not terms and conditions of service can be varied to the disadvantage of the Members is more important than *who* actually determines the salaries and emoluments.

In the context of terms and conditions of service, therefore the questions are answered as follows:

(1) Do the provisions of the parent statute provide sufficient protection from Executive interference in the terms and conditions of service in the course of engagement as a Member of the Tribunal?

Ans: **Yes, the Rules providing for salaries and emoluments are subject to Parliamentary oversight.**

(2) Is there any protection from unfair variation to disadvantage of a Member?

Ans: **Yes, the TRAI Act prevents the variation of salaries and emoluments from being varied during the tenure of the Member or Chairperson to their disadvantage.**

*(iii) Removal and suspension*

Under the TRAI Act, the Central Government may remove from office, the Chairperson or any Member of the TDSAT, who:

(1) has been adjudged an insolvent, or
(2) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude, or

[23] TRAI Act (n 2), s. 14E.

[24] TRAI Act (n 2), s. 37.

[25] TRAI Act (n 2), proviso to s. 14E.

[26] Telecom Disputes Settlement and Appellate Tribunal (Salaries, Allowances and other Conditions of Service of Chairperson and Members) Rules, 2000, Rule 3 ("TDSAT Salaries Rules").

[27] TDSAT Salaries Rules (n 26), Rule 7.

(3) has become physically or mentally incapable of acting as Chairperson or Member; or
(4) has acquired such financial or other interest as is likely to affect prejudicially his functions as the Chairperson or a Member; or
(5) has so abused his position as to render his continuance in office prejudicial to the public interest.[28]

However, the Chairperson or a Member of the TDSAT shall be removed from his office on the ground specified in clause (iv) or (v) above only if the Supreme Court on a reference being made to it in this behalf by the Central Government, has, on an enquiry, held by it in accordance with specified procedures, reported that the Chairperson or a Member ought to be removed on such grounds. The Central Government may suspend from office the Chairperson or a Member of the TDSAT in respect of whom a reference has been made to the Supreme Court under the above terms until the Central Government has passed an order on receipt of the report of the Supreme Court on such reference.

So far no Chairperson or Member has been removed under any of the grounds mentioned in section 14G.

Therefore to answer the question in the context of removal:

Are there sufficient procedural safeguards in ensuring that the removal and suspension are not within the sole discretion of the Executive?

Ans: **Only to the extent that the Chairperson or Member has to answer to the specific charges in an enquiry proceeding conducted by the Supreme Court on a reference made to it for the express purpose by the Executive itself. However, the process of initiating the removal itself is concomitant with the power of suspension, as with other Government servants, this puts the TDSAT Member and Chairperson at par with an employee of the Government.**

### (b) Functional Independence

The TRAI Act mandates that the Central Government will provide the TDSAT with such officers and employees as it may deem fit, with their salaries and terms and conditions governed by the rules prescribed by the Central Government in this respect.[29] However, the TRAI Act also prescribes that the said officers and employees will work under the supervision of the Chairperson.

In relation to the financial independence of the TDSAT, the budget for the TDSAT is determined by the DoT with little or no input from the Chairperson of the TDSAT.[30] The funding for the TDSAT therefore comes directly from the DoT's budget. For instance, the budget of 2013-14 has allocated a 'grant' of Rupees 13.01 crores earmarked for the TDSAT to the DoT, *inter alia* among other heads under which sums of money are allocated to the DoT.[31] In Budget 2012-13, the amount allocated to the TDSAT was Rupees 11.99 crores and later revised downwards to Rupees 11.91

[28] TRAI Act (n 2), s. 14G.

[29] TRAI Act (n 2), s.14.

[30] Interview at 11 am on 3 April 2014, with former Chairperson of the TDSAT who did not wish to be named.

[31] Notes on Demands for Grants, 2013-14, No. 14, Department of Telecommunications <http://indiabudget.nic.in/ub2013-14/eb/sbe14.pdf> (accessed 10 June 2014).

crores.[32] Unlike the High Courts therefore, the expenses for the TDSAT are being essentially met out of the budget allocated for the DoT.

In infrastructure terms, the TDSAT presently functions out of two floor of the Hotel Samrat located in Chanakyapuri. Although Hotel Samrat is Government owned, nevertheless the TDSAT does not have separate premises of its own, occupied and used solely for the purposes of the TDSAT.

(1) Does the TDSAT have the power to hire and fire its own staff?

**No, TDSAT does not have the power to hire staff on its own, though the staff work under the superintendence of the Chairperson and may be removed by him.**

(2) Is the TDSAT entirely dependent on the Executive for its funds?

Ans: **Yes, the TDSAT is entirely dependent on the Executive for its funding and also does not have independent infrastructure of its own.**

## 2. Efficiency

Based on the figures publicly available, the following table provides an annual break-up of the number of cases filed before the TDSAT, the number of cases disposed and the yearly pendency, until the end of 2013.[33] The number of cases includes petitions, review petitions, appeals, cases transferred from TRAI (only in the first year), transferred from the High Court, cases remanded from the Supreme Court and execution applications. All the data has been obtained from the website of the TDSAT which provides a running table of cases filed, disposed and the pendency position dating back to the year 2000.[34]

**TABLE 1**

| YEAR | FILED | DISPOSED | CUMULATIVE PENDENCY | DISPOSAL RATE |
|---|---|---|---|---|
| 2001 | 57 | 57 | 0 | 100.00% |
| 2002 | 37 | 37 | 0 | 100.00% |
| 2003 | 55 | 55 | 0 | 100.00% |
| 2004 | 70 | 70 | 0 | 100.00% |
| 2005 | 174 | 174 | 0 | 100.00% |
| 2006 | 374 | 374 | 0 | 100.00% |
| 2007 | 402 | 395 | 7 | 98.26% |
| 2008 | 297 | 293 | 11 | 98.65% |
| 2009 | 322 | 303 | 30 | 94.10% |

[32] Notes on Demands for Grants, 2012-13, No. 14, Department of Telecommunications <http://indiabudget.nic.in/ub2012-13/eb/sbe14.pdf> (accessed 10 June 2014).

