

A FRAMEWORK FOR THE NATIONAL TRIBUNALS COMMISSION

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Contributors

Aakanksha Mishra
Siddharth Mandrekar Rao
Surya Prakash B.S.

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For any queries and clarifications regarding this paper please email
info@dakshindia.org

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Executive Summary

The 42nd Constitutional Amendment in 1976 embedded tribunals as an integral part of the justice delivery mechanism in India. Since then, specialised tribunals have been set up in a wide range of sectors both under union as well as state laws. However, the more than four decades-long experience with these tribunals has been far from satisfactory, and has exposed many problems plaguing these adjudicatory bodies.

Executive influence is often seen in matters of appointment and removal of tribunal members. Tribunals are dependent on the sponsoring ministry for finances and resources, infrastructure, and even physical space for functioning, which impairs their ability to act independently. The non-uniformity in the administration of tribunals arising out of inconsistencies in qualifications and variance in service conditions of various tribunal members adds to their woes. Many tribunals are also dealing with huge pendency and backlog of cases contrary to their stated objective of providing speedy access to justice. Attempts have been made several times to reform the tribunal system in India. However, these efforts have either been perfunctory, in contravention of the Supreme Court's guidelines, or undermined the judiciary's independence.

While the Courts have over the years upheld the constitutional validity of the establishment of tribunals, and vesting of judicial functions on the tribunals by the legislature, they have also lamented over the problems and inadequacies of the tribunals. In 1997, the Supreme Court of India in *L. Chandra Kumar v. Union of India*¹, for the first time mooted the idea

of creation of a single umbrella organization for the administration of all tribunals. Since then, the Court has repeatedly urged the government to create a wholly independent agency to oversee the working of tribunals and take care of their needs. The most recent of these orders was passed on November 27, 2020 by a three-judge bench of the Supreme Court which issued directions to the Union of India to constitute a 'National Tribunals Commission'. Looking at 9 selected tribunals, roughly 4 lakh pending cases would be affected by tribunal reform (See [Annexure C](#)). In the Customs, Excise and Service Tax Appeal Tribunal alone, ['revenue to the tune of rupees two hundred thousand crores have been locked due to pendency of more than one lakh cases in that body.'](#) The impacts of tribunal reform will affect a large number of people and will have considerable economic impact. Therefore, great care must be taken in addressing numerous questions and considerations about how these reforms should be carried out. This paper attempts to answer these questions and to provide a path forward.

Means of establishment

1. The National Tribunals Commission (NTC) should be established either through the statutory route or a constitutional amendment, by balancing considerations like ease of establishing an oversight

¹ *L. Chandra Kumar v. Union of India and Others*, 1997 (2) SCR 1186 (hereinafter *L. Chandra Kumar*)

body, securing independence of such a body through the different routes. A constitutional body would have greater functional, operational, and financial independence, particularly if its broader powers, functions, responsibilities and duties were given constitutional backing, allowing for additional specific modifications through ordinary legislation. If the statutory route is chosen, the bill should not be characterised as a Money Bill, as was done with certain provisions dealing with tribunals in the Finance Act, 2017.

2. State Tribunals Commissions may also be set up for oversight of tribunals established under state legislation. It may be more economical and efficient to manage tribunals in some states through Joint Tribunals Commissions.

■ Independence

1. **The expenses of the members of the NTC should be charged to the Consolidated Fund of India, to ensure the financial independence of both the NTC and the tribunals managed by it.**
2. The NTC must have full control over the appointment of its own staff and an administrative cadre for tribunals. This is necessary for the independence of both the NTC and tribunals. Procedures of the appointment of members of the NTC should be made free of executive influence by guaranteeing security of tenure and stable service conditions, and their terms of office must exceed and be staggered against the electoral cycle.

3. The NTC must have full control over its operational affairs, and must be free from executive interference in this regard. The legal framework for the NTC should enable it to work with other institutions where required but should ensure that the NTC retains full authority over matters that fall within its mandate.
4. **Provisions specifying the service conditions, necessary qualifications, eligibility conditions, and conduct while in service of NTC members must ensure their independence.** They must not, for example, engage in paid employment outside their office during their tenure or be involved with contracts or agreements on behalf of the State from which they derive any benefit or profit.
5. **There should be a legal or constitutional provision preventing the NTC from interfering in the judicial functions of tribunals.** Tribunals must retain full control over their adjudicatory decision-making in individual cases. The NTC must be obliged to ensure that tribunals have been provided with sufficient resources and administrative support to function efficiently and independently.

■ Accountability

1. In the interest of transparency, the NTC must present reports before the legislature and publish them online. The extent of these disclosures must be clearly codified in the legal framework, especially given the broad-ranging autonomy and independence it would enjoy. These must include regular formal reports and financial statements, accompanied by explanations of proceedings. Annual reports

should provide detailed information on its performance and those of tribunals under it, finances and a plan for the forthcoming year. The NTC would be accountable under the RTI Act, 2005, and must respond to information requests in addition to the information it discloses proactively.

2. The NTC must have institutional arrangements for both public reporting and public engagement. For every reform or programme that it undertakes, the NTC must conduct a form of public consultation to understand the views of citizens and specific stakeholder groups.
3. Limited oversight responsibilities over the NTC by counterpart independent offices, such as auditing of its accounts by the Comptroller and Auditor General of India, can strengthen the accountability of the NTC and make its working more transparent.

■ Organisational structure

1. **The NTC should be headed by a board comprising a diverse mix of stakeholders with both judicial and technical expertise representing the tribunals under the NTC, headed by the Chairperson.** The composition of the board should be such that judicial independence is preserved.
2. **The NTC should be run on a day-to-day basis by a Chief Executive Officer who will be accountable to the board and who must possess relevant expertise and experience in management and delivery of public goods.**

3. The NTC should be supported by a secretariat to support it in its administration and functioning, which can be organised into sub-committees according to function and territory. Their oversight should be free from executive interference.

■ Appointments to tribunals, service conditions, and disciplinary proceedings

1. **The NTC should have the power to independently appoint both judicial and technical members of tribunals. The NTC should be empowered to prescribe qualifications for tribunal members and determine the process of recruitment.**
2. To safeguard the independence of tribunals, retired judges should not be eligible to be appointed as judicial members of tribunals, and there should be a total bar on the reappointment of members.
3. The NTC should adopt empirically proven methods of determining the required number of tribunal members for a given tribunal, such as the weighted case-load method.
4. **In conducting disciplinary proceedings, the NTC should be obliged to ensure adequate judicial representation on any sub-committee or other internal arrangement for this purpose.** The only appeal against these decisions should be to the Supreme Court or High Courts on constitutional grounds.

5. The qualifications, service conditions, and appointment procedures for judicial members must be uniform across all tribunals. While service conditions must be uniform between them, qualifications and selection procedures for technical members should be comparable to the extent possible.

■ Budgeting

1. **The NTC should be responsible for conducting judicial impact assessments to understand the change in resource requirements resulting from the creation of new tribunals.**
2. The NTC secretariat should be supported by staff with expertise in public budgeting, and should implement proven, effective budgeting practices. Budget preparation must be linked with other needs, such as filling vacancies and appointing staff.

■ Oversight and Administrative Support

1. The composition of the NTC must include members with expertise in human resource management, information systems, operations, and other fields.
2. **The NTC must create a unified administrative cadre to provide registry services to all tribunals, such as managing records, overseeing maintenance of tribunal locations and infrastructure, and receiving documents and applications.**

3. The NTC should help evolve performance standards and benchmarks for the tribunals in consensus with them. The NTC should be empowered to measure the performance of each tribunal against these standards and benchmarks, and means of enforcing them.

■ Processes, Technology, and Infrastructure

1. **The functioning of the tribunals can be constantly improved by enabling the NTC to oversee research on procedural reform in both adjudicative and administrative matters.**
2. Physical infrastructure of the multiple tribunals that currently exist should be consolidated, and appropriately expanded so that there is no duplication of infrastructure, and that tribunals are at least as geographically accessible as the High Courts whose jurisdiction was transferred to them.
3. Tribunals should undergo a digitisation programme to upgrade their present information systems, with the goal of adopting a single, consolidated, modern information system. The NTC should ideally follow a 'digital platform' approach in this initiative, creating a base of digital infrastructure which all tribunals need, but allowing for them to configure as they need to.
4. A process re-engineering exercise should be undertaken in all tribunals in conjunction with the digitisation initiative. This will involve rationalising administrative procedures to eliminate unnecessary steps and function more efficiently.



There should be a legal or constitutional provision preventing the NTC from interfering in the judicial functions of tribunals. Tribunals must retain full control over their adjudicatory decision-making in individual cases.



■ What the NTC should not be:

Given the breadth of the mandate that would be granted to the NTC according to the recommendations above, it is necessary to highlight some important boundaries regarding the role, authority, and activity of the NTC. Some of these are given below.

1. There should be a legal or constitutional provision preventing the NTC from interfering in the judicial functions of tribunals. Tribunals must retain full control over their adjudicatory decision-making in individual cases.
2. Members of the NTC should not be allowed to hold any office in the Central Government or any state government after their tenure as an NTC member.

■ Implementation plan

The Supreme Court has directed that until the NTC is established, a separate wing should be established under the Ministry of Finance to take care of the needs of all the tribunals in the interim. The Leggatt Report that brought about wide-ranging reforms in the tribunals' framework in the United Kingdom and provided an implementation sequence for the creation of a user focused tribunals service provides useful guidance for a transitioning of tribunals under a unified body. Refer to [Section E](#) for more details on the Leggatt Report. We recommend a similar sequential plan for a smooth transition of tribunals from under their parent ministries to the NTC through the creation of an inter-ministerial committee which will be responsible for coming up with a white paper on the structure of, resource plan, and legal framework for the NTC after consultation with stakeholders. This must be followed up with drafting of the legal framework by experts and passing of the requisite legislation. In parallel, transitional arrangements and plans must be made for disengaging tribunals from their respective sponsor departments, followed by moving a few core tribunals to NTC on an incremental basis.

Figure 1 : Key Recommendations



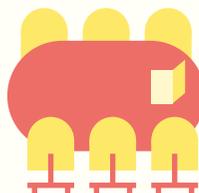
The NTC should be established either through the statutory route or a constitutional amendment.



The NTC should independently appoint judicial and technical members of tribunals, and prescribe qualifications for tribunals members and the process of recruitments.



The expenses of the members of the NTC should be charged to the Consolidated Fund of India.



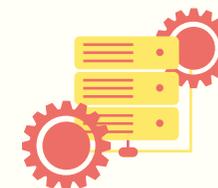
The NTC should be headed by a board with both judicial and technical expertise representing the tribunals under the NTC, headed by the Chairperson.



The NTC should be run on a day-to-day basis by a Chief Executive Officer who will be accountable to the board.



The NTC must create a unified administrative cadre to provide registry services to all tribunals.



The NTC should oversee creation, maintenance, and improvement of a unified technological infrastructure or platform for all tribunals.

A INTRODUCTION

The introduction of Articles 323A and 323B into the Constitution of India has successfully embedded tribunals as an integral part of the justice delivery mechanism in the country. Since the tribunals have been vested with jurisdiction over certain matters that were previously vested with the district courts and the High Courts, these judicial institutions have become forums for the common person to seek justice and therefore are expected to be as fair and as independent as any other court.² The tribunals should not become an indirect route for the executive to assert their control over the judiciary.³ As the executive regularly appears before such tribunals as a litigating party, their excessive involvement in the functioning of tribunals can jeopardise public trust and faith in these institutions. The Supreme Court of India has in a number of decisions over the last three decades directed the government to maintain the independence of these tribunals in line with the constitutional scheme. The Court has repeatedly recommended the creation of a single independent umbrella agency (the “National Tribunals Commission (NTC)”) to oversee the administration of the tribunals and standardise the selection process, removal, eligibility criteria for appointment, etc. of tribunal members.⁴ However, the union government has not paid heed to the court’s suggestion and instead, from time to time, have framed rules in contravention of the court’s guidelines, giving rise to protracted and endless litigation.

On November 27, 2020, a three-judge Bench of the Supreme Court in the case of Madras Bar Association ordered the union government to constitute a National Tribunals Commission (NTC) to act as an independent body to supervise appointments and functioning of tribunals across India. The Bench said there was an “imperative need” to ensure that tribunals discharged the judicial functions without any interference of the executive whether directly or indirectly. The NTC would take care of the administrative and infrastructural needs of tribunals, enhance the image of tribunals and instill confidence in the minds of litigants. Further, the Court directed that until the NTC was constituted, a separate wing in the Ministry of Finance shall be established to cater to the requirements of tribunals.⁵

² Shubhansh Thakur. 2020. ‘National Tribunal Commission: A disregarded constitutional necessity’, *The Daily Guardian*, 25 December, available online at <https://thedailyguardian.com/national-tribunal-commission-a-disregarded-constitutional-necessity/#:~:text=The%20committee%20comprised%20of%20the,each%20having%20a%20single%20vote> (accessed on 3 March, 2021)

³ *Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Another*, (1970) 4 SCC 225; *Maneka Gandhi vs Union Of India* (1978) AIR 597

⁴ *L. Chandra Kumar v. Union of India and Others*, 1997 (2) SCR 1186; *Union of India v. R. Gandhi*, (2010) 11 SCC 1