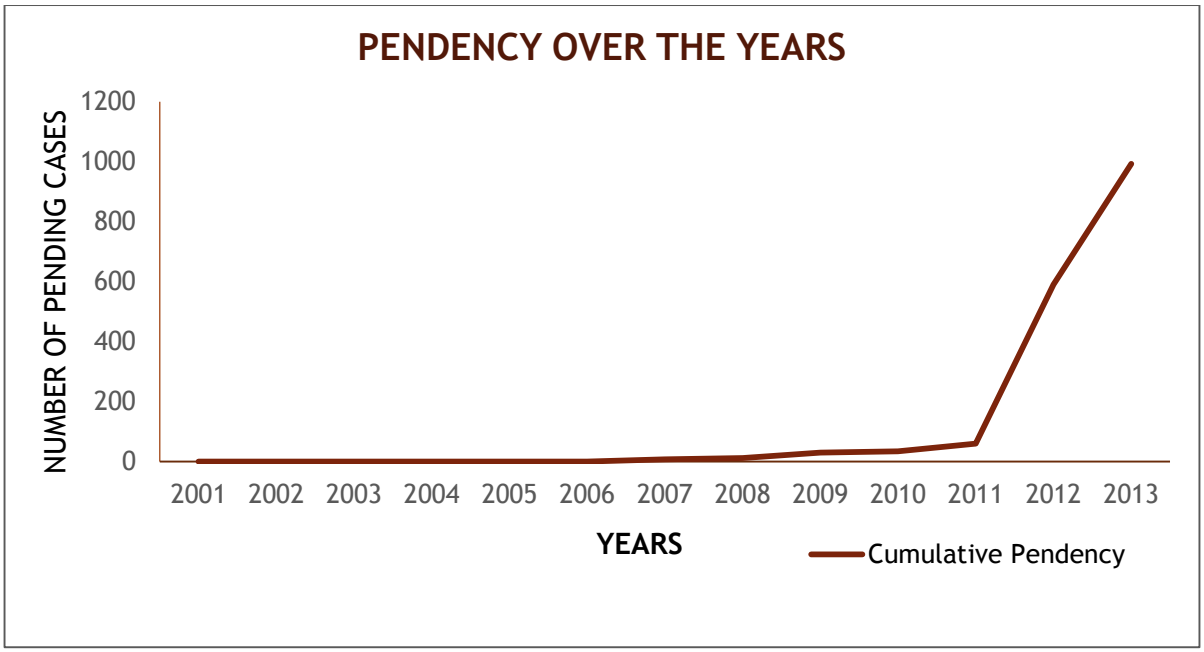
[33] Website of the Telecom Disputes Settlement and Appellate Tribunal, Statement of Institution, Disposal and Pendency of Cases <http://www.tdsat.nic.in/Statement_of_Disposal.htm> (accessed 19 May 2014).

[34] It must be mentioned that most data with respect to cases and the actual text of decisions dating back to 2006 were easily available on the website of the TDSAT, which is a very useful and regularly updated resource for information relating to this tribunal.

| | | | | |
|---|---|---|---|---|
| 2010 | 496 | 492 | 34 | 99.19% |
| 2011 | 563 | 538 | 59 | 95.56% |
| 2012 | 1068 | 537 | 590 | 50.28% |
| 2013 | 534 | 131 | 993 | 24.53% |

The table demonstrates an excellent disposal rate, almost a hundred percent until a sharp increase in petitions filed and therefore of pendency, in 2012. This can be attributed to the large number of petitions filed due to cancellation of several 2G spectrum licenses by the Government, as a result of a judgment of the Supreme Court.[35]

**GRAPH 1**




Since 2001, the TDSAT has managed to dispose 76.8 percent of the cases filed before it. This compares very unfavourably to the 90.50 percent disposal rate of the High Court which it was supposed to supplement, let alone the 97 percent disposal rate of Civil Courts. However, while this reflects the overall figures, we find that up to the year 2011 the disposal rate was actually 99.2 percent with a pendency of only 25 out of 2498 cases filed since 2001. Up to the end of 2011, it is evident that the TDSAT was functioning efficiently disposing of cases filed before it with only a negligible number of cases pending. This suggests that the TDSAT was handling cases within its capacity up to 2011.

To what therefore, can we attribute the sudden spike in pendency and the reduction in the percentage of cases disposed in a year?

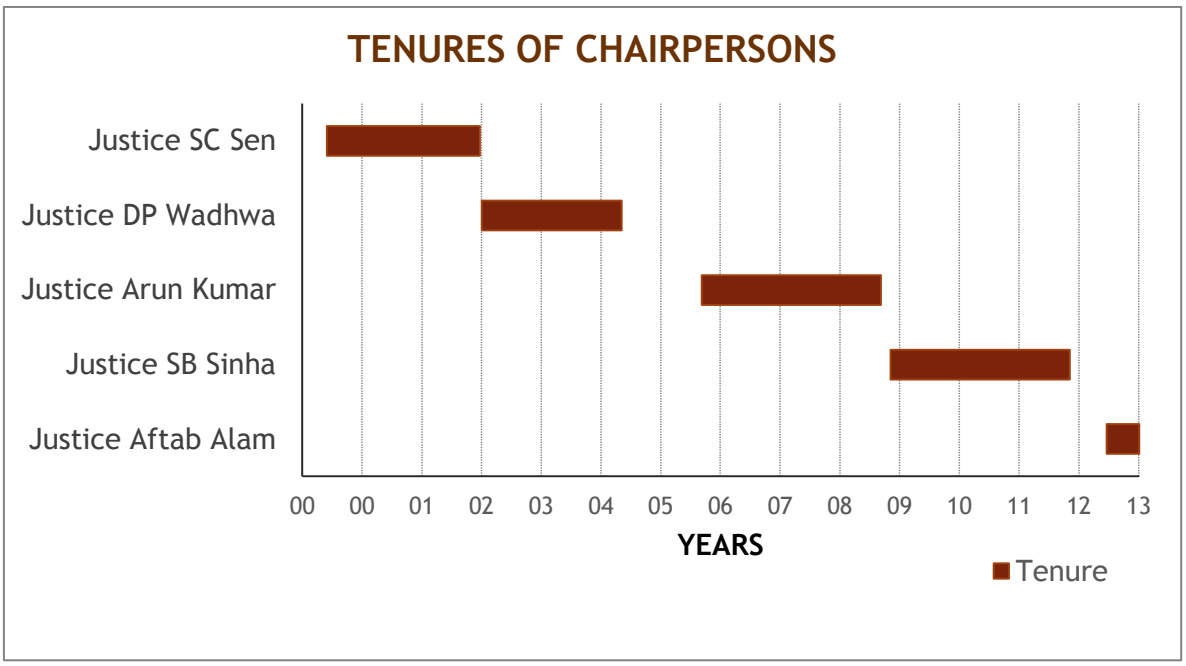
One obvious answer seems to be the frequency and extent of vacancies in the TDSAT, which could have contributed to the increasing pendency. The Central Government is required to appoint a

[35] *Centre for Public Interest Litigation v Union of India*, (2012) 3 SCC 1.

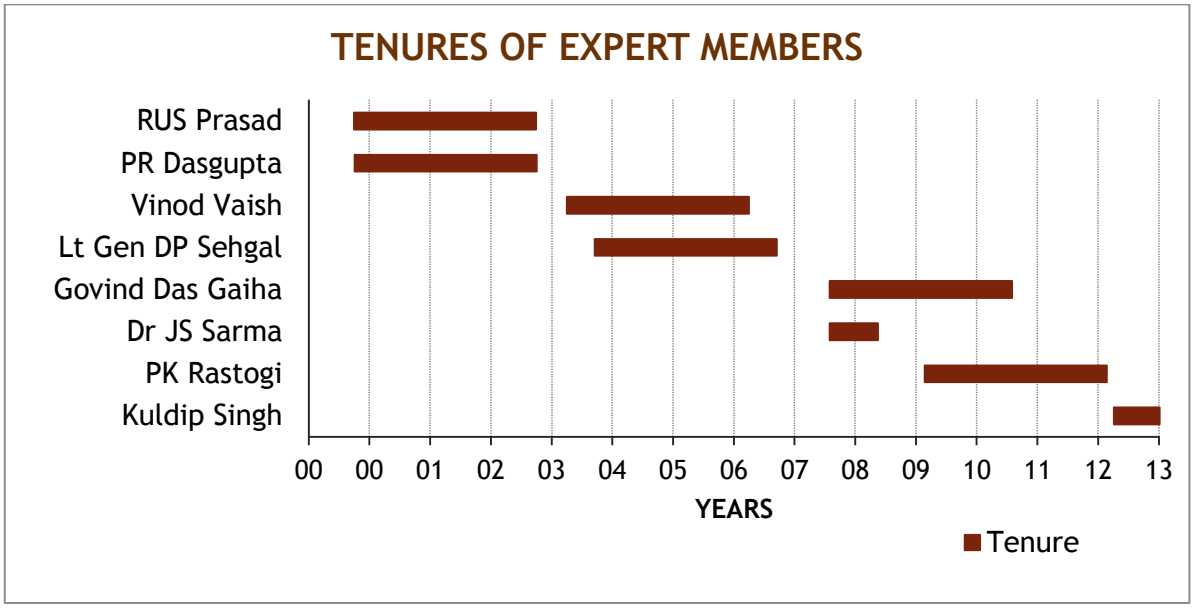
Chairperson or Member in the event of any vacancy in the TDSAT, apart from temporary vacancy.[36] However, this does not seem to have been done on a systematic basis.

The following two graphs indicate the tenures of Chairpersons as well as Members, and the corresponding vacancies, between the years 2000 and 2013.

**GRAPH 2**




**GRAPH 3**




The TDSAT has often not been filled to its capacity, with a vacancy of one non-judicial Member being common across several periods, if not two as seen in 2002-03, 2006-07 and in 2013. For six months between October 2003 and March 2004, and for almost a year between September 2007

[36] TRAI Act (n 2), s. 14F.

and July 2008, there were no non-judicial Members on the TDSAT. The absence of the non-judicial Member however, does not seem to have affected the disposal of cases as the disposal rate rarely slipped below 95 percent in any given year up to 2011 and the pendency was therefore minimal.

A notable vacancy in the position of the Chairperson was between November 2012 and the middle of June 2013, for a period of seven months and a half. This coincided with the period when a large number of petitions were pending before the Tribunal, and has therefore most likely contributed to a significant delay in disposing of cases. Indeed, the only Member on the Tribunal at that time had postponed final hearings on several matters, thus delaying their disposal.[37]

Since the TDSAT was supposed to replace the civil court and the High Court, to answer the question:

Does the TDSAT function more efficiently than the court it was supposed to replace?

Ans: **No, at present it does not. While it was functioning efficiently till 2011, its efficiency in disposing cases has been seriously hampered by the delays in appointment over the last three years and the sudden spurt in litigation.**

## 3. Efficacy

Efficacy of the TDSAT has been analysed on the basis of an assessment of select judgments of the Tribunal (*a*), and the rate of success of appeals from its orders and judgments (*b*).

### (a) Assessment of select judgments

In this part, we have analysed a representative sample of judgments delivered by the TDSAT, with the object of assessing the nature of reasoning adopted in TDSAT decisions.

(i) *Loop Mobile v Bharti Airtel*, 2 January 2013

This was an Order[38] by a non-judicial Member, disposing of a preliminary question in two petitions at the same time. The petitioner sought to declare as null and void, an agreement for payment of 10 paise per SMS under the SMS Termination Service entered into between the parties. According to the petitioner, it was coerced into signing the impugned agreement by the respondents who threatened to disconnect the SMS termination services by virtue of their dominant position. The respondents maintained on the other hand that the TDSAT had no jurisdiction in the instant case, and denied allegations of duress as well.

The Tribunal held that although it had no jurisdiction to decide the validity of the terms and conditions of the agreement, it did possess the jurisdiction to decide any dispute between the parties on the interpretation of the terms and conditions of the contract. Whether or not the agreement had been signed under coercion could be examined by the TDSAT in terms of its jurisdiction under section 14(a)(ii) of the TRAI Act. At the preliminary stage, it could not determine whether the petitioner had been coerced. Only at the merits stage, it would be possible

[37] Interview at 6 pm on 9 May 2014 with Senior Advocate who practices regularly at the TDSAT and did not wish to be named.

[38] *Loop Mobile v Bharti Airtel*, Petition No. 946 of 2012 and Petition No. 822 of 2012 (TDSAT) (2 January 2013) <http://www.tdsat.nic.in/02.01.2013/PNo.%20946%20of%202012.pdf> (accessed 20 May 2014).

to adjudicate on the existence of coercion. Accordingly, the respondent's plea of lack of jurisdiction was rejected and the petition was admitted by the Tribunal.

The reasoning of the Tribunal seems sound. When it has been set up to replace the jurisdiction of civil courts, it would be absurd and self-defeating if the Tribunal refused certain kinds of issues from being raised in a dispute before it where it would otherwise have had jurisdiction. In addition, the Tribunal has also applied the well-established principle of law that a tribunal is competent to determine its own jurisdiction.[39] The Tribunal's Order in this case seems well reasoned and in accordance with the law laid down.

(ii) *Reliance Communication Ltd. v Union of India*, 1 November 2012

This judgment[40] was delivered by the Chairman and a Member of the TDSAT. In this case, the petitioner was a licensee for the Rajasthan Circle. A distributorship agreement was entered into between the petitioner and the Arihant Trading Company. Clause 5.1.1 of the agreement stipulated full compliance with all regulations issued by TRAI, the DoT, and all other regulatory authorities with regard to acquisition and verification of telecom subscribers. The Government issued two circulars dated 24.12.2008 and 18.11.2010 wherein penalty was to be levied with respect to those cases where the licensee had failed to provide subscriber verification on the graded scale and where the scheme for levy of financial penalty in such cases other than monthly audit of Customer Application Forms ("CAF") was provided respectively. The petitioner approached the TDSAT, aggrieved by the demand of an amount of Rs. 88,50,000/- for non-submission of 177 CAFs relating to the aforementioned circulars.