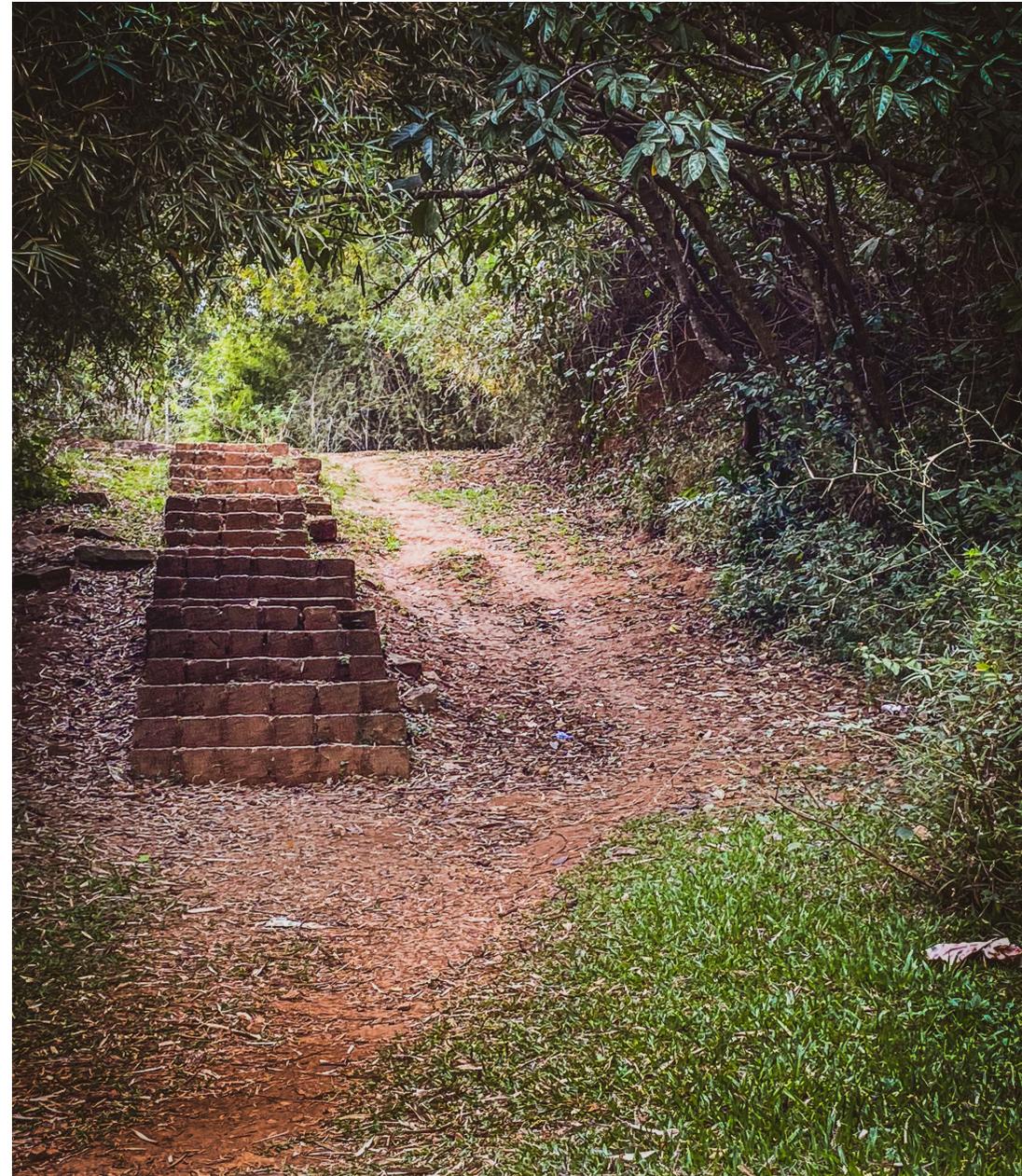
⁵ *Madras Bar Association v. Union of India*, (2020) SCC OnLine SC 962



As tribunals have attained a unique place in the Indian judicial landscape and have been adjudicating several important matters, their independence has to be crystallised and preserved in reality by the formation of NTC.



As tribunals have attained a unique place in the Indian judicial landscape and have been adjudicating several important matters, their independence has to be crystallised and preserved in reality by the formation of NTC. The objective of this paper is to discuss the various issues to consider in establishing an NTC, providing a roadmap to implement it, and making recommendations on its structure and functions, to ensure the independence, efficacy, and efficiency of tribunals. In [Section B](#) of this paper, we provide a brief background on the genesis of the tribunal system in India, the problems that have plagued these institutions and the series of judicial interventions that have directed the government to maintain the independence and impartiality of the tribunals while establishing their constitutional validity. In [Section C](#), we map out the considerations for designing the legal framework and institutional design of the NTC, discuss the functions that the NTC should be empowered to carry out, including the need for judicial impact assessment. [Section D](#) provides a sequential plan for a smooth transition of existing tribunals from under their respective departments to the National Tribunal's Commission. [Section E](#) discusses the tribunal frameworks in other countries, their experiences and best practices for tribunal administration. Lastly, in [Section F](#), we conclude with recommendations for planning, formulating and establishing the National Tribunals Commission.



B BACKGROUND

i Overview of tribunal system in India

A tribunal is a form of quasi-judicial body whose creation is intended to provide a means of resolving disputes that is more efficient than courts, or which possesses a degree of expertise in a particular domain in which courts typically do not, or both.⁶ They are not bound to follow as rigid a procedure as courts do, but they are held to the principles of natural justice.⁷ They typically consist of both judicial members, who are judges, and ‘technical members’. The technical members may not have legal expertise, but are experts in fields relevant to a given tribunal.⁸ Tribunals are also intended to provide a faster, more affordable and accessible means of resolving disputes than courts do.⁹

Though tribunals have not been explicitly defined in the laws that enable their creation, the Supreme Court of India has established conceptual and legal boundaries regarding tribunals, or quasi-judicial authorities, on numerous occasions. Some cases have simply described tribunals as bodies that resolve disputes, such that courts themselves may be considered a type of tribunal.¹⁰ The Supreme Court has ruled that tribunals share similarities with courts to the extent that they exercise judicial power of the State, but unlike courts, they are created to implement an administrative policy or

adjudicate upon disputes under an administrative law.¹¹ In this context, the test of whether an authority acting judicially is a tribunal is whether it shares some, but not all, of the attributes of courts.¹²

Articles 323A and 323B of the Constitution of India provide the basis for the creation of tribunals, which were inserted by the 42nd Constitutional Amendment in 1976. They empower parliament or state legislatures to create tribunals through statute. Under Article 323A, they may be established to adjudicate on the recruitment and service conditions of personnel appointed to any post created and overseen by the State. Article

⁶ *All India Hill Leaders Conference, Shillong v. Captain W.A. Sangma*, 1977 AIR 2155

⁷ *Associated Cement Co. Ltd. v. P.N. Sharma*, AIR 1965 S.C. 1595.

⁸ For example, see section 5 of the Administrative Tribunals Act, 1985

⁹ Law Commission of India. 2017. *Report no. 272: Assessment of Statutory Frameworks of Tribunals in India*, New Delhi: Government of India, available online at <https://lawcommissionofindia.nic.in/reports/Report272.pdf> (accessed on 1 March 2021)

¹⁰ *Kihoto Hollohon v. Sri Zachilhu*, 1992 SCC Supl. (2) 651

¹¹ *Harinagar Sugar Mills v Shyam Sunder Jhunjunwala*, 1961 AIR 1669; *State of Gujarat v. Gujarat Revenue Tribunal Bar Association*, (2012) 10 SCC 353

¹² *State of Gujarat v. Gujarat Revenue Tribunal Bar Association*, (2012) 10 SCC 353; *Jaswant Sugar Mills Ltd., Meerut v. Lakshmichand*, 1963 AIR 677

323B enables the creation of tribunals for many different jurisdictions under clause (2), ranging from taxes to labour disputes. Both articles allow parliament to exclude the jurisdiction of High Courts from these matters, and only provide for appeal to the Supreme Court through Article 136. However, the Supreme Court has ruled that the jurisdictions of the Supreme Court and High Courts (under Articles 32 and 226) cannot be excluded.¹³

The first tribunal to be set up in India was the Income Tax Appellate Tribunal, in 1941. A notable development in the history of tribunals in India was the passing of the Administrative Tribunals Act, 1986 (Administrative Tribunals Act) under which tribunals were created to resolve disputes related to conditions of service and recruitment to government bodies. This law enables the establishment of three types of tribunals: the Central Administrative Tribunal, State Administrative Tribunals, and Joint Administrative Tribunals.¹⁴ The passing of this Act was in response to delays in court proceedings;¹⁵ the Supreme Court observed that the Act was necessary to ensure that delays in litigation involving public servants do not interfere with their responsibilities.¹⁷

Non-administrative tribunals are typically established under specific laws, which define the areas which they adjudicate upon. Some examples are the Competition Commission of India, which is intended to eliminate business practices that have an adverse effect on competition in markets,¹⁶ and the Securities and Exchange Board of India, which regulates the securities market.

However, an examination of data has revealed that tribunals have not succeeded in resolving cases efficiently, and themselves suffer from backlog and delays.¹⁸ Some tribunals have been shown to be less efficient than the courts they were intended to replace.¹⁹ Other concerns include the independence of tribunals. Both administrative and non-administrative tribunals are dependent on government departments for funding, infrastructure, appointment of staff, and administrative support.²⁰ These government departments are often parties to disputes before the same tribunals leading to a conflict of interest.²¹ In addition to this, tribunals operate separate from one another, meaning that the administrative services required by each tribunal are duplicated between them.²² There is heterogeneity in the procedures they follow, the conditions of service of their members, and in numerous other areas.²³

¹³ L. Chandra Kumar

¹⁴ Clauses (f) and (h) of section 3, section 4 (1), and Section 4 (2) of the Administrative Tribunals Act, 1985

¹⁵ Law Commission of India. *Report no. 272: Assessment of Statutory Frameworks of Tribunals in India*.

¹⁶ Section 7 and section 18, Competition Act, 2002

¹⁷ Section 11 (1), Securities and Exchange Board of India Act, 1992

¹⁸ Law Commission of India. *Report no. 272: Assessment of Statutory Frameworks of Tribunals in India*

¹⁹ Vidhi Legal Policy. 2014. 'The State of the Nation's Tribunals, Introduction and Part 1: Telecom Disputes Settlement and Appellate Tribunal.' *Vidhi Legal Policy*, available online at <https://vidhilegalpolicy.in/wp-content/uploads/2019/05/sTribunals-TDSAT.pdf> (accessed on 03 March, 2021)

²⁰ Pratik Datta. 2015. 'Towards a tribunal services agency', *NUJS Law Review* 8: p.181

²¹ *Madras Bar Association* (2020)

²² Dutta. 'Towards a Tribunals Services Agency'

²³ Law Commission of India. 2017. *Report no. 272: Assessment of Statutory Frameworks of Tribunals in India*, Dutta. 'Towards a Tribunals Services Agency'

Problems that have plagued tribunals in India

1. Lack of independence in matters of appointment and removal of tribunal members

As tribunals carry out adjudicatory functions, it is expected that these adjudicators act impartially and independently. **However, executive interference is often seen in matters of the appointment and removal of tribunal members.** While most tribunal chairpersons are appointed after consulting the Chief Justice of India, other tribunal members are typically recommended by a selection committee. Since the secretaries of the sponsoring department/ ministry are often a part of these selection committees, the process of appointment is influenced by the executive.²⁴ Department bureaucrats are often appointed as tribunal members, continuing their lien on their parent cadre.²⁵ Another trend is the proclivity of the central government to select retired judges to head such tribunals. Such post-retirement benefits act as perverse incentives to toe the executive line when deciding high-stake cases against the government.²⁶

The removal procedure of tribunal members also affects their independent functioning. **At present, there exist wide variations in the removal procedure of members across the tribunals depending on the provisions of the statutes under which they have been established.** For example, some statutes do not have any provision on the removal itself, such as the Appellate Tribunal for Forfeited Property under Smugglers and Foreign Exchange Manipulators (forfeited of property) Act, 1976, Authorities for Advance Ruling under Income Tax Act, 1961, Customs Excise and Service Tax Appellate Tribunal and Income Tax Appellate Tribunal. Not having any procedure or grounds for removal paves the way for arbitrariness.²⁷ Some

statutes require a judicial inquiry to be conducted before removal while others do not. Further, some statutes leave a wide scope for executive discretion in the removal process.²⁸ Even with regard to the reappointment of members, there is no uniformity across tribunals. While some statutes prohibit reappointment, some permit reappointment in express terms and some others are silent on re-appointment.²⁹

2. Excessive dependence on the executive

Given the current framework for tribunals in India, many tribunals are heavily dependent on their parent ministries for their day-to-day functioning which impairs their ability to act independently. They are dependent on the sponsoring ministry not only for finances but for resources, infrastructure and even physical space for functioning.³⁰ By retaining control over the basic requirements of the tribunals to carry out their

²⁴ *Madras Bar Association* (2020)

²⁵ *R. Gandhi*

²⁶ Madhav S. Aney, Shubhankar Dam & Giovanni Ko, 'Jobs for Justice(s): Corruption in the Supreme Court of India', available online at <https://www.isid.ac.in/~epu/acegd2016/papers/MadhavSAney.pdf> (accessed on 25 February 2021)

²⁷ Vidhi Legal Policy. 'Reforming the Tribunals Framework in India: An Interim Report'

²⁸ In AFT and CAT, when there is a complaint pertaining to a member, the central government sets up a committee comprising senior bureaucrats, which undertakes a preliminary scrutiny of the complaint. Thereafter, the committee submits its findings to the President, who may make a reference to the CJI based on whether she/he believes that there are reasonable grounds for an inquiry. Therefore, there is scope for executive discretion on whether inquiry can be conducted or not.