The TDSAT was of the opinion that the petitioner was guilty of violating the circular issued by the Government, particularly in view of the fact that (i) the CAFs had not been sent to the petitioner's office in Jaipur for a long time which demonstrated that the distributors of the petitioner company had been violating the circulars with impunity; (ii) the petitioner had been activating SIM cards without actually receiving original CAF forms; (iii) the conduct of the Petitioner's Witness No. 2 in not signing the seizure memo was not sufficiently explained and the attempt on the part of the petitioner to provide an explanation subsequently by purporting to file a *bona fide* report was not contemplated by the circulars; (iv) the petitioner could not on the one hand, accept the guilt of its distributor and on the other hand, question the imposition of penalty on the ground of the purported *bona fide* on its part. The petitioner was also bound to explain the conduct on the part of its distributor forthwith and had been taking time to file its show cause without adequate reasons. The Tribunal ruled that the petitioner was not entitled to any relief. However it applied the principle of proportionality in determining the quantum of penalty, relying on a previous petition before it.

This was an instance of a straightforward application of the relevant circulars in determining the fault of the licensee in the present case. The facts were more or less undisputed, and the TDSAT's reasoning applying the natural consequences under the prevailing agreement cannot be found fault with. However, what is problematic is the application of the principle of proportionality to the

[39] See generally *SBP & Co v Patel Engineering Ltd*, (2005) 8 SCC 618.

[40] *Reliance Communication Ltd. v Union of India*, Petition No. 42 of 2012 (TDSAT) (1 November 2012) <http://www.tdsat.nic.in/01.11.2012/PNo.42-2012.pdf> (accessed 20 May 2014).

facts of the present case. Proportionality, as a principle evolved under criminal law[41], labour law[42] and administrative law[43] for different reasons, would not be applicable in the case of a contractual dispute between the licensee and the Central Government.[44] The standard of review of the imposition of a penalty under a contract, or for that matter any action taken under a contract by the Government would be to see if the same would be so unreasonable and unfair as to amount to a violation of Article 14 of the Constitution. The TDSAT in this case, seems not to have taken note of this well settled position of law only on the aspect of penalty.

(iii) *Tata Teleservices (Maharashtra) Ltd. v Union of India*, 18 December 2009

This case[45] was decided by the Chairperson and a Member of TDSAT. The petitioner in this case was the holder of two licenses – one for providing basic services commonly known as Unified Access Service ("UASL") and the second for being an Internet Service Provider ("ISP"). The petitioner introduced a service commonly known as Push-To-Talk ("PTT") service. Prior to introducing the service, the petitioner held discussions with Members of TRAI and with its letter dated 26 May 2004 enclosed a brief write-up, covering technical aspects, network architecture diagram and highlights of PTT service. According to the petitioner, the new application was based on internet protocol under the category of ISP license and its service area being throughout the territories of India, it was eligible to provide the said services throughout India. On 18 February 2005, the Government asked the petitioner to cease the PTT service and thereafter, a show-cause notice was issued. A second notice was issued asking the petitioner to show cause as to why a penalty of Rs. 50 crore should not be levied. Through the impugned order dated 21 January 2006, a penalty of Rs. 50 crore was imposed on the petitioner.

According to the TDSAT's findings, the Government proceeded on a wrong premise. If no amount of penalty was specified in terms of the ISP License, the Government did not have the power to initiate a proceeding for imposition of penalty for a sum of Rs. 50 crore. A provision for levy of penalty of such a large amount must meet the requirements of law. The petitioner had shown cause in response to both the notices. Before issuance of the second show-cause notice, no opportunity of personal hearing was granted. The Government's conduct clearly established that before the penalty was imposed, which would have to be preceded by determination of the question as to whether the petitioner was guilty of violation of conditions of license, an opportunity of personal hearing had not been given. Moreover, GSM Hutch services had been providing the said services on its UASL license and the Government had not levied any penalty on the providers of services of similar nature. The impugned Order, therefore, was in violation of Article 14 of the Constitution of India. The petition was thus allowed, setting aside the impugned Order.

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[41] See *Bachan Singh v State of Punjab*, (1982) 3 SCC 24.

[42] See *Ved Prakash Gupta v Delton Cable India (P) Ltd*, (1984) 2 SCC 569.

[43] See *Ranjit Thakur v Union of India*, (1987) 4 SCC 611.

[44] *HSIDC v Hari Om Enterprises*, (2009) 16 SCC 208.

[45] *Tata Teleservices (Maharashtra) Ltd. v Union of India*, Petition No. 58 of 2006 (TDSAT) (18 December 2009) <http://www.tdsat.nic.in/18.12.2009/PNo.58of06.htm> (accessed 20 May 2014).

Here, the TDSAT was concerned more with the manner in which the decision was taken, playing the supplemental role to the High Court rather than purely examining the contractual nature of the dispute as a civil court would. While undoubtedly it was correct in holding that the power of the Government to impose the penalty under a contract was limited expressly by the terms of the contract, its subsequent finding that there was a violation of Article 14 seems be in excess of its jurisdiction since unlike a tribunal such as the Central Administrative Tribunal, it has not been given the power to strike down Governmental actions for violation of the Constitution.

(iv) *Radio Mid Day West (India) Ltd. v Union of India, Ministry of Information & Broadcasting*, 18 October 2006

This case[46] was decided by a full Bench of the TDSAT – the Chairperson as well as two Members. The petitioner in this case had challenged the allocation of a new frequency to the petitioner in place of the frequency it was allocated earlier for broadcast on the FM Radio Broadcasting Channel in Mumbai by the Union of India under sections 14 (a)(i) and 14(A)(1) of the TRAI Act. According to the petitioner, in the FM Broadcast business the identity of a FM Station is built around its broadcast frequency and every broadcaster is recognized and accessed at its known spot frequency. In other words the number of spot frequency is identified with the broadcaster and is sacrosanct to it. In support of the argument that the impugned action is permissible only if it is in public interest or it is in interest of national security, the petitioner relied on clause 11 of the License Agreement. The Government drew attention to Schedule A to the license granted in favour of the petitioner according to which 'Channel Identity' means the name of the FM Station as approved by the licensor for the particular station. On this basis, the Government submitted that it is the name which is important in the trade and not the number of the frequency.