¹⁷ Section 11 (1), Securities and Exchange Board of India Act, 1992

²⁹ Vidhi Legal Policy. 'Reforming the Tribunals Framework in India: An Interim Report'

³⁰ *Rojer Mathew v. South Indian Bank Limited*, (2020) 6 SCC 1 (hereinafter *Rojer Mathew*); *R. Gandhi*

day-to-day operations, the executive can influence them. For example, several benches of the National Green Tribunal have shut down or are paralyzed from rendering any decision due to unfilled vacancies, lack of infrastructure, and resources. Meanwhile, numerous litigations relating to environmental clearances provided by the ministry for big investment projects remain pending.³¹

■ 3. Non-uniformity in the administration of tribunals

The Courts have repeatedly lamented over the non-uniformity in the administration of tribunals across the country.³² These concerns arise out of discrepancies in qualifications and variances in service conditions of various tribunal members because the tribunals function under different ministries and statutes. Such inconsistency leads to differences in competencies, maturity and status of members.³³ Further, the short tenure of members obviates the cultivation of domain expertise, necessary for the efficacy of tribunals. In *Madras Bar Association v. Union of India*, the Supreme Court suggested a tenure of 5-7 years to address this issue. The 74th Parliamentary Standing Committee report suggested a regularized system of appointment where tenure ends at the age of retirement. Despite this, several tribunals have shorter tenures. Most recently, the Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 has sought to override court judgments and restrict the service length of Chairperson, Vice-Chairperson and members of tribunals to four years.³⁴ Different retirement ages, it has been suggested, has led to uneven tenures in benches which in turn hamper institutional continuity.³⁵



³¹ Geetanjoy Sahu . 2018. 'Ecocide by Design? Under Modi, Vacancies At National Green Tribunal Reach 70%', The Wire, 15 February, available online at <https://thewire.in/politics/ngt-political-apathy-vacancies> (accessed on 25 February 2021)

³² L. Chandra Kumar

³³ Rojer Mathew, Justice Chandrachud, paragraph 21 b

³⁴ Section 12(11) of the Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021, available online at <http://egazette.nic.in/WriteReadData/2021/226364.pdf> (accessed on 5 April 2021)

³⁵ Vidhi Legal Policy. 'Reforming the Tribunals Framework in India: An Interim Report'

■ 4. Pendency of cases and Access to Justice

A stated justification for the introduction of constitutionally authorized tribunals in the mid-1970s was to reduce the problems of delay and backlog.³⁶ Administrative tribunals were originally set up to provide specialised justice delivery and to reduce the burden of caseload on regular courts. **However, the figures of pending cases across several tribunals do not paint a satisfactory picture of the functioning of tribunals.**³⁷ For an overview of number of cases pending before various tribunals, please refer to Annexure C. Further, the court system (High Courts and Supreme Court) is getting congested by appeals from various tribunal decisions. These appeals, in turn, remain pending in the High Courts/Supreme Court for years, leading one to speculate on whether tribunals are actually delivering specialised and speedy justice delivery.³⁸

Adding to the woes of litigants is the fact that some tribunals have benches only in bigger cities. In *Gujarat Urja Vikas Nigam Ltd v. Essar Power Ltd*, the Court commented on the inherent difficulty for many litigants in accessing justice as benches of some tribunals were located only in New Delhi. Again, in *Rojer Mathew*, Justice Deepak Gupta observed, “...Having tribunals without benches in at least the capitals of States and Union Territories amounts to denial of justice to citizens of those States and Union Territories. It also makes the justice delivery system very metropolis centric... Instead of taking justice to the common man, we are forcing the common man to spend more money, spend more time and travel long distances in his quest for justice, which is his fundamental right.”³⁹



Having tribunals without benches in at least the capitals of States and Union Territories amounts to denial of justice to citizens of those States and Union Territories



■ 5. Jurisdiction of High Courts

Provisions allowing direct appeals to the Supreme Court which by-pass the jurisdiction of High Courts have been examined in multiple cases, e.g., Appeals from the Securities Appellate Tribunal can be filed directly with the Supreme Court. Despite existing precedents and the Law Commission of India’s recommendations, parent statutes of many tribunals continue to allow for a direct appeal to the Supreme Court. A direct appeal to the Supreme Court is inaccessible to many litigants; and such a provision leads to congestion of the docket of the Supreme Court.⁴⁰

³⁶ Arun Thiruvengadam. 2016, in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds.), *The Oxford Handbook of the Indian Constitution*, pp. 412-431. Oxford: Oxford University Press

³⁷ Law Commission of India. *Report no. 272: Assessment of Statutory Frameworks of Tribunals in India*, paragraph 3.35, p. 32

³⁸ Financial Express. 2016. ‘The Growing Case for Tribunal Reform’, Financial Express, 23 September, available online at <https://www.financialexpress.com/opinion/the-growing-case-for-tribunal-reform/387383/> (accessed on 25 February 2021)

³⁹ *Rojer Mathew*, Justice Deepak Gupta, paragraph 44

⁴⁰ *Rojer Mathew*, Justice D. Y. Chandrachud

Series of judicial interventions

The Constitution (Forty-second Amendment) Act, 1976 allowed for the insertion of Articles 323A & 323B which provided for the establishment of tribunals to adjudicate on matters where the particular legislature could make laws. As a consequence, the Administrative Tribunals Act, 1985 was enacted. This was criticized as violating the separation of powers principle embedded within the constitutional framework and seen as an attack on the independence of the judiciary. Since then the Supreme Court has, in a series of cases, tried to address the jurisdictional disputes between High Courts and these specialized tribunals while also emphasizing the need for strengthening the structural and functional independence of tribunals to curb interference from the executive.

■ 1. Constitutionality of Tribunals

The judgment of the constitution bench of the Supreme Court in *S.P. Sampath Kumar v. Union of India*⁴¹ kick-started the debate on the constitutionality of tribunals. The constitutionality of the Administrative Tribunals Act, 1985 and the Constitution (Forty-second Amendment) Act, 1976 was the primary issue raised in this case. The petitioner contended that these amendments excluded judicial review (writ jurisdiction of Articles 32 and 226), which was a basic and essential feature of the Constitution. The Court held that although judicial review was part of the basic structure, the Constitutional Amendment did not leave a void in the process of excluding the jurisdiction of High Courts. According to the Court, if another effective 'alternative institutional mechanism' was set up wherein the power of judicial review was vested with the Administrative Tribunal then under such a scenario it would pass the test of constitutionality.

A decade later, a seven-judge bench of the *Supreme Court in L. Chandra Kumar v. Union of India*⁴² overruled *Sampath Kumar* on the point of power of judicial review of the High Courts and this decision holds good till date. The Court held that the power of judicial review vested with the Supreme Court and High Courts under Articles 32 and 226 were inherent constitutional safeguards, which ensured the independence of the higher judiciary, were not accessible to the lower judiciary and thereby held that judicial review, being part of the basic structure of the Constitution, cannot be abrogated by any amendment. Therefore, the exclusion of the jurisdiction clause under Articles 323A(2)(d) and 323(B)(3)(d) were struck down. The Court further held that since the power of superintendence was a power vested in the higher judiciary over the lower courts the same was also part of the basic structure and cannot be taken away. On the issue of technical members, the Court held that the setting-up of tribunals was founded on the premise that those with judicial experience and grassroots experience would best serve the purpose of dispensing speedy justice. The Court also clarified that the tribunals would continue to act as Courts of first instance in respect of the areas of the law for which they have been constituted.

After this decision, a constitution bench of the Supreme Court was constituted in *Union of India v. R. Gandhi, President Madras Bar Association*⁴³ to clarify to what extent the powers of the High Court, apart from the power of judicial review, could be transferred to the tribunals and whether there was a demarcating line for the Parliament to vest intrinsic judicial functions traditionally performed by Courts in any tribunal. The Court noted that

⁴¹ *S.P. Sampath Kumar v. Union of India*, AIR 1987 SC 386 (hereinafter *Sampath Kumar*)

⁴² *L. Chandra Kumar*

⁴³ *Union of India v. R. Gandhi, President Madras Bar Association*, (2010) 11 SCC 1 (hereinafter *R. Gandhi*)

the Constitution permits judicial power being exercised by both courts and tribunals. Except for the powers and jurisdictions vested in superior courts by the Constitution, the powers and jurisdiction of courts are controlled and regulated by legislative enactments. Therefore, it held that the legislature had the power to create tribunals with reference to specific enactments and confer jurisdiction on them to decide disputes arising from such special enactments. However, the Court also ruled that while the legislature could make a law providing for the constitution of tribunals and prescribing the eligibility criteria and qualifications for being appointed as members, the High Courts and the Supreme Court could, in the exercise of the power of judicial review, examine whether the qualifications and eligibility criteria provided for selection of members are proper and adequate to enable them to discharge judicial functions and inspire confidence.

In yet another landmark decision in *Madras Bar Association vs. Union of India*,⁴⁴ a five-judge bench of the Supreme Court was constituted to decide on the constitutionality validity of the National Tax Tribunal (NTT). Examining the line of precedents, the Court concluded that it was settled law that while the Parliament was competent to enact a law transferring the jurisdiction of the High Court with respect to specific subjects to other Courts or tribunals, what it could not do was to transfer power vested in the High Courts, by the Constitution itself. According to the Court, the jurisdiction transferred by the NTT Act was with regard to specified subjects under tax-related statutes which in their opinion was permissible in terms of the position expressed above. The Court noted that the power of “judicial review” vested in the High Court and the power vested in High Courts to exercise judicial superintendence over the benches of the NTT within their respective jurisdiction under Articles 226 and 227 of the Constitution was not divested by the NTT Act and remained unaltered. Therefore, it was

held, the NTT Act did not violate the basic structure of the constitution by abrogating the power of judicial review. The NTT was nevertheless struck down as being unconstitutional on account of several provisions of the NTT Act undermining the independence of the judiciary through excessive executive interference, such as the provision empowering the Union government to decide the location, jurisdiction and constitution of benches, transfer of members, etc.



⁴⁴ *Madras Bar Association v. Union of India*, AIR 2015 SC 1571

2. Strengthening the structural and functional independence of tribunals

Figure 2 : Evolution of the idea of a National Tribunals Commission



1986

Sampath Kumar | 5-judge bench

The constitutionality of the Administrative Tribunals Act, 1985 and the Constitution (Forty-second Amendment) Act, 1976 was upheld as the court held that the Administrative Tribunals provided an effective 'alternative institutional mechanism' wherein the power of judicial review was vested.

The Supreme Court stated the need for an independent mechanism of making appointments to tribunals, such as High Powered Selection Committee, or by generally requiring approval of the Chief Justice of India.



1997

L. Chandra Kumar | 7-judge bench

The decision overruled *Sampath Kumar's* alternative institutional mechanism theory and held that the power of the High Courts under Article 226 and 227 to exercise judicial superintendence over the decisions of all courts and tribunals, is a part of the basic structure. It also stated that *"all decisions of Tribunals, whether created pursuant to Article 323A or Article 323B of the Constitution, will be subject to the writ jurisdiction of the High Courts under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular tribunal falls."* The decision holds good till date.

For the first time, the Supreme Court recommended the creation of an independent agency to oversee appointment and administration of tribunals, and until such time, recommended that all tribunals be brought under the Ministry of Law and Justice.



2010

R. Gandhi | 5-judge bench

The decision reasoned that since the powers and jurisdiction of courts are controlled and regulated by legislative enactments (except for those vested in superior courts by the Constitution itself), the legislature had the power to create tribunals with reference to specific enactments and confer jurisdiction on them to decide disputes arising from such special enactments. However, even in such cases, the High Courts and the Supreme Court could exercise their power of judicial review over such legislative enactments.

The decision also recommended following *L. Chandra Kumar* for creating an umbrella agency for administration of all the tribunals and undertake reforms of the tribunal system in India inspired by the UK's consolidation of tribunal administration under a single service, to oversee tribunal premises, IT infrastructure, and training.



2014

**Parliamentary Standing Committee
On Personnel, Public Grievances, Law And Justice – 74th Report**

Both the Committee and the Law Commission endorsed the idea of creating an NTC to oversee selection and removal of tribunal members, as well as introduction of common eligibility criteria and meeting financial and infrastructural needs.

2017

272nd Law Commission Report



2019

***Roger Matthew* | 5-judge bench**

The majority decision held that:

- Tribunals must be financially independent for the purpose of their day-to-day functioning
- Their expenditure must be charged to the Consolidated fund of India
- There is a need-based requirement to conduct 'Judicial Impact Assessment' of all the tribunals
- The Union Government shall carry out amalgamation of existing tribunals by adopting the test of homogeneity of the subject matters to be dealt with

In separate opinions, Justice D.Y. Chandrachud and Justice Deepak Gupta recommended the creation of an NTC. Justice D.Y. Chandrachud also recommended the creation of an All India Tribunal Service.



2020

***Madras Bar Association* | 3-judge bench**

The Supreme Court directed the Government to create an NTC, and to consolidate tribunal administration under the Ministry of Finance as an interim measure.

The Court expressly called out the Government for not having implemented the directions issued by the Supreme Court yet, and directed strict adherence to this ruling in order to avoid future litigation.

Addressing the issue of the dependence of tribunals on the executive for administrative requirements, the Supreme Court for the first time in *L. Chandra Kumar*, made a recommendation for the creation of a single umbrella organization, which will be a wholly independent agency to oversee the working of all the tribunals. The Court was also of the opinion that until such a body can be set up, it would be desirable for all tribunals to be under a single nodal Ministry which should be the Ministry of Law and Justice, Government of India. It would be open for the Ministry, in its turn, to appoint an independent supervisory body to oversee the working of the tribunals. The Court observed:

“...Such a supervisory authority must try to ensure that the independence of the members of all such Tribunals is maintained. To that extent, the procedure for the selection of the members of the Tribunals, the manner in which funds are allocated for the functioning of the Tribunals and all other consequential details will have to be clearly spelt out. The suggestions that we have made in respect of appointments to Tribunals and the supervision of their administrative function need to be considered in detail by those entrusted with the duty of formulating the policy in this respect...We, therefore, recommend that the Union of India initiate action in this behalf and after consulting all concerned, place all these Tribunals under one single nodal department, preferably the Legal Department.”

In *Roger Mathew v. South Indian Bank Limited*,⁴⁵ the Supreme Court observed that when tribunals or members thereof have to seek financial, administrative or any other facility from a department who is also the litigant before them, their fairness or independence is likely to be compromised. The majority decision held that:

- a. Every tribunal must enjoy adequate financial independence for the purpose of its day-to-day functioning** including the expenditure to be incurred on (i) recruitment of staff; (ii) creation of infrastructure; (iii) modernisation of infrastructure; (iv) computerisation; (v) perquisites and other facilities admissible to the Presiding Authority or the Members of such tribunal.
- b. It may not be very crucial as to which Ministry or Department performs the duties of Nodal Agency for a tribunal, but what is of utmost importance is that the tribunal should not be expected to look towards such Nodal Agency for its day-to-day requirements. There must be a direction to allocate adequate and sufficient funds for each tribunal to make it a self-sufficient and self-sustainable authority for all intents and purposes.**⁴⁶
- c. The expenditure to be incurred on the functioning of each tribunal has to be necessarily a charge on the Consolidated Fund of India.** The Ministry of Finance shall, in consultation with the Nodal Ministry/Department, earmark separate and dedicated funds for the tribunals.”