According to the Tribunal, the petitioner had failed to demonstrate that the Government's action had been mala fide. The power to regulate and change frequencies had been given in the licence itself and the same could not be disputed. With respect to the question of exercise of power, the Government had provided its justification for the course of action adopted by it – expansion of the broadcast regime in Phase II and resultant entry of several players into the field. The TDSAT was unable to find any fault with the stated objective which the Government had tried to achieve. Further, the Tribunal stated that the delay on the part of the petitioner in approaching the TDSAT for readjustment of frequencies had rendered such an exercise impossible. Therefore, the petition was dismissed.

Although on the surface of it, the present dispute seems to relate to judicial review of the Government's action, it is in fact a pure contractual dispute which is being decided upon by the TDSAT. The Tribunal has carefully drawn the distinction between merits review of the Government's action (which would be outside the scope of its powers) and validity of the Government's actions under the Licence Agreement. Finding that Government's action was permissible under the terms and conditions of the agreement, the Tribunal, in line with its jurisdictional limits, refused to review the merits of the Government's policy which was being followed in exercising this contractual right.

[46] *Radio Mid Day West (India) Ltd. v Union of India, Ministry of Information & Broadcasting*, Petition No. 234 of 2006 (TDSAT) (18 October 2006) <http://www.tdsat.nic.in/Judgments/18.10.2006/Petition%20234%20of%202006%20dt%2012.10.06.htm> (accessed 20 May 2014).

Broadly, we find that the TDSAT's judgments and orders in the issues which come within its jurisdiction are well reasoned and traverse the facts in detail and apply the law correctly. While the TDSAT has correctly appreciated the scope of its jurisdiction and the limit of its powers under the TRAI Act, on the issue of review of Governmental action, it has had the tendency to conflate the contractual power of the Government with the executive powers of the Government resulting in some overreach, especially in the area of imposition of penalty under the licence agreement upon the licensees.

### (b) Success of Appeals

An assessment of the efficacy of TDSAT judgments is also possible by a review of the success of appeals made to the Supreme Court from this tribunal. The TRAI Act provides that notwithstanding provisions of the Civil Procedure Code, 1908 ("CPC") or any other existing law, an appeal lies against any order of the TDSAT, not being an interlocutory order, to the Supreme Court on one or more of the grounds specified in section 100 of the CPC.[47] Appeals can only be made within a period of ninety days from the date of the decision or order appealed against, which time may be extended by the Supreme Court given sufficient cause.[48]

The table below provides a list of judgments of the Supreme Court which have been considered on appeal from the TDSAT. Our research has revealed seventeen instances where judgements of the TDSAT were appealed to the Supreme Court. Out of the seventeen cases considered below, in seven, appeals have been allowed and in nine, dismissed (one was withdrawn soon after some arguments had taken place). This demonstrates a fairly average rate of success on appeal, the data not indicating a strong inclination either in saying that the Supreme Court shows deference to the reasoning of the TDSAT or has consistently refused to uphold the reasoning of the TDSAT.

**TABLE 2**

| | YEAR OF APPEAL[49] | DATE OF JUDGMENT | NAME OF CASE | OUTCOME |
|---|---|---|---|---|
| 1 | 2002 | 17 December 2002 | *Cellular Operators Association of India v Union of India*, (2003) 3 SCC 186 | Appeal allowed, Order set aside, remitted to TDSAT |
| 2 | 2002 | 4 March 2003 | *Department of Telecommunication v Cellular Operators Association of India*, (2003) 4 SCC 477 | Appeal dismissed (however relief granted by the TDSAT was modified) |
| 3 | 2002 | 31 March 2005 | *Bharti Telenet Ltd. v Union of India*, (2005) 4 SCC 72 | Appeal allowed, Order of TDSAT rejecting the case on grounds of delay set aside, case remitted to TDSAT for fresh hearing on merits. |

[47] TRAI Act (n 2), s. 18(1).

[48] TRAI Act (n 2), s. 18(3).

[49] The year of appeal lists the earliest year of appeal in cases involving a number of appeals being heard together.

| | | | | |
|---|---|---|---|---|
| 4 | 2006 | 28 April 2006 | *Union of India v Millennium Mumbai Broadcast Pvt. Ltd.*, (2006) 10 SCC 510 | Appeal dismissed. |
| 5 | 2006 | 24 November 2006 | *Hotel and Restaurant Assn. v Star India Pvt. Ltd.*, (2006) 13 SCC 753 | Appeal allowed. |
| 6 | 2005 | 3 April 2007 | *Star India Pvt. Ltd. v Sea TV Network Ltd.*, (2007) 4 SCC 656 | Appeal dismissed. |
| 7 | 2004 | 23 August 2007 | *Union of India v Tata Teleservices (Maharashtra) Ltd.*, (2007) 7 SCC 517 | Appeal allowed, case remanded to TDSAT for a fresh adjudication and disposal after appropriate counter-claim is allowed to be filed (which was not allowed earlier) |
| 8 | 2006 | 30 April 2008 | *Reliance Infocomm Ltd. v Bharat Sanchar Nigam Ltd.*, (2008) 10 SCC 535 | Appeal dismissed. |
| 9 | 2005 | 30 April 2008 | *Tata Teleservices Ltd. v Bharat Sanchar Nigam Ltd.*, (2008) 10 SCC 556 | Appeal dismissed. |
| 10 | 2003 | 14 May 2008 | *Bharat Sanchar Nigam Ltd. v BPL Mobile Cellular Ltd.*, (2008) 13 SCC 597 | Appeal dismissed, since no substantial question of law had arisen. |
| 11 | 2003 | 5 October 2010 | *Sistema Shyam Teleservices Ltd. v Union of India*, (2010) 10 SCC 165 | Appeal dismissed. |
| 12 | 2003 | 5 October 2010 | *Bharti Cellular Limited v Union of India*, (2010) 10 SCC 174 | Appeal dismissed. |
| 13 | 2010 | 29 November 2010 | *Bharat Sanchar Nigam Ltd. v Reliance Communication Ltd.*, (2011) 1 SCC 394 | Appeal allowed, remitted to the TDSAT for hearing in accordance with the interpretation given by the SC to a clause in an agreement. |
| 14 | 2011 | 30 May 2011 | *Assam Cable Communications P. Ltd. v Zee Turner Ltd.*, 2011 (4) UJ 2108 | Appeal withdrawn. |
| 15 | 2007 | 11 October 2011 | *Union of India v Association of Unified Telecom Service Providers of India*, (2011) 10 SCC 543 | Appeal from all impugned orders allowed after settling all substantial questions of law involved. |
| 16 | 2012 | 5 December 2012 | *Aircel Ltd. and Ors. v Bharti Aircel Ltd.*, (2012) 13 SCC 398 | Appeal dismissed. |
| 17 | 2011 | 17 April 2014 | *Association of Unified Tele Services Providers and Ors. v* | Judgement of TDSAT set aside, allowing DoT's appeal. |

| | | | |
|---|---|---|---|
| | | *Union of India*, Civil Appeal No. 4591 of 2014 | |

The table below provides a list of judgments from the Delhi High Court that review TDSAT Orders. Out of the twelve decisions that our research revealed, in ten, the Court dismissed the Writ petition. In seven of these dismissed petitions, it stated that there was no procedural infirmity on the grounds of which interference was called for and it would not enter the merits and act as a court of appeal, and in three of them, it agreed with the findings of the TDSAT and hence found no reason for interference. In one case, the petition was allowed and the case was remanded to the TDSAT for fresh adjudication since it was a non-speaking Order. In another decision, a writ was attempted to be revived but the Court found an alternative solution which was to be available soon, and thus did not revive it.