⁴⁵ *Roger Mathew*

⁴⁶ The court took note of the statements of the Ld. Attorney General who had submitted that the Ministry of Law was already overburdened and could not effectively perform the supervisory function, as a single nodal Ministry, for all the tribunals. (Order dated 27 March 2019 in Writ Petition (Civil) No. 267/2012, Supreme Court of India)

- d. **There is a need-based requirement to conduct ‘Judicial Impact Assessment’ of all the tribunals** so as to analyse the ramifications of the changes in the framework of tribunals as provided under the Finance Act, 2017. The Court issued a writ of mandamus to the Ministry of Law and Justice to carry out such ‘Judicial Impact Assessment’ and submit the result of the findings before the competent legislative authority.
- e. **The Union Government shall carry out an appropriate exercise for amalgamation of existing tribunals** adopting the test of homogeneity of the subject matters to be dealt with and thereafter constitute adequate number of Benches commensurate with the existing and anticipated volume of work.

In his separate opinion, Justice DY Chandrachud recommended the constitution of an independent statutory body called the National Tribunals Commission to oversee the selection process of members, criteria for appointment, salaries and allowances, the introduction of common eligibility criteria, for removal of Chairpersons and Members as also for meeting the requirement of infrastructural and financial resources. He also asked the Union government to consider formulating a law for constituting an All India Tribunal Service governing the recruitment and conditions of service of the non-adjudicatory personnel for tribunals.

In yet another separate opinion, Justice Deepak Gupta expressed anguish over the Government’s inaction to comply with the 7-Judge Bench judgment of this Court in *L. Chandra Kumar* regarding the establishment of an independent body to oversee the functioning of tribunals. In his view, "merely giving financial autonomy to the tribunals will not do away with

the need of having one common umbrella organisation to supervise all the tribunals" and therefore the government must be directed to set up a single nodal agency within a period of 6 months so that the matter doesn’t linger on indefinitely.

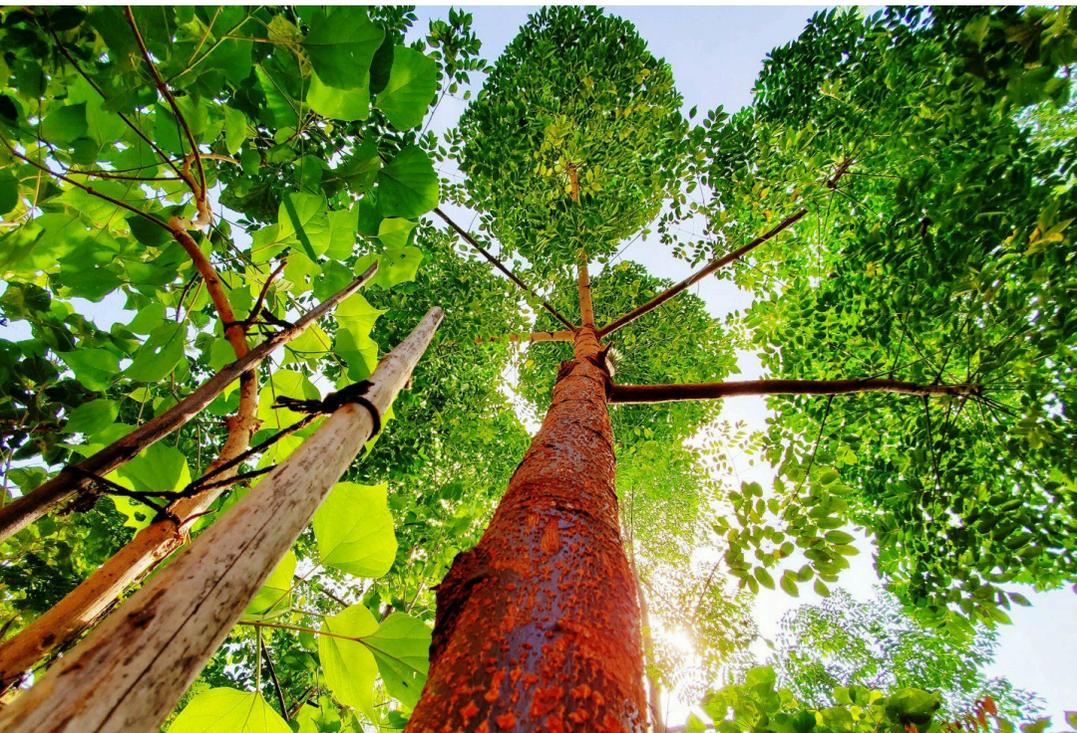
In a sequel to the *Roger Mathew* decision, in November 2020, a three-judge bench of the Supreme Court in *Madras Bar Association v. Union of India*⁴⁷, reiterated the importance of the constitution of an autonomous oversight body for recruitment and supervision of the performance of the tribunals. While relying on the decision in *L. Chandra Kumar* and the recommendations of the 74th Report of the Parliamentary Standing Committee, the Court directed the Union of India to set up a National Tribunals Commission at the earliest. To stop the dependence of the tribunals on their parent Departments for routing their requirements and to ensure speedy administrative decision making, as an interregnum measure, the court directed that there should be a separate “tribunals wing” established in the Ministry of Finance, Government of India to take up, deal with and finalize requirements of all the tribunals till the National Tribunals Commission is established. In its judgment, the court expressly observed:

 *Dispensation of justice by the Tribunals can be effective only when they function independent of any executive control: this renders them credible and generates public confidence.*
 – Supreme Court of India, in *Madras Bar Association (2020)* 

⁴⁷ *Madras Bar Association (2020)*

“We have noticed a disturbing trend of the Government not implementing the directions issued by this Court... The involvement of this Court, in the series of decisions, rendered by no less than six Constitution Benches, underscores the importance of this aspect. The role of both the courts as upholders of judicial independence, and the executive as the policy making and implementing limb of governance, is to be concordant and collaborative. This Court expects that the present directions are adhered to and implemented, so that future litigation is avoided. The Government is, accordingly, directed to strictly adhere to the directions given above.”

While the Courts in *L. Chandra Kumar* and *Rojer Mathew* urged the Union to set up a single umbrella organization through its recommendations, the November 27, 2020 judgement in *Madras Bar Association v. Union of India*, issued a mandatory direction to the Union of India for the constitution of a National Tribunals Commission.



Over the last decade, both the judiciary as well as the legislature have tried to reform the tribunals' framework in India, albeit without much success. Several attempts have been made at reforming the tribunals' system in India including proposals to create a Central Tribunals Division⁴⁸, consolidation of tribunals⁴⁹ and rationalization of various service conditions of tribunal members.⁵⁰ For more details, please refer to [Annexure B](#). However, there has been a lack of political will to enforce any systemic reforms concerning tribunals once they are created. Whenever an effort has been made, it has either been considered to be half-hearted (by the 74th report of the Parliamentary Standing Committee on the Tribunals, Appellate Tribunals and Other Authorities (Conditions of Service) Bill, 2014) or motivated in a way to affect the independence of the judiciary (as done through the Finance Act, 2017)⁵¹ or in contravention of court guidelines (Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021). The latest direction of the Court to constitute the National Tribunals Commission, presents an opportunity for the Union Government to transform the tribunals' system in India.

⁴⁸ Press Information Bureau, Government of India. 2001. 'Administrative Control of Tribunals', *Press Information Bureau, Government of India*, available online at <https://archive.pib.gov.in/archive/releases98/lyr2001/raug2001/02082001/ro20820012.html> (accessed on 25 February 2021)

⁴⁹ Finance Act, 2017

⁵⁰ Tribunals, Appellate Tribunals and Other Authorities (Conditions of Service) Ordinance, 2014; Tribunals Reforms (Rationalisation and Conditions of Service) Bill, 2021

⁵¹ Arijeet Ghosh and Reshma Sekhar. 2018. 'What We Can Do to Reform the Tribunals Framework in India', *The Wire*, 24 July, available online at <https://thewire.in/law/india-national-tribunals-commission> (accessed on 25 February 2021)

NATIONAL TRIBUNALS COMMISSION

The fundamental problem that has prompted the Indian judiciary to repeatedly reiterate the need for an independent oversight body for all tribunals is non-uniformity across tribunals with respect to service conditions, the tenure of members, varying nodal ministries in charge of different tribunals, and the lack of independence owing to tribunal's dependence on sponsoring ministry for funding, infrastructure and other resources. All of these factors hamper the efficient administration of tribunals, thus effectively impeding access to justice. With the Supreme Court now mandating the Union of India to constitute the NTC⁵², the government must begin this process at the earliest, as it has a constitutional duty to act in the aid of the Supreme Court.⁵³

Institutional Framework – NTC as an 'independent oversight institution'

The following section describes in general terms the broad contours and features of 'independent oversight institutions' while making a case for how the NTC (given the objective for its creation) should be designed as an independent oversight institution.

1. Definition

Independent oversight institutions vary widely in their formal structures and mandates, function in different governance systems and can have widely different responsibilities even within the same country. According to De Vrieze, "independent oversight institutions exercise oversight over the democratic functioning and integrity of the executive and state administration". He draws a distinction between 'independent oversight institutions' and 'regulatory bodies.' Although regulatory bodies may have some operating independence, they are primarily charged with managing the regulation of an economic sector rather than having a broader mandate related to good governance and rights protection.⁵⁴ Independent oversight institutions are essentially public bodies, politically neutral and independent from the three main branches of government, whose purpose is to ensure

⁵² *Madras Bar Association* (2020)

⁵³ Article 144, Constitution of India

⁵⁴ Franklin De Vrieze. 2019. 'Independent Oversight Institutions and Regulatory Agencies, and their Relationship to Parliament: Outline of assessment framework', Westminster Foundation for Democracy: p. 40, available online at: https://wfd.hostmydev.com/wp-content/uploads/2019/02/WEB_INDEPENDENT-OVERSIGHT-INS.pdf (accessed on 24 February 2021)

the integrity—and improve the quality and resilience—of democratic governance.⁵⁵ Further, independent oversight institutions exercise oversight of the executive and public administration in a different and more specialized way compared to how parliaments exercise oversight. The parliament conducts oversight on policies at specific times and often in a more generic way while independent oversight institutions do so continuously, by specialized staff and with an explicit mandate based in legislation.⁵⁶ **The main features of oversight bodies are the capacity of co-ordination of institutional frameworks from a whole-of-government perspective⁵⁷, independence and sufficient authority, political support at a high political level, and integration into a broad concept of reform.⁵⁸**

■ 2. Role of such institutions

Independent oversight institutions can provide a type of check and balance, alongside relationships within and between the three traditional branches of government. They can function as neutral guardians⁵⁹, vigilant monitors, and autonomous administrators.⁶⁰

Neutral guardians safeguard the procedural fairness and integrity of the political system. They separate the executive branch, which is partisan and seeks to pursue particular policy agendas, from the permanent institutions of the state, which are supposed to be neutral and non-partisan. Examples of neutral guardians include institutions responsible for ensuring the free and fair conduct of elections, appointing public officials or ensuring judicial independence.⁶¹ As the NTC will be established as a body to oversee the functioning of tribunals, which are now deeply embedded as an integral constituent of the judicial system of India, safeguarding

judicial independence in such a context will be of critical importance. The independence of NTC (made operational through financial autonomy and the ability to appoint/remove tribunal members and staff) will allow it to shield the tribunals from partisan influence.

Vigilant monitors track and report on government performance in particular areas. They might be involved in non-partisan policy research and analysis or can help to ensure that the interests of vulnerable populations are adequately represented. Examples of this type of institution usually include human rights commissions, gender commissions and minority rights commissions.⁶² As tribunals are involved in justice delivery to the citizens and were initially established with a few to deliver speedier justice, one of the most important mandates of the NTC would be to monitor and evaluate the performance of the tribunals in securing effective access to justice.

⁵⁵ Elliot Bulmer. 2019. 'Independent Regulatory and Oversight (Fourth-Branch) Institutions', *International Institute for Democracy and Electoral Assistance (IDEA)*, available at <https://www.idea.int/sites/default/files/publications/independent-regulatory-and-oversight-institutions.pdf> (accessed on 24 February 2021)

⁵⁶ De Vrieze. 'Independent Oversight Institutions and Regulatory Agencies, and their Relationship to Parliament: Outline of assessment framework'

⁵⁷ Regulatory reform has been proved more effective in cases where it is considered as a whole-of-government process. Key institutions should be integrated into a comprehensive strategy, strengthening co-ordination mechanisms among regulators and ministries.

⁵⁸ 'Background Document on Oversight Bodies for Regulatory Reform', OECD <http://www.oecd.org/mena/governance/36785272.pdf> (accessed on 24 February 2021)

⁵⁹ Stanley A. De Smith. 1964. *The New Commonwealth and its Constitutions*, London: Stevens and Sons

⁶⁰ Bulmer. 'Independent Regulatory and Oversight (Fourth-Branch) Institutions'

⁶¹ Bulmer. 'Independent Regulatory and Oversight (Fourth-Branch) Institutions'

⁶² Bulmer. 'Independent Regulatory and Oversight (Fourth-Branch) Institutions'

Autonomous administrators have an administrative role, which may even include aspects of delegated (mostly technical) law and policymaking within a defined sphere. These institutions are typically granted functional and operational autonomy over the types of decisions that—for the sake of good governance, continuity, long-term planning and technical competence—have to be kept at arm’s length from politicians. Financial Commissions and Central Banks are some examples of autonomous administrators.⁶³

In order for the NTC to be effectively independent, it will have to carry out several administrative functions such as providing infrastructure, deciding budgets, recruiting competent and expert staff etc.

■ 3. Mandate

Just as the areas of oversight responsibility diverge greatly from institution to institution, so do the mandates and powers of independent oversight institutions. Some of the mandates that are frequently assigned to oversight institutions include:

- a. **Assessing systemic issues in the institution’s responsibility area**
- b. **Maintaining data on complaints and their resolution;**
- c. **Monitoring policy and practices**
- d. **Recommending policy changes to address systemic issues**
- e. **Regularly reporting (normally annually) on compliance with relevant legislation and good practice**
- f. **Conducting investigations on individual cases/particular instances**

An independent oversight body should typically have the right to determine its own subjects for enquiry within its mandate area, as well as responding to the requests of state bodies and citizens. Independence of oversight institutions must be combined with accountability including responsibility (both for good management of resources and for acting within the law), relevance, and impact. A body that is independent, but whose findings are ignored by the bodies it oversees, is not effective. Oversight institutions need to be able to transmit their findings to legislative or judicial bodies to ensure follow-up, whether through enforcement action or through legislative changes.⁶⁴

As an independent oversight institution, the NTC should be empowered to oversee the functioning of tribunals by not only providing administrative support to it but also by framing rules in certain areas (like qualification and appointments of tribunal members), conducting disciplinary proceedings, identifying and addressing systemic issues in the tribunal system through judicial impact assessments, monitoring and evaluating the performance of individual tribunals etc. For a detailed discussion on the functions of NTC, please refer to [part II](#) of Section C, and for details on judicial impact assessment, please refer to [part III](#). Therefore, the NTC will have executive (administrative), legislative (rules and policy making) as well as quasi-judicial (disciplinary) powers to effectively carry out its mandate.

⁶³ Bulmer. ‘Independent Regulatory and Oversight (Fourth-Branch) Institutions’

⁶⁴ Jonathan Murphy and Franklin De Vrieze. 2020. ‘Guide for Parliaments Independent Oversight Institutions’, *Agora Portal for Parliamentary Development*, available online at https://www.agora-parl.org/sites/default/files/agora-documents/WFD_Publication_IOI_Guide-for-Parliaments_web.pdf (accessed on 24 February 2021)

ii Legal Framework for the NTC- some considerations

Establishing an institution based upon a sound legal foundation is the first step in ensuring the independence of an oversight body. Various options exist for the establishment of the NTC – it can be instituted as a constitutional authority, a statutory body or brought into existence through an executive action. In the section below, we list out certain preliminary factors which must be considered, and balanced against each other, before choosing an appropriate legal framework for the NTC.

■ 1. Ease of establishing an oversight body

Each of the options for the legal framework of NTC requires a different legal procedure to be followed. These procedures vary in complexity depending on, inter alia, who is to be consulted, whose approval/ratification needs to be sought, the number of votes required, and the timelines. This in turn affects the feasibility and ease with which the NTC can be established.

Establishing the NTC through an executive order or resolution will be the easiest and quickest option as it can be done solely through the actions of the government in power, and will exclude parliamentary consultations.

If the NTC is to be created under a statute, the requisite legislative process has to be followed. Depending on the characterization of the Bill (as Ordinary Bill or Money Bill), it will be voted upon by the Lok Sabha and Rajya Sabha. It is useful to remember that the Finance Act of 2017 which amended certain provisions governing the appointment, selection and conditions of



service of diverse tribunals was classified as a Money Bill and was challenged before the court in *Rojer Mathew*. The majority decision did not conclusively answer if judicial review was available in respect of the Speaker's decision to characterize a Bill as a Money Bill and referred the question to a larger Bench. In light of the fact that the correct position on this point of law is still undecided, if the statute creating the NTC were to be characterized as a Money Bill, it could be met with constitutional challenges.

The primary advantage of establishing the NTC through a statute is flexibility. Enabling the legislature to regulate independent institutions by ordinary statutes means that their powers, remit, governance structure, etc., can be amended more easily in response to changing needs of the polity over time.

The NTC could also be established as a constitutional body. This would require the legislature to amend the Constitution. A constitutional amendment requires a special majority (not less than two-thirds of the members of that House present and voting) before it is sent to the President for his assent. Further, Articles 323A and 323B which empower the legislature to make laws for the adjudication of disputes by tribunals may also need to be amended to harmonize the powers to be vested on the NTC vis-à-vis the ancillary and incidental matters relating to tribunals on which the legislature can make laws. The lack of political will to bring about systemic reforms in the tribunal system of India is evident from the series of judicial interventions, by no less than six constitution benches. This coupled with the government's admission that there is no consensus between its various departments for the creation of a centralized tribunals division⁶⁵, makes it difficult to envision a smooth passage for a constitutional amendment for the establishment of the NTC.

■ 2. Permanence of the body

The legal framework needs to prevent the NTC from being easily interfered with, or its governance arrangements from being inappropriately amended. The permanence of the oversight institution and the possibility of dissolution needs to be accounted for so the institution can function independently.

A body established through executive action can be easily suspended and/or abolished by the government of the day without parliamentary approval or consultation by simply withdrawing the executive order. An example of this

is the abolition of the Planning Commission. In other instances, executive bodies have lost relevance and become defunct; for example, the National Development Council, though not formally abolished, has had no meetings or work since the inception of NITI Aayog.

Any change in the structure or status of a statutory authority can be made by a simple majority in the legislature enacting that statute. Therefore, a statutorily backed NTC will enjoy a higher degree of permanence than an executive body because abolishing it will require the approval of the legislature that passed the enabling statute. However, this also means that an ordinary legislation (which is less onerous than a constitutional amendment procedure) can be used to erode the powers of and/or abolish the NTC.

A constitutionally backed body would guarantee the highest degree of permanence out of the three options as abolishing or changing the structure of such a body would require the onerous route of a constitutional amendment as described above. It is also useful to remember that even in the case of a constitutional body, the legislature has the option of designing it as a permanent body like the Election Commission or an ad-hoc body like the Finance Commission.

⁶⁵ *Navdeep Singh v. Union of India*, Civil Writ Petition No. 10751 of 2012, November 20, 2012, High Court of Punjab and Haryana at Chandigarh. Also see [Annexure B](#).



Developing an independent oversight body that can secure accountable governance is a considerable challenge. It requires a legal framework that explicitly protects its independence and impartiality.



■ 3. Independence of the body

Developing an independent oversight body that can secure accountable governance is a considerable challenge. It requires a legal framework that explicitly protects its independence and impartiality. The legal framework of the NTC must promote independence and the institutional design should minimise partisan influence. Where the institutional design is not properly conceived, partisan interests can twist the law to serve political or private interests thus defeating the aim of entrenching these independent institutions.⁶⁶

Borrowing from the Supreme Court of Kenya, the five factors that have been recognized as necessary to ensure institutional independence are functional independence, operational independence, financial independence, perception of independence, and collaboration and consultation with other State organs.⁶⁷

a. Functional independence

Functional independence implies that independent institutions should enjoy administrative independence and should not be directed or controlled by any interests or persons external to these bodies

Functional independence will be difficult to achieve in the case of a body created through executive action as such a body will be beholden to the government of the day. As the government itself is one the largest litigators in matters before tribunals, it will be difficult to expect impartially out of NTC constituted through a purely executive action. Further, experience shows that political interference is rampant in case of executive bodies. For example, the Central Bureau of Investigation, an ‘independent’ investigation agency established in 1963 through a resolution passed by the Union Home Ministry, has been criticized for being a “caged parrot speaking in its master's voice”⁶⁸, due to excessive political interference. Another case in point was the Government’s suppression of unemployment data in the Periodic Labour Force Survey report prepared by the National Statistical Commission⁶⁹, a body set up in 2005 through a Government of India resolution.

⁶⁶ Andras Sajó. 2004. ‘Neutral Institutions: Implications for Government Trustworthiness in East European Democracies’, in J. Kornai and S. Rose-Ackerman (eds.), *Building a Trustworthy State in Post-Socialist Transition*, p. 37

⁶⁷ In the Matter of the National Land Commission, Advisory Opinion Reference No. 2 of 2014, Supreme Court of Kenya, 2 December 2015, paragraph 184, available online at <http://kenyalaw.org/caselaw/cases/view/116512> (accessed on 24 February 2021)

⁶⁸ Business Standard. 2013. ‘CBI a caged parrot speaking in its masters' voice, observes SC’, *Business Standard*, 9 May, available online at https://www.business-standard.com/article/current-affairs/cbi-a-caged-parrot-speaking-in-its-masters-voice-observes-sc-113050900032_1.html (accessed on 24 February 2021)

⁶⁹ Asit Ranjan Mishra. 2019. ‘NSC members resign after row over NSSO employment report’, *Mint*, 30 Jan, <https://www.livemint.com/news/india/nsc-members-resign-after-row-over-nssso-employment-report-1548778444218.html> (accessed on 24 February 2021)

While a statutory body in comparison to an executive body offers more autonomy and ensures continuity of policies and operations irrespective of which government is in power, it is not completely immune from government pressure as has been seen in the case of the Central Information Commissioner⁷⁰ and even the Reserve Bank of India.⁷¹ In the case of most statutory authorities, the executive branch, through the responsible minister, will retain some form of direct legal control powers. Reporting obligations will typically be to both the minister and parliament. While a statutory authority has some autonomy, that autonomy is diminished by ministerial arrangements.⁷² Institutions created or regulated by statute continue to be dependent, for their powers and their very existence, on the goodwill of the legislative majority. This may expose them to partisan manipulation and hinder their ability to perform their duties in a robust, neutral and fearlessly independent way. For this reason, reliance upon statutory provision is likely to be adequate, if democratic institutions are well established and where democratic and constitutional values are deeply entrenched at all levels of society.

If the NTC is constituted as a constitutional body and its mandate, powers and functions are derived from the Constitution itself, the chances of government interference are much less. However, it is a reality that the mere entrenchment of new institutions in a constitution cannot guarantee its independence. Respect for and facilitation of the functioning of these independent institutions is crucial if they are to play their constitutionally designated roles. This can be achieved by embedding fundamental accountability institutions and mechanisms in the Constitution. In most contexts, therefore, robust constitutional protection will be needed if independent regulatory and oversight institutions are to function with effectiveness and resilience. This may include provisions regulating how

members will be appointed and removed, the qualifications applicable to each office, rules of conduct, reporting requirements and funding provisions. Detailed constitutional provisions are likely to be particularly worthwhile in situations where: (a) the institution is being set up anew by the constitution; (b) the institutions have in the past been weak, or have lacked administrative, financial and operational independence; or (c) the legislature is relatively weak, is not inclusive and representative of all sections of society, or is likely to be dominated by the executive, since in such circumstances the legislature might not be trusted to legislate for independent institutions in a way that respects their autonomy and neutrality.

The possibility of government interference in the functional domain of the independent authority, in the name of policy directives, needs to be eliminated. Even when issuing 'policy directives', the legal framework should make it mandatory for the Government to consult the independent authority concerned and give it an opportunity to express views, prior to issuing such directives.⁷³

⁷⁰ Money Control. 2020. 'RTI is now a constitutional illusion', *Money Control*, 10 May, available online at <https://www.moneycontrol.com/news/opinion/politics-rti-is-now-a-constitutional-illusion-4259671.html> (accessed on 24 February 2021)

⁷¹ Anuj Srivas. 2018. 'Explained: The Widening Rift Between the RBI and the Modi Government', *The Wire*, 10 December, available online at <https://thewire.in/economy/explained-the-widening-rift-between-the-rbi-and-the-modi-government> (accessed on 24 February 2021)

⁷² Donald Feaver and Benedict Sheehy. 2015. 'The Political Division of Regulatory Labour: A Legal Theory of Agency Selection', *Oxford Journal of Legal Studies*, 35 (1), pp. 153–177, available online at www.jstor.org/stable/24562952 (accessed on 19 February 2021)

⁷³ CUTS C-CIER. 2006. 'Institutional Independence in India', *CUTS International*, available online at http://www.cuts-international.org/pdf/Institutional_Independence_in_India.pdf (accessed on 19 February 2021)

The best example of the entrenchment of accountability is currently provided by the South African Constitution's Chapter 9 institutions which have been established with the avowed purpose of strengthening constitutional democracy in the country. What is unique about the South African approach is that the Constitution itself spells out certain principles that are to ensure that these institutions are effective and not a political charade of symbolic value only. The principles provide that:

1. These institutions are independent and subject only to the constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice;
2. Other organs of state, through legislative and other measures, must assist and protect these institutions, to ensure their independence, impartiality, dignity and effectiveness;
3. No person or organ of state may interfere with the functioning of these institutions; and
4. These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.⁷⁴

b. Operational Independence

Operational independence can be guaranteed by ensuring that the NTC has control over the day-to-day running of its affairs in the execution of its mandate. Independence, in this context, refers not only to the ability

to make decisions free from governmental interference but also to have the organisational infrastructure required to function efficiently and effectively. **This can be safeguarded by ensuring that the procedure of the appointments of members, the composition of the independent bodies, and the procedures of the commission are not politicised.** The appointment procedures must guarantee that patronage is not used to gain influence in these institutions to avoid the risk of state capture of these bodies by political interest groups. To ensure independence, commissioners must be non-political and the recruitment processes must be transparent and be based on merit uninfluenced by political or other irrelevant factors. Moreover, once appointed, the commissioners should enjoy the security of tenure, with clear legal provisions on removal.⁷⁵ With regard to tenure, members of independent regulatory and oversight institutions across many countries typically serve for a fixed term of office that is longer than the legislative or executive term.⁷⁶ Therefore appointments to these institutions are staggered against the electoral cycle, which helps maintain their political independence.⁷⁷

⁷⁴ See clauses (1), (2), (3) and (4) of Section 181 of the South African Constitution

⁷⁵ Walter Khobe Ochieng. 2019. 'The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya', *Kabarak Journal of Law and Ethics*, 4: 135-164, available online at <https://www.kabarak.ac.ke/downloads/journal%20of%20law%20and%20ethics%20vol%204/The%20Independence,%20Accountability%20and%20Effectiveness.pdf> <https://thewire.in/economy/explained-the-widening-rift-between-the-rbi-and-the-modi-government> (accessed on 24 February 2021)

⁷⁶ In Israel, the normal term of Parliament is four years, while that of the state controller (whose office combines the functions of financial auditing and administrative redress) is seven years; The Constitution of Romania (article 140) provides that members of the Court of Auditors are appointed for nine years, while the president serves for five years and parliamentarians for four years; The Republic of Korea's Central Electoral Management Committee is appointed for a term of six years (article 114), while the president is elected for five years.