**TABLE 3**

| | DATE OF JUDGMENT | NAME OF CASE | OUTCOME |
|---|---|---|---|
| 1 | 22 January 2013 | *Reliance Communications Ltd. v. Bharti Airtel Ltd.*, W.P. (C) 243/2013 and CM 503/2013 | No procedural infirmities with reasoning of TDSAT in interim order, thus writ set aside. |
| 2 | 20 December 2012 | *Yakesh Anand v. Union of India*, W.P. (C) No. 7189/2011 | TDSAT had delivered a split verdict and the imbroglio could not be resolved since it did not have a third Member. Court noted that the Government had served show cause notices to the respondents on the same subject matter, which had been challenged in a separate writ petition. Court gave orders to make this other adjudication time bound. Since the imbroglio would be resolved once the latter judgement was delivered, the Court did not enter the issues of the writ petition here. Petition disposed of, not revived. |
| 3 | 21 February 2011 | *MSM Discovery Pvt. Ltd. v New Delhi Television Ltd.*, LPA No. 44 of 2011, (2011) 3 Comp LJ 151 (Del) | TDSAT had given detailed orders giving adequate reasons, there was no procedural irregularity or illegality or acting in excess of jurisdiction. The order thus did not warrant interference and the writ petition was dismissed. |
| 4 | 22 December 2010 | *MSM Discovery Pvt. Ltd. v. Union of India*, W.P. (C) 8585/2010 and CM Appl 21898/2010 | High Court agreed with finding of TDSAT, passing interim order which had adequate reasons, therefore saw no ground for interference and dismissed writ petition. |
| 5 | 11 August 2010 | *MSM Discovery Pvt. Ltd. v Viacom 18 Media Private Ltd.*, (2011) 2 Comp LJ | High Court dismissed writ petition against interlocutory order of TDSAT. |

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| | | 658 (Del) | |
| 6 | 27 October 2009 | *Intermedia Cable Communication Pvt. Ltd v Zee Turner Ltd.*, W.P.(C) 12670/2009 | Court held that the TDSAT interim order was a non-speaking order, passed without stating any reasons. Hence the matter was remanded to TDSAT for fresh adjudication. |
| 7 | 16 September 2009 | *Neo Sports Broadcast Pvt. Ltd. v Sun Direct TV Pvt. Ltd.*, W.P.(C) 11639/2009 | Court held that there was no ground for interfering with the TDSAT interim order under the given facts, although the case could be reopened if a new disclosure was made. Hence, the writ petition was dismissed. |
| 8 | 29 July 2009 | *ICOS Entertainment v. Zee Turner Ltd.*, W.P. (C) 10505/2009 | High Court, on writ petition against TDSAT interim order, refused to enter into merits of the argument and sit as a court of appeal. Thus directed both petitioners and respondents to co-operate with the interim orders of the Tribunal. Writ petition dismissed. |
| 9 | 16 April 2009 | *Digicable Network India Pvt. Ltd. v. Star Den Media Services Pvt. Ltd.*, W.P. (C) 8112/2009 | Certain modified interim orders of the TDSAT were challenged, whereby it was contended that the modifications had been made in error without looking into all the facts offered by the petitioner. High Court stated that the TDSAT was entitled to modify its own orders and the same was not procedurally irregular nor had it overlooked substantive provisions of the law. Thus an interference was not called for under Article 226 which only deals with matters of procedure. Writ petition dismissed. |
| 10 | 28 February 2005 | *Entertainment Network (India) Ltd. v Union of India*, 4 Comp LJ 583 (Del) | Writ petition to review/modify interim order passed by TDSAT. High Court observed that TDSAT had given orders to adjourn the matter and hear the Government's decision at a date in the near future. Thus there was no point in entertaining the petition at this stage. Moreover, even if the decision was not communicated to the TDSAT on time, it would be the task of the Tribunal to pass an order accordingly, not the High Courts. Writ petition dismissed. |
| 11 | 16 December 2005 | *Star India Pvt. Ltd. v Shanskardhani Cable Network*, 126 (2006) DLT 299 | TDSAT interim orders, in the nature of mandatory injunctions, were challenged. These are granted in the rarest of cases. High Court noted that TDSAT was mindful of all relevant concerns while passing the orders. Thus, petition was dismissed and TDSAT was directed to proceed without being influenced by any observation in the High Court's judgement. |

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| 12 | 1 February 2005 | *Music Broadcast Pvt. Ltd. v Union of India*, (2005) 4 Comp LJ 565 (Del) | Interference with interim orders of TDSAT sought but Court noted that they had acted after reasonable inspection of facts and law and thus with no procedural infirmity, there was no ground for interference. Petition dismissed. |

There have been a few decisions by other High Courts as well. In one case, the Bombay High Court dismissed a petition on the ground that procedural infirmity giving cause for interference had not been established. In another, the Andhra Pradesh High Court rejected the claim that the TDSAT had acted in excess of its jurisdiction and without consideration of natural justice, and thereby dismissed the writ petition. In yet another decision, the Madras High Court quashed the TDSAT's order in exercise of its writ jurisdiction.