⁷⁷ Bulmer. 'Independent Regulatory and Oversight (Fourth-Branch) Institutions'

The legal framework should enable the NTC to select and recruit its own staff with the appropriate qualifications in order to function appropriately and with authority. It is an important indicator of independence if the head of the institution or agency has the authority to select and appoint staff, provided they have the appropriate qualifications and professional expertise. Seconding staff from another institution, ministry or public authority can potentially undermine the independence of the oversight institution.⁷⁸

In order to perform their functions effectively, independent regulatory and oversight institutions need adequate powers. While the Constitution should prescribe the powers, functions, responsibilities and duties of these institutions in general terms, there may be scope for specific restrictions or limitations, or additional grants of powers, to be applied by ordinary legislation.

c. Financial independence

It is necessary that the financial autonomy of independent commissions is protected, in order to avoid the budget process being used to prevent them from fulfilling their mandate. They should be resourced with enough funds to discharge their functions. To secure financial independence for independent institutions, the executive branch should not have absolute control over their funding. This also means that funds allocated to these bodies should be expressly allocated by Parliament after the independent institutions have been afforded an opportunity to explain their budgetary requirements before Parliament.

 *There must be a direction to allocate adequate and sufficient funds for each Tribunal to make it self-sufficient and self-sustainable authority for all intents and purposes.* 

The Supreme Court in *Rojer Mathew* has expressly stated,
“There must be a direction to allocate adequate and sufficient funds for each Tribunal to make it self-sufficient and self-sustainable authority for all intents and purposes. The expenditure to be incurred on the functioning of each Tribunal has to be necessarily a charge on the Consolidated Fund of India. Therefore, hitherto, the Ministry of Finance, in consultation with the Nodal Ministry/Department, shall earmark separate and dedicated funds for the Tribunals.”

The judgement clarifies that the expenses incurred by each Tribunal will be a charge on the Consolidated Fund of India. It is, therefore, logical to suggest that the expenses borne by the oversight body for tribunals, that is the NTC, should also be a charge on the Consolidated Fund of India.

In the case of most constitutional functionaries, like the Comptroller and Auditor General, the judges of the Supreme Court and High Courts and the Union Public Service Commission, salaries and other benefits are determined in the Constitution itself and cannot be changed to their detriment once they are appointed. Such expenses are charged on the Consolidated Fund of India and the Parliament does not have the ability to vote on it during the budget.

⁷⁸ De Vrieze. 'Independent Oversight Institutions and Regulatory Agencies, and their Relationship to Parliament: Outline of assessment framework'

In the case of statutory bodies, the details regarding the finance, accounts and audit of the body are provided in the statute itself. In some instances, the statute itself provides that the expenses of the body will be a charge on the Consolidated Fund of India, for example the Central Vigilance Commission.⁷⁹ In the case of some other statutory bodies, for example, the University Grants Commission, it has its own fund and is required to prepare a budget in respect of the subsequent financial year next with the estimated receipts and expenditure, which is forwarded to the Central Government.⁸⁰ In the case of the National and State Human Rights Commission, grants are made by the Central and State government respectively, after due appropriation made by the Parliament/ state legislature by law on this behalf.⁸¹ The Central Government makes grants to the Securities Exchange Board of India after due appropriation made by Parliament by law.⁸²

While the general perception is that constitutional bodies and functionaries enjoy more financial independence than statutory bodies, this is not always true as seen from the discussion above. **Therefore, irrespective of whether the NTC is established through a statute or through a constitutional amendment, the legislature must expressly provide that its expenses be charged on the Consolidated Fund of India.**

d. Perception of Independence

An independent institution will be perceived as independent when it appears independent from the objective standpoint of a reasonable and informed person. This is attainable when constitutional commissions and independent offices appear to be insulated from deliberate and inadvertent attempts to weaken their position or to call their authority into question.

The public undermining of independent institutions through political attacks on their ability to actively and effectively carry out their mandates and through partisan appointments has been a significant challenge to institutional independence. In 1999, the tussle over turf between the Government and the Telecom Regulatory Authority reached such a level that the Government responded to scrapping the entire TRAI Act, 1997. This became necessary since the Act protected the Members of the Authority, as their removal was subject to proven guilt in a judicial probe. The Government got rid of the then Chairperson/members of TRAI by repealing the entire Act. The 'after effect' can be observed in several laws passed subsequently. In the amended TRAI Act, 2000, the Government has kept its overriding power not just to issue 'policy directives' but has gone to the extent of empowering itself with powers of superseding the Authority in certain situations.⁸³

Many times, bodies originally created through executive action are given statutory backing and statutorily created bodies are given constitutional status subsequently after problems and controversies arise or to improve public perception of such institutions. For example, the Unique Identification Authority of India which was established in 2009 through an executive order

⁷⁹ Section 13 of the Central Vigilance Commission Act, 2003 provides that the expenses of the Commission, including any salaries, allowances and pensions payable to or in respect of the Central Vigilance Commissioner, the Vigilance Commissioners, Secretary and the staff of the Commission, shall be charged on the Consolidated Fund of India.

⁸⁰ Section 16 and 17 of the University Grants Commission Act, 1956

⁸¹ Section 32 and 33 of the Protection Of Human Rights Act, 1993

⁸² Section 13 of the Securities and Exchange Board of India Act, 1992

⁸³ CUTS C-CIER. 2006. 'Institutional Independence in India', *CUTS International*, available online at http://www.cuts-international.org/pdf/Institutional_Independence_in_India.pdf (accessed on 19 February 2021)

as an attached office of the Planning Commission was later given statutory backing through the Aadhar Act in 2016 after public comments over making Aadhaar mandatory for availing government schemes.⁸⁴ Similarly, the Central Vigilance Commission that was initially established in 1964 through a Government of India resolution was given statutory backing in 1991 pursuant to the Supreme Court's direction in the Vineet Narain case.⁸⁵ The National Commission for Backward Classes (NCBC), a statutory body set up under the National Commission for Backward Classes Act, 1993 only had recommendatory powers regarding inclusion and exclusion of groups within the list of backward classes. After demand for constitutional status for over two decades, it was granted such status through the Constitution (One Hundred and Second Amendment) Act, 2018 and was empowered to examine and investigate complaints.⁸⁶

While constitutional status to oversight bodies may inspire high levels of public confidence, it does not necessarily guarantee the independence of such a body, as seen in several instances, for example with the Election Commission of India.⁸⁷ Independence is also an internal institutional responsibility. The presence of a strong leader can help in making institutional independence widely felt.

The inclusion of certain independent regulatory and oversight institutions in the constitution may be politically necessary to build confidence, especially among the opposition or minorities, in the integrity of the system as a whole.

■ 4. Eliminating incentives to secure independence

The legal framework should contain rules that preserve the independence of oversight institutions by eliminating incentives that might influence the actions of those heading such institutions. These can take the form of prohibitions against members of these institutions simultaneously, or after their term, holding office in, or being candidates for election to, the executive or legislative branches. For example, the Comptroller and Auditor-General is not eligible for further office either under the Government of India or under the Government of any State after he has ceased to hold his office.⁸⁸

It can also take the form of restrictions on the political activities or private business activities of members of these institutions. For example, the Constitution of India provides that the Chairman or any other member of a Public Service Commission can be removed from office if he engages in any paid employment outside the duties of his office during the term of his office.⁸⁹ Further, such person is or becomes in any way concerned

⁸⁴ Mint. 2014. 'Fresh concerns for UIDAI pending statutory backing', *Mint*, 5 February, available online at <https://www.livemint.com/Politics/JvcVEbm5UPd59uVgmTWQVN/Supreme-Court-begins-final-hearing-on-constitutional-validity.html> (accessed on 24 February 2021)

⁸⁵ *Vineet Narain and Others v. Union of India*, (1998) 1 SCC 226

⁸⁶ Business Standard. 2018. 'Constitutional status to NCBC: A milestone for OBCs' empowerment, says Hukumdev', *Business Standard*, 12 August, available online at https://www.business-standard.com/article/pti-stories/constitutional-status-to-ncbc-a-milestone-for-obcs-empowerment-says-hukumdev-118081200517_1.html (accessed on 24 February 2021)

⁸⁷ *State of Goa v. Fouziya Imtiaz Shaikh*, Civil Appeal Nos. 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, and 892 of 2021 and Writ Petition (Civil) No. 309/ 2021, March 12, 2021, Supreme Court of India;

⁸⁸ Clause (4), Article 148, The Constitution of India

⁸⁹ Clause (3), Article 317, The Constitution of India

or interested in any contract or agreement made by or on behalf of the Government of India or the Government of a State or participates in any way in the profit thereof or in any benefit or emolument arising therefrom otherwise than as a member and in common with the other members of an incorporated company, he shall, for the purposes of clause (1), be deemed to be guilty of misbehavior.⁹⁰

■ 5. Accountability and Collaboration – NTC’s relationship with other state organs and bodies

The fundamental principle that underlies the success of the idea of independent institutions is a co-operative and constructive relationship. This, ultimately, depends upon meaningful communication and trust. Independent institutions should seek a collaborative relationship with other state organs for the purpose of supporting good governance. However, collaboration and consultation do not imply that these independent institutions are under an obligation to cooperate with the government of the day in all circumstances. If this were the case, it would be difficult for these bodies to act without fear, favor or prejudice and to fulfil their functions effectively. Further, while independence is crucial for being able to exercise the functions effectively, at the same time, independent oversight institutions don’t function above the law and need to be accountable as well. Since the NTC will be mandated to carry out vital functions and, like any other state organ will be run by state resources, it must be held accountable. Therefore, it is important to establish arrangements through NTC’s relationship with other institutions and bodies for checking that the NTC performs its allotted tasks satisfactorily.



The interaction of NTC with other state organs and bodies and the kind of relationship that determines their state of co-dependency can be broadly classified into ‘horizontal’ and ‘vertical’ relationships. In a horizontal relationship, the entities involved in this relationship are of similar status, and share equal respect. While, in a vertical relationship, some related entities have more power, authority, and say over other related entities. However, it is important to note that the kind of relationship is not absolute, and often depends on the eyes of the observer, a particular situation, or a specific kind of interaction/transaction. Figure 1 below shows how administrative hierarchies will change, and how judicial hierarchies will remain intact, after the creation of the NTC.

⁹⁰ Clause (4), Article 317, The Constitution of India

Figure 3a : How tribunal administration will be made simpler, more efficient, and more independent with the NTC

Before NTC

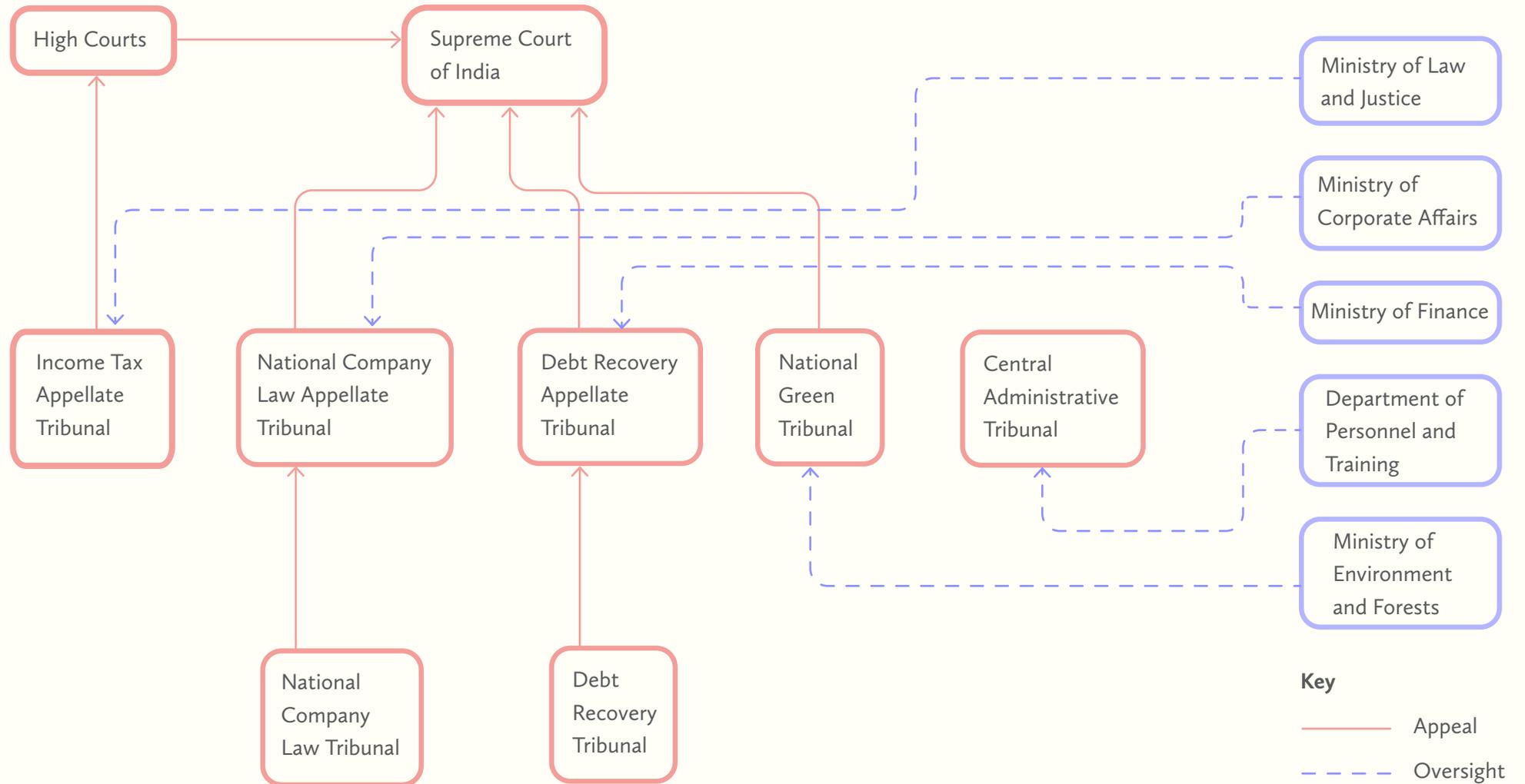


Figure 3b : How tribunal administration will be made simpler, more efficient, and more independent with the NTC

After NTC

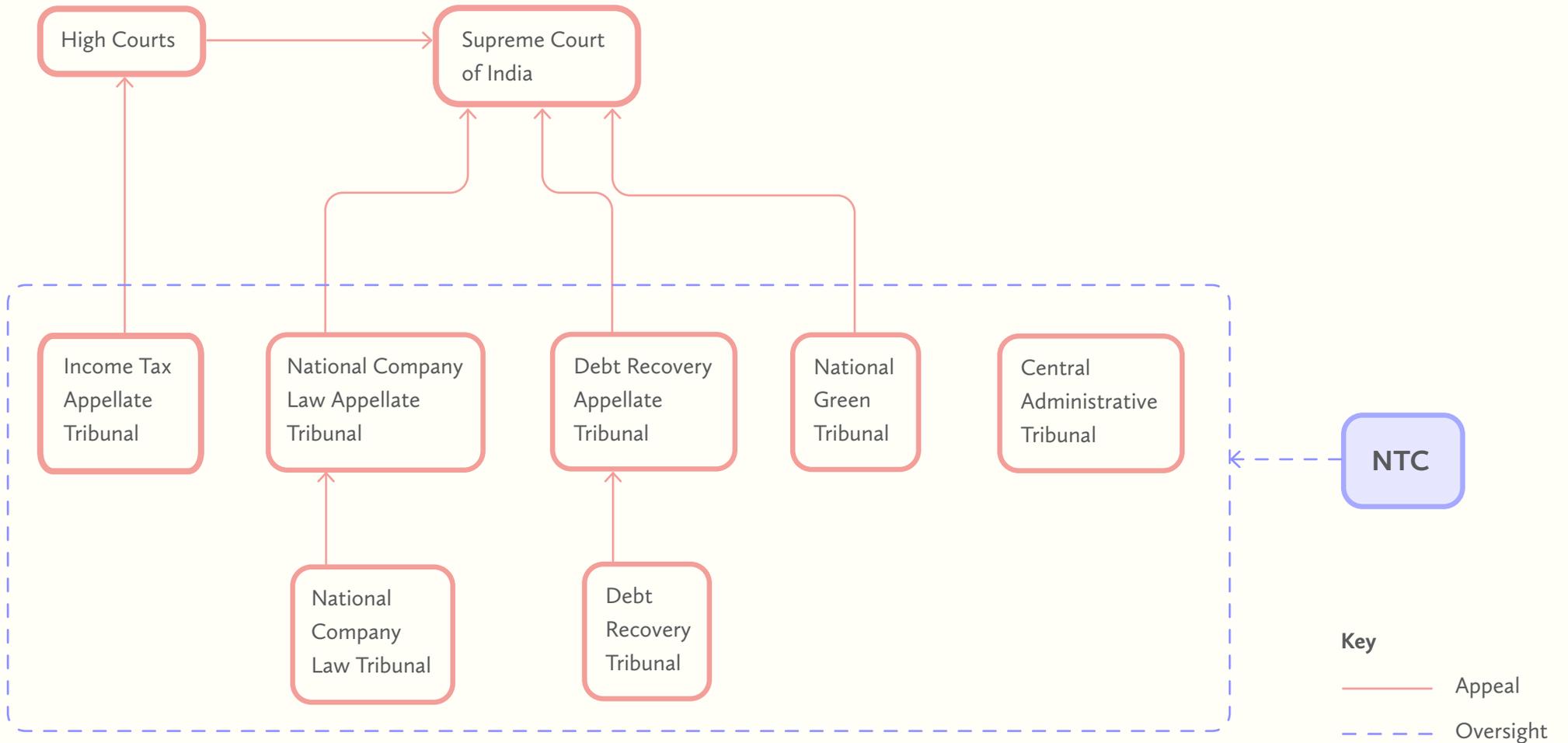
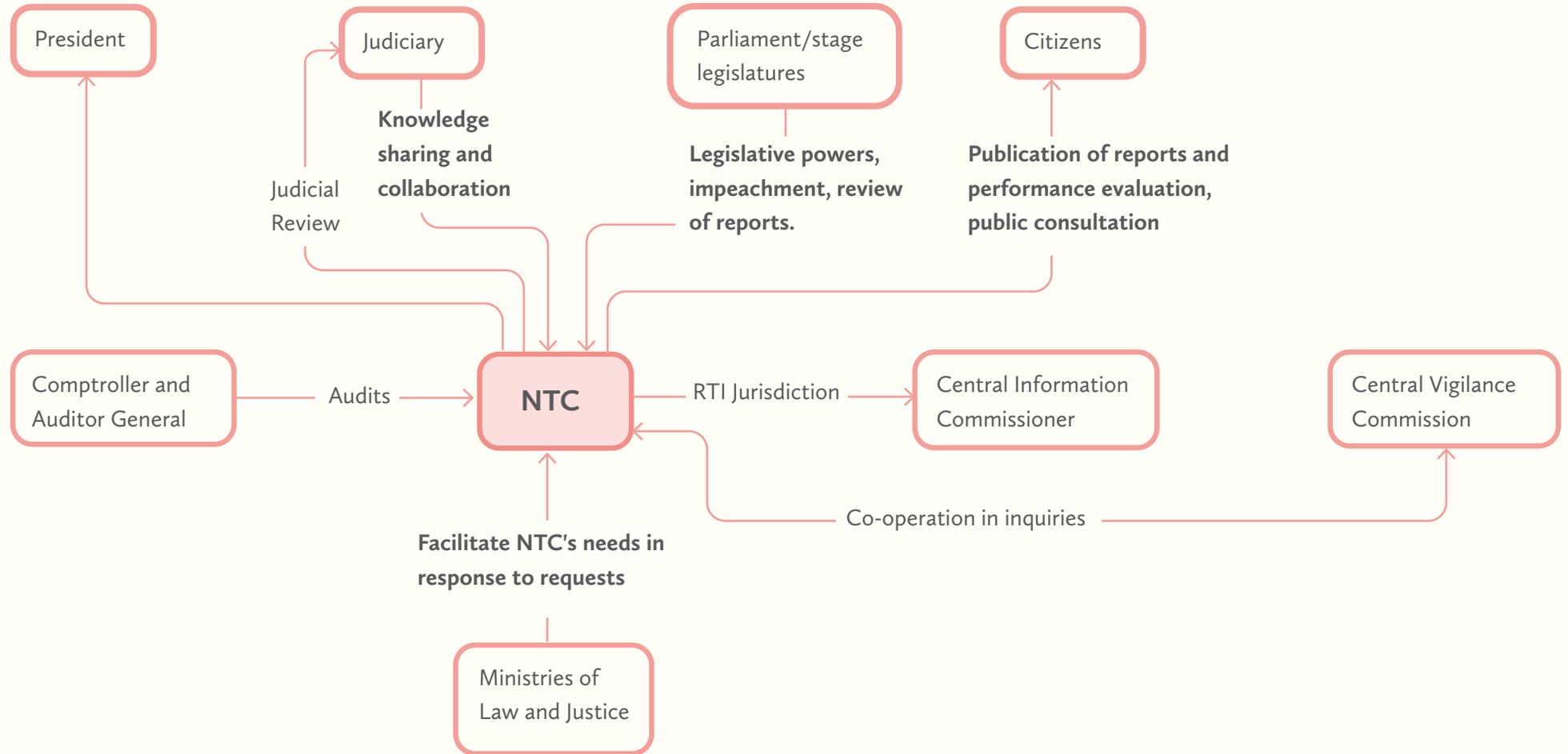


Figure 4 : The NTC's horizontal and vertical relationships



a. Horizontal relationships

i. With the executive branch

The Supreme Court in *Madras Bar Association v. Union of India* has observed, “...The role of both the courts as upholders of judicial independence, and the executive as the policy making and implementing limb of governance, is to be concordant and collaborative...” Therefore, the legal framework for NTC should facilitate such cooperation with adequate safeguards. In order to strike a balance between the independence of the NTC on one hand and the NTC’s accountability to the executive on the other hand, the legislature can impose an obligation on independent institutions to submit a report to the President annually, and to report on a particular issue if requested by the President. Such a report has to be published and publicized. The presentation of the reports enables the executive to hold the independent institutions to work within and account in respect to implementation of policies and strategic vision of the government. **In particular, the legal framework should facilitate consultations between the NTC, the Ministry of Law and Justice, the Ministry of Finance and other ministries (on a needs basis) by way of which the NTC can provide its recommendations and advise the ministries when they formulate policies and regulations that can have an effect on the functioning of the tribunals system.**

ii. With other independent bodies

Another manner in which accountability can be strengthened is by providing limited oversight responsibilities over the NTC by counterpart independent offices. This can be effectuated by the Comptroller and Auditor General, a constitutional functionary carrying out audits of the NTC. The NTC should also be amenable to the Right to Information Act. When called upon, the NTC should cooperate with the Information Commissions and Vigilance Commissions to the fullest extent possible without jeopardizing its own independence.

b. Vertical relationships

i. With the Parliament/State Legislature

In a democracy, all parts of government ought to be accountable to the people. This arises out of the social contract which makes the government an agent of the citizenry in a democracy. One way to ensure accountability is to require the institution to submit annual reports to the legislature (directly, or via the executive) so that any abuse of power, arbitrary behavior or illegal and unconstitutional conduct on the part of an independent institution can be prevented and/or detected. It is also a means of holding the independent institution to account in respect of how money and resources allocated to it has been utilized. The requirements on structure and content of the annual report (which should ideally include information on finances, annual performance, and an annual work plan for the forthcoming year) can also be provided under a law formulated by the Legislature. Another way by which Parliament can keep a check on the NTC is through its role in the process of impeachment of NTC members on specific grounds stated under the law formed by it. **Ultimately, since NTC will be the creation of the legislature, be it through a statute or a constitutional amendment, the Parliament will always have the power to abolish or modify the powers of such a body, albeit through complex and tedious procedures.**

ii. With the Judiciary

The possibility for judicial review of the institution's action guarantees ultimate accountability. Since the courts are the custodians of the Constitution they are mandated to intervene if it is alleged that an independent institution has acted in breach of either the Constitution or the law. **Therefore, the decisions taken by the NTC in exercise of their powers (either administrative, rule-making or quasi-judicial) can be challenged before the High Courts or Supreme Courts under their writ jurisdiction.**

The NTC can also liaise with the judiciary for knowledge-sharing and mutual learning of the best practices in various aspects of managing and administering justice delivery institutions.

iii. With the citizens

There exists also a kind of vertical accountability, which speaks to the interaction between the independent institutions and the people in general. Public consultation and public reporting are key tools employed to improve transparency, efficiency and effectiveness of oversight practices. For example, in Kenya, every commission or independent office specified under the Constitution is required to publish and publicize its reports. In South Africa, independent regulatory and oversight institutions are accountable to the National Assembly and must report on their activities and the performance of their functions to the Assembly at least once a year. Obliging independent institutions to publish regular formal reports and financial statements, to write explanations of proceedings, and to respond to requests for information are the primary means to make governance transparent and accessible. **Therefore, the legal framework establishing the NTC should mandate the publication of annual and quarterly reports by the NTC which shall be made publicly available.**

Performance assessment is a crucial element for the justification of the oversight institution's mission and existence and is yet another instrument of accountability. In addition to legislative oversight implemented through reporting obligations, accountability is strengthened if there is a requirement and practice of an external performance assessment and evaluation procedure. **For a performance review to be meaningful, it is important to have a good understanding of what specific measures are critical to good performance of the institution.** Citizens' perceptions surveys for oversight institutions can provide useful inputs for performance assessments. Desired accountability could be attained through activism on part of the civil society organizations, as well as pressure from an informed public. This would work as an effective deterrent against a possible 'institutional capture', which varies with the degree of institutional independence.

■ 6. Union and state level tribunals

Tribunals in India are created both under the laws of Parliament⁹¹ and under various state laws. Therefore, whether the NTC should have jurisdiction over tribunals created under state laws or separate State Tribunals Commissions need to be set up is another consideration which needs to be deliberated upon.

⁹¹ For a list of Tribunals formed under laws of the Parliament that are currently functional, please refer to Annexure A.

Some arguments in favour of national (union) level institutions include:

- Common minimum standards: Independent regulatory and oversight institutions established at the national level may provide a basis for common minimum standards of integrity and good governance throughout the union. In particular, they might be able to perform their functions with greater objectivity and neutrality, without being embedded in local power struggles and free from the pressure of local political interests.
- Cost and efficiency: A single national-level institution is likely to be more resource-efficient than a number of state-level institutions. A national institution might be better suited at avoiding conflicting mandates, confusion and unnecessary duplication of effort.

Some considerations in favour of state-level institutions include:

- Local knowledge and effective delegation: Some institutions may be able to perform their duties more effectively if established at the state-level, because of local knowledge, the ability to work in local languages or sensitivity to local needs. In terms of administrative efficiency, the scale of the task may be such that state-level delegation is necessary.
- Power-sharing and resource distribution: Independent regulatory and oversight bodies can be part of the overall territorial division of powers and resources, particularly in terms of the distribution of patronage.
- Trust: If the people in one part of the country have felt marginalised and been excluded from power, they might not trust national-level institutions.



The creation of a single umbrella organisation will, in our view, remove many of the ills of the present system. If the need arises, there can be separate umbrella organisations at the Central and the State levels.

- Supreme Court of India in L. Chandra Kumar



While observing that there is no uniformity in the administration of tribunals, the Supreme Court in *L. Chandra Kumar* has stated, “...the situation at present is that different tribunals constituted under different enactments are administered by different administrative departments of the Central and the State Governments. The problem is compounded by the fact that some Tribunals have been created pursuant to Central Legislations and some others have been created by State Legislations.... The creation of a single umbrella organisation will, in our view, remove many of the ills of the present system. If the need arises, there can be separate umbrella organisations at the Central and the State levels.”

In his separate judgement in *Rojer Mathew*, Justice Deepak Gupta observed that the tribunal system at present (without benches in every state and Union territory) has made the justice delivery system “metropolis centric”. Instead of taking justice to the common man, the system is such that it forces the common man to spend more money, spend more time and travel long distances in his quest for justice.