**TABLE 4**

| NAME OF CASE | DATE OF JUDGMENT AND COURT | OUTCOME |
|---|---|---|
| *Indusind Media and Communication Ltd. v. TDSAT* | Bombay High Court, 2013 (4) Bom CR 766 | Petition against TDSAT's refusal to grant interim orders as requested. Court held that there was no procedural infirmity and thus it would not interfere. Writ petition dismissed. |
| *Sun TV Ltd. v. Tata Sky Ltd. and TDSAT* | Madras High Court, (2007) 5 MLJ 277 | **On the issue of challenge to jurisdiction of the Court to entertain the petition**: Held, even if a fraction of a cause of action has arisen within the territorial jurisdiction of a Court, that is sufficient for the Court concerned to entertain a petition. Petitioner had its registered office and business in Chennai, even if the first respondent had its office in Delhi and the TDSAT which has passed the impugned Orders was housed in Delhi – whatever relief if was granted from Delhi would have an effect on Sun TV, Chennai. Therefore, there is jurisdiction under 226 to review the TDSAT's orders.<br>**On the merits**: The TDSAT had passed an interim order granting a final relief, after having discussed exhaustively certain issues that were to be discussed only at the stage of final hearing for final order. By this the TDSAT had violated the settled legal proposition that the final relief cannot be granted at the interim stage. Thus its order was liable to be quashed. |
| *Akash Cable T.V. Network Pvt. Ltd. v TDSAT* | Andhra Pradesh High Court, 6 July 2006, W. P. Nos. 27978 of 2005 and | TDSAT final order challenged as being arbitrary and without jurisdiction. Court interpreted the definition section of the TRAI Act to hold that the parties to the dispute before TDSAT who are cable operators are also |

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| | 768 of 2006, 2006 (2) APLJ 291 | service providers as envisaged by the Act and therefore the dispute lay within the jurisdiction of the Tribunal and not the MRTP Commission as claimed, and it had not acted in excess of its jurisdiction.<br>Court also held that there was no violation of natural justice by TDSAT. Thus, the petition was dismissed. |

Unlike the Supreme Court however, we notice a discernible deference towards the TDSAT from the High Courts. There is a marked reluctance to interfere with the orders of the TDSAT unless they found that there was breach of the principles of natural justice or principles of civil procedure. Most of the writ petitions here were presented against the interim orders of the TDSAT and in all but three instances, were dismissed. Therefore, in twelve out of fifteen cases the High Courts did not interfere in the orders of the TDSAT. This could be attributed in one respect to the quality of the judgments from the TDSAT. The jurisdiction of the High Court under Article 226 not encompassing the width of the appeal jurisdiction of the Supreme Court under the TRAI Act, and the average TDSAT judgment being well reasoned and based on law, the High Courts therefore seem to have deferred to the TDSAT's reasoning in all but rare instances.

(1) Do the judgments of the Tribunal reflect sound reasoning and proper application of law to the facts?

Ans: **Yes, the sample of judgments examined by us indicate that the TDSAT examined and appreciated the facts and relevant law in detail before passing the order, though there seems to be some confusion on the nature of review being undertaken. However, a larger sample of judgments will have to be examined for more definite conclusions in this respect.**

(2) How do the superior courts deal with findings of law and fact made by tribunal in appeal or in review?

Ans: **We find that there is no discernible trend in the way in which the Supreme Court has examined the TDSAT judgments in appeal. On the other hand, in all but the rarest cases, the High Courts show deference to TDSAT orders and judgments in judicial review.**

## 4. Analysis of Tribunals, Appellate Tribunals and Other Authorities Bill, 2014 in context of TDSAT

The Tribunals Bill was introduced in the Rajya Sabha on 17 February 2014. The Bill seeks to provide for uniform service conditions with regard to retirement age, tenure of appointment, accommodation for Members and Chairpersons of tribunals, appellate tribunals and authorities performing quasi-judicial functions. The Bill seeks to include the TDSAT within its purview, as specified in the First Schedule to the Bill.[50]

In the event that this Bill is passed by Parliament in its present form, a few provisions of this law will affect the TDSAT. A minor point of difference is the increased term of office for Chairperson

[50] Tribunals, Appellate Tribunals and Other Authorities Bill, 2014, First Schedule, Entry 8 ("Tribunals Bill").

and Members – increased from three years to five.[51] There are also minor alterations in the age of retirement, though not substantial.[52] For a Chairperson or other Member who has been a Judge of the Supreme Court, the age of retirement is seventy years, whereas for those who have been a Chief Justice or Judge of a High Court, the corresponding age is sixty seven years, and for all other Chairpersons or Members, the retirement age is sixty five years.[53] Most provisions of the Bill are concerned with allowances and medical benefits, pension and conditions for suspension of pension, conditions for grant of leave, prohibition of arbitration or practice, and the like. None of these provisions are addressed in the TRAI Act, and are governed under the TDSAT Salaries Rules. This Bill will thus not substantially affect the functioning of the TDSAT or address some of the problems we have highlighted above.

## C. Summary of Conclusions and Specific Recommendations

To summarise the conclusions on the eleven questions we had posed earlier, in the specific context of the TDSAT:

(1) Is the Executive required to consult with the Judiciary in the appointment of Members to the TDSAT?

Ans: **Yes, it is required to by virtue of section 14B(1) and this has been carried out in practice as well.**

(2) If the TDSAT is required to review the decisions of the Executive, does such 'consultation' also mean concurrence?

Ans: **Since the jurisdiction of the TDSAT does not extend to the review of decisions taken by the Department of Telecommunications, but only to review decisions of the TRAI, which is itself a regulatory authority separate from the Executive, such a requirement is not necessary.**

(3) Are the qualifications of the expert Member to the TDSAT with Government service sufficient to ensure independence of the TDSAT?

**Ans: Yes, since the basic qualification for a Member who has been a Government Servant is that he or she has served at the rank of Secretary to the Government of India.**

(4) Do the provisions of the parent statute provide sufficient protection from Executive interference in the terms and conditions of service in the course of engagement as a Member of the TDSAT?

Ans: **Yes, the Rules providing for salaries and emoluments are subject to Parliamentary oversight**.

(5) Is there any protection from unfair variation to disadvantage of a Member of the TDSAT?

[51] Tribunals Bill (n 50), s. 4.

[52] Tribunals Bill (n 50), s. 4.

[53] Tribunals Bill (n 50), s. 4.

Ans: **Yes, the TRAI Act prevents the variation of salaries and emoluments from being varied during the tenure of the Member or Chairperson to their disadvantage.**

(6) Are there sufficient procedural safeguards in ensuring that the removal and suspension of the Chairperson and Members of the TDSAT are not within the sole discretion of the Executive?

Ans: **Only to the extent that the Chairperson or Member has to answer to the specific charges in an enquiry proceeding conducted by the Supreme Court on a reference made to it for the express purpose by the Executive itself. However, the process of initiating the removal itself is concomitant with the power of suspension, as with other Government servants, this puts the TDSAT Member and Chairperson at par with an employee of the Government**

(7) Does the TDSAT have the power to hire and fire its own staff?

Ans: **No, TDSAT does not have the power to hire staff on its own, though the staff work under the superintendence of the Chairperson and may be removed by him.**

(8) Is the TDSAT is entirely dependent on the Executive for its funds?

Ans: **Yes, the TDSAT is entirely dependent on the Executive for its funding and also does not have independent infrastructure of its own.**

(9) Does the TDSAT function more efficiently than the court it was supposed to replace?

Ans: **No, at present it does not. While it was functioning efficiently till 2011, its efficiency in disposing cases has been seriously hampered by the delays in appointment over the last three years and the sudden spurt in litigation.**

(10) Do the judgments of the TDSAT reflect sound reasoning and proper application of law to the facts?