The above observations of the Court lend support to the argument that separate tribunals commissions should be established both at the union level and at the state level. **Therefore, we recommend the creation of the NTC for oversight of tribunals at union level made under the laws of the Parliament and the creation of State Tribunals Commissions in each state for oversight of state level tribunals created under the laws of that state.** To clarify further, if state-level tribunals are established under a law of the Parliament (and not a state law), such as state-level GST Appellate Tribunals, the NTC should have jurisdiction over such state-level tribunals. Moreover, regional benches of tribunals established under laws of the Parliament, such as the regional benches of NCLT, should also fall under the NTC's domain. In certain instances, where Tribunals do not have the critical mass of cases that justify expenditure on setting up of a state-level tribunals commission for each individual state, a Joint Tribunals Commission for several states taken together could be set up. We have seen this in case of other constitutional bodies - such as a single High Court having jurisdiction and supervision over several states and union territories and Joint Public Service Commissions for a group of states⁹², as well as statutory bodies such as Joint Electricity Regulatory Commissions.

 *..we recommend the creation of the NTC for oversight of tribunals at union level made under the laws of the Parliament and the creation of State Tribunals Commissions in each state for oversight of state level tribunals created under the laws of that state.*



7. Organizational set-up

Some independent regulatory and oversight functions are entrusted to a sole individual official. Others are vested in a collegial body such as a board, committee or commission. Some general patterns which can be observed across several jurisdictions are that the office of the ombudsman is generally vested in one person, but most electoral management bodies are collegial. In many civil law countries, the inspection of public finances is generally vested in a collegial court of accounts, while in several common law countries, a sole auditor-general is more common. The reasons for these choices are not always clear. Much depends on 'path dependency'; countries tend to replicate what they know, from either their own experience or that of similarly situated countries. Nevertheless, some considerations which should be borne in mind in deciding whether a particular independent institution should consist of one individual or of several persons collectively are:

- Cost and capacity: Multi-member institutions are inevitably more expensive than a sole official. They also require a larger pool of suitably qualified candidates from which to make appointments.
- Responsibility and accountability: A sole individual can take effective action and be held personally accountable for that action. Responsibility is diffused in a collegial body.

⁹² Clause 2, Article 315, The Constitution of India

⁹³ Some examples are the Joint Electricity Regulatory Commission for the state of Goa and Union Territories, Joint Electricity Regulatory Commission for Manipur and Mizoram established under Electricity Act 2003

- Resistance to corruption: Multi-member commissions may be more resistant to corruption than sole officials. One person might easily be bribed or swayed by personal connections, whereas it might be more difficult to corrupt all members of a multi-member commission.
- Impartiality v. balanced inclusion: An institution headed by a sole official requires the holder of that office to be completely neutral and independent—which is often very difficult to achieve, especially in a deeply divided or politically polarized society. A multi-member commission can be constituted on the basis of balance (i.e. instead of trying to find one perfectly impartial appointee, some appointees may be chosen from all interest groups).
- Diversity: Multi-member commissions can reflect gender balance and ethnic diversity in a way that no single official can. Moreover, a multi-member commission can include people with a range of complementary qualifications, experiences and professional profiles.
- Practical size for decision-making: Three members is a practical minimum for any multi-member body; two are likely to disagree without a mediator. There is no universal maximum size of a multi-member body, but a large group can become unwieldy. Smaller bodies can have less formal, and flatter, more internally deliberative, decision-making processes; larger bodies usually require more formal internal decision-making and stronger internal leadership.
- Workload: The size of the country and the expected workload of the independent institution must also be considered. This may require a larger institution, which can divide its workload.

In *R. Gandhi*, the apex court cited with approval, the Report of the Leggatt Committee in the United Kingdom. The report expressed the view that the independence of tribunals would best be safeguarded by having their administrative support provided by the Lord Chancellor's Department as he is uniquely placed to protect the independence of those who sit in tribunals as well as of the judiciary, through a Tribunals Service and a Tribunals System analogous with, but separate from, the Court Service and the courts. This led to the enactment of the 'Tribunals, Courts & Enforcement Act, 2007' and the establishment of a common Tribunal Service as an executing agency in the Ministry of Law & Justice, which was later merged with the Court Service to form Her Majesty's Courts and Tribunal Service (HMCTS).

In India too, there have been calls in the past for the separation of judicial and administrative functions of adjudicatory bodies.⁹⁴ Pursuant to the Report of the Financial Sector Legislative Reforms Commission, which suggested, among other things, the creation of a combined Financial Sector Appellate Tribunal (FSAT), the Draft Indian Financial Code was made. The Code provides that the administrative functions of the Tribunal may be supported by a separate agency or body corporate approved by the Central Government in consultation with the Presiding Officer pursuant to an agreement.⁹⁵

⁹⁴ In the Parliament, Mr Rangasayee Ramakrishna, in his speech before the Rajya Sabha, proposed the setting up of a public sector organisation to support the administrative functions of the Indian judiciary. See Rajya Sabha Session 235, Official Debates Part 2, Discussion on Working of Ministry of Law and Justice, Apr. 29, 2015. Also see Harish Narasappa. 2017. 'Maximising Judicial Time: Measures to Combat Delay and Pendency in Subordinate Courts', in Harish Narasappa, Shruti Vidyasagar, and Ramya Shridhar Thirumalai (eds.), *Approaches to Justice in India*, EBC Publishing.

⁹⁵ Section 396(3), Indian Financial Code, 2015, available online <https://www.prsindia.org/uploads/media/draft/Draft-%20Indian%20Financial%20Code,%202015.pdf> (accessed on 24 February 2021)

One of the main reasons that has motivated the Supreme Court to direct the creation of NTC is the need for an authority to support uniform administration across all tribunals.⁹⁶ **The NTC could therefore pave the way for the separation of the administrative and the judicial functions carried out by various tribunals and thus increase the efficiency of the tribunals in India.** In this context, a ‘corporatized’ structure of NTC will allow it to scale up its services and provide requisite administrative support to all tribunals across the country. The ‘corporatized’ model of NTC could comprise of the following:

The NTC should be headed by a Board comprising a diverse mix of all the stakeholders headed by the Chairperson. The composition of the board should be such that the independence of the judiciary is preserved.⁹⁷ While technical legal knowledge will be provided by the judicial members on the Board, the independent members should bring in technical knowledge in non-legal disciplines like finance, accounting, and public administration⁹⁸, which would be needed in running the NTC. Important decisions can be made by the Board. Decisions in the form of board resolutions need to be passed by a majority vote.

In *Rojer Mathew*, Justice D.Y. Chandrachud in his separate opinion recommended the following membership for the NTC:

- a. Three serving judges of the Supreme Court of India nominated by the Chief Justice of India;
- b. Two serving Chief Justices or judges of the High Court nominated by the Chief Justice of India;

- c. Two members to be nominated by the Central Government from amongst officers holding at least the rank to a Secretary to the Union Government: one of them shall be the Secretary to the Department of Justice who will be the ex- officio convener; and
- d. Two independent expert members to be nominated by the Union government in consultation with the Chief Justice of India.
- e. The senior-most among the Judges nominated by the Chief Justice of India shall be designated as the Chairperson of the NTC.⁹⁹

A Chief Executive Officer who will manage and execute the functions of the NTC and to operationalize its mandate on a day to day basis. The chief executive officer should preferably be a professional manager and need not necessarily have any qualifications in law but should have skills in delivery of public goods.¹⁰⁰

⁹⁶ L. Chandra Kumar, R. Gandhi, Rojer Mathew

⁹⁷ Vidhi Legal Policy. ‘Reforming the Tribunals Framework in India: An Interim Report’

⁹⁸ Pratik Dutta, Mehtab Hans, Mayank Mishra, Ila Patnaik, Prasanth Regy, Shubho Roy, Sanhita Sapatnekar, Ajay Shah, Ashok Pal Singh, and Somasekhar Sundaresan .2019. ‘How to Modernise the Working of Courts and Tribunals in India’. NIPFP Working paper series, 258

⁹⁹ *Rojer Mathew*, DY Chandrachud, para 105-106

¹⁰⁰ Dutta et. al. ‘How to Modernise the Working of Courts and Tribunals in India’

A Secretariat for its administration and functioning. Like the Secretariat of the Election Commission of India,¹⁰¹ **the NTC Secretariat could also have functional and/or territorial distribution of work by organizing itself into sub-committees, divisions, branches and sections.** The Secretariat of the NTC consisting of officers and staff at various levels should be insulated from the interference of the executive in the matters pertaining to their appointments, promotions, etc. and all such functions should be vested in the NTC Board. In fact, the need for an independent secretariat (in the context of the Election Commission) has been emphasized repeatedly by various committees.¹⁰²

¹⁰¹ The main functional divisions in the Election Commission are Planning, Judicial, Administration, Systematic Voters' Education and Electoral Participation, SVEEP, Information Systems, Media and Secretariat Co-ordination. The territorial work is distributed among separate units responsible for different Zones into which the 35 constituent States and Union Territories of the country are grouped for convenience of management. See Election Commission of India. 2018. 'The Setup', *Election Commission of India*, available online <https://eci.gov.in/about/about-eci/the-setup-r1/> (accessed on 24 February 2021)

¹⁰² Currently the ECI has a separate secretariat of its own, with the service conditions of its officers and staff being regulated by the rules made by the President under Article 309 of the Constitution, similar to other departments and ministries of the Government of India in connection with union matters. However, the need for an independent secretariat has been highlighted several times; see: (a) Committee on Electoral Reforms. 1990. *Report of the Committee on Electoral Reforms*, New Delhi: Legislative Department, Ministry of Law and Justice, Government of India; available online at <https://adrindia.org/sites/default/files/Dinesh%20Goswami%20Report%20on%20Electoral%20Reforms.pdf>; (b) Law Commission of India. 2015. *Report No. 255: Electoral Reforms*; (c) ECI, *Proposed Electoral Reforms*, New Delhi: Government of India, available online at <https://lawcommissionofindia.nic.in/reports/Report255.pdf> (accessed on 24 February 2021) (c) Election Commission of India, *Proposed Electoral Reforms*, D.O. No. 3/ER/2004 (2004); (d) The Core-Committee On Electoral Reforms, Legislative Department, Ministry Of Law And Justice, Government Of India. 2010. 'Background Paper On Electoral Reforms', Ministry Of Law And Justice, Government Of India, available online at <https://lawmin.gov.in/background-paper-electoral-reforms> <https://lawcommissionofindia.nic.in/reports/Report255.pdf> (accessed on 24 February 2021). The Government too has, has signified its in-principle approval of an independent secretariat with the introduction of the Constitution (Seventieth Amendment) Bill, 1990, which was withdrawn only with a view to re-introduce a more comprehensive Bill.

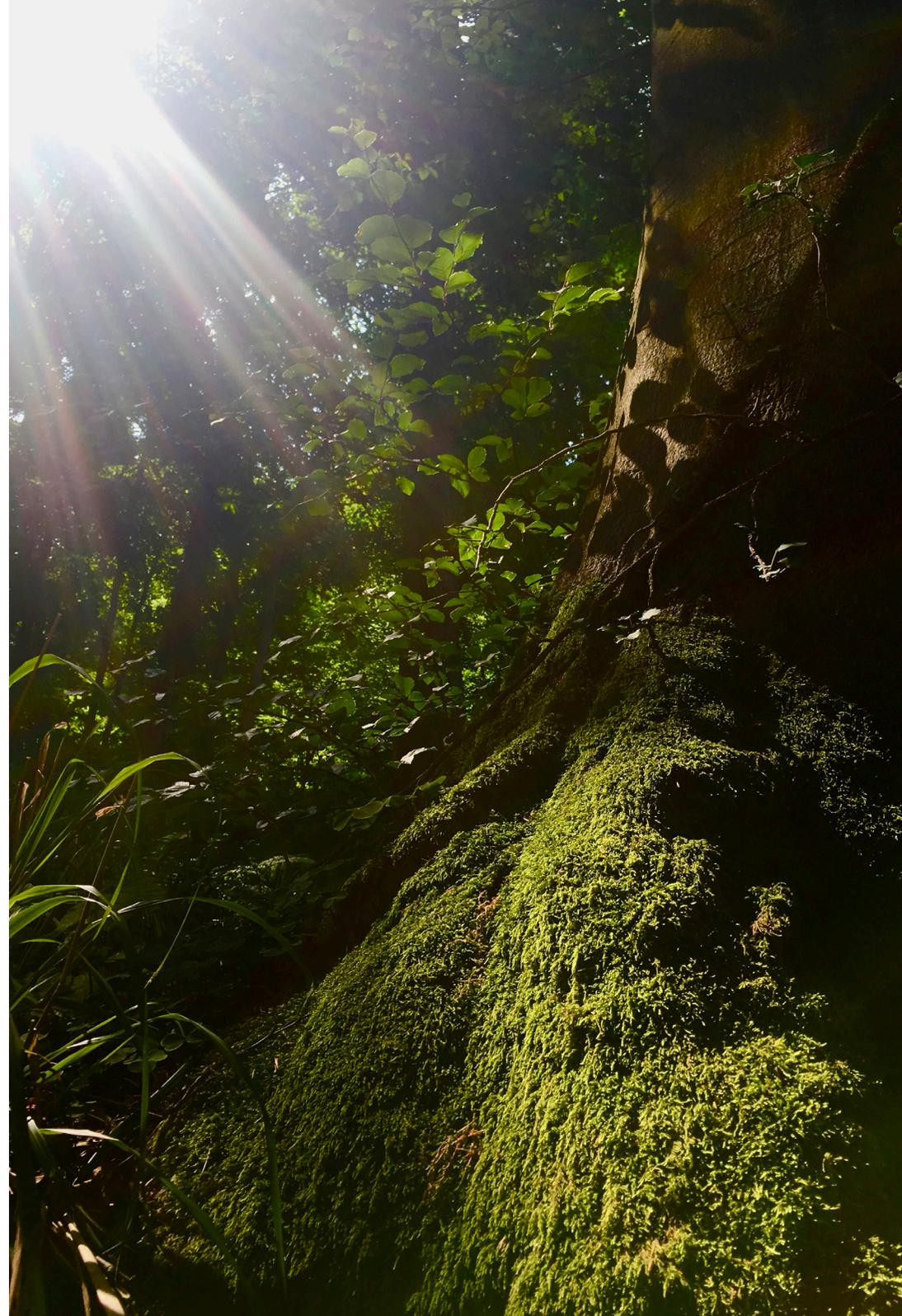