Ans: **Yes, in the sample of judgments examined by us indicate that the TDSAT examined and appreciated the facts and relevant law in detail before passing the order, though there seems to be some confusion on the nature of review being undertaken. However, a larger sample of judgments will have to be examined for more definite conclusions in this respect.**

(11) How do the superior courts deal with findings of law and fact made by the TDSAT in appeal or in review?

Ans: **We find that there is no discernible trend in the way in which the Supreme Court has examined the TDSAT judgments in appeal. On the other hand, in all but the rarest cases, the High Courts show deference to TDSAT orders and judgments in judicial review.**

Insofar as independence is concerned, while the normative independence of the TDSAT seems adequately safeguarded under the TRAI Act, the power to suspend a Chairperson or Member or the Tribunal would, it would seem go contrary to the Supreme Court's judgment in *Madras Bas Association* and therefore of dubious constitutionality. It is therefore recommended that the provision in the TRAI Act be amended to ensure that suspension take place only with the concurrence of the Chief Justice of India. In the alternative, the Tribunals Bill can be suitably amended so that the provision applies to all Tribunals which fall within the purview of the Bill, including the TDSAT.

As regards functional autonomy, there are concerns relating to:

(i) Lack of ability to hire its own staff
(ii) Dependence on the Central Government for funding
(iii) Lack of separate, independent infrastructure.

To this end therefore, the TRAI Act needs to be amended to allow for the TDSAT to hire its own staff as per its requirement and also permit it to charge its expenses to the Consolidate Fund of India instead of relying upon the DoT.

In addition, it is also recommended that the TDSAT be given separate and independent infrastructure of its own along the lines that it does not share with any other body or authority.

As far as efficiency is concerned, as we have pointed out, the TDSAT was able to, with its present strength maintain an exceptional rate of disposal till the year 2011. Following that the sudden drop in the rate of disposal seems directly attributable largely to the gaps in the appointment of Members and Chairperson to the TDSAT which affected its functioning. The Central Government should, ideally, ensure seamless appointment procedures that will not feature gaps between the retirement of one Member and the appointment of her replacement. However, since this may not always be possible, it would be advisable to amend the TRAI Act to grant a temporary three month extension to each Member/Chairperson who is retiring or till the replacement has been appointed, whichever is earlier to ensure seamless functioning of the TDSAT.

With these changes, the TDSAT should be able to function as a more independent, efficient and efficacious tribunal for the settlement of telecom disputes.

# ANNEX I

## Qualifications of Present and Past Members of TDSAT

**R. U. S. Prasad**: Senior positions in Ministry of Communications, Agriculture, Home Affairs and Finance including Additional Secretary to the Government of India and Secretary Telecom Commission from 1993 to 1996; Secretary to the Government of India, Chairman Postal Services Board and Directorate General of Posts, Ministry of Communications, Government of India from 1996 to 2000.

**P. R. Dasgupta**: Secretary to Chief Minister of Maharashtra and Secretary (Industries), Government of Maharashtra from 1987 to 1990; on deputation to World Bank from 1990 to 1992; Additional Secretary and first Project Director of National AIDS Control Organisation, Government of India from 1992 to 1995 and thereafter Education Secretary, Ministry of Human Resource Development, Government of India (1995-1999), Secretary (Rural Development) and Chairman, Food Corporation of India (1999 - 2000).

**Vinod Vaish**: Collector, Gwalior (1976) and Commissioner, College Education, Industries Commissioner, Managing Director, State Textiles Corporation and Agriculture Secretary Government of Madhya Pradesh; Cabinet Secretariat, Government of India from 1978 to 1982 and in the Ministry of Commerce as Director; Joint Secretary in Department of Chemicals and Petrochemicals; Additional Secretary / Special Secretary, Ministry of Environment and Forests, Government of India, from 1996 to 2000; Secretary, Department of Telecom Services (June – September 2000); Secretary, Ministry of Labour (October, 2000 – May, 2002); Chairman, Telecom Commission and Secretary, Department of Telecommunications from June, 2002 to January 2004.

**Lt. Gen. D. P. Sehgal**: Commissioned in the Corps of Signals, Indian Army, in June 1963, held various appointments in the field; on retirement from Indian Army in February 2004, Advisor to Bharat Electronics Ltd, Electronics Corporation of India Ltd, on the Board of Indian Telephone Industries Limited; Chairman, Electronic Development Panel of Defence Research and Development Organisation (DRDO), Chairman, Sub Committee on Joint Electronic Management Compatibility Advisory Board and Chairman, Joint Electronic Warfare Board.

**Dr. J. S. Sarma**: Collector and District Magistrate, Chittoor; Managing Director of the Oilseeds Growers' Federation, Commissioner, Municipal Corporation of Hyderabad, Commissioner of Land Reforms & Urban Land Ceilings, and Secretary in the Departments of Labour, Education and Planning; Ministry of Defence and Ministry of Chemicals & Fertilizers (1977-1980); Joint Secretary, Ministry of Rural Development (1997-2002); Additional Secretary, Department of Personnel and later in Department of Telecommunications (2002-2004); Secretary, Department of Telecommunications and Chairman, Telecom Commission (2005-2006); and Secretary, Department of Fertilizers (2006-2008).

**Govind Das Gaiha**: Joined the Indian Telecom Service in 1968; Appointed Director, telecom, Varanasi, in charge of 18 telecom districts of eastern Uttar Pradesh, in 1983; From 1992, he spent many years with MTNL, first as general manager, material management, in Delhi and later as general manager, project management south; From 1998 to 2002, worked as director, technical, at MTNL's corporate headquarters; Has 37 years of experience in telecommunications technology; Last tenure was as CMD of Telecommunications Consultants India Ltd (TCIL) (2002-2007).

**P. K. Rastogi**: 35 years' experience in IAS including 10 years of regulatory, quasi-judicial & development administration at district level, 3 years of technical education administration (including as Vice Chancellor of Jawaharlal Nehru Technical University, Hyderabad); 3 years as Managing Director of A.P. Technology Services; and 3 years as Chief Executive of non-banking financial institution responsible for financing the development of industries; 3 years as Principal Secretary (Finance), Government of Andhra Pradesh and a long stint in Industries Department; 8 years in service of Government of India; Defence Ministry for more than 5 years; Special Secretary, Ministry of Defence before joining as Secretary to Government of India, Ministry of Steel.

**Kuldip Singh**: Prior to appointment to TDSAT, was Director (Technical), MTNL Board, for more than 8 years, including as Chairman-cum-Managing Director for 2 years; earlier, worked in various capacities in Department of Telecommunications, National Informatics Centre in the Computer Networking Project and Overseas Communication Service.

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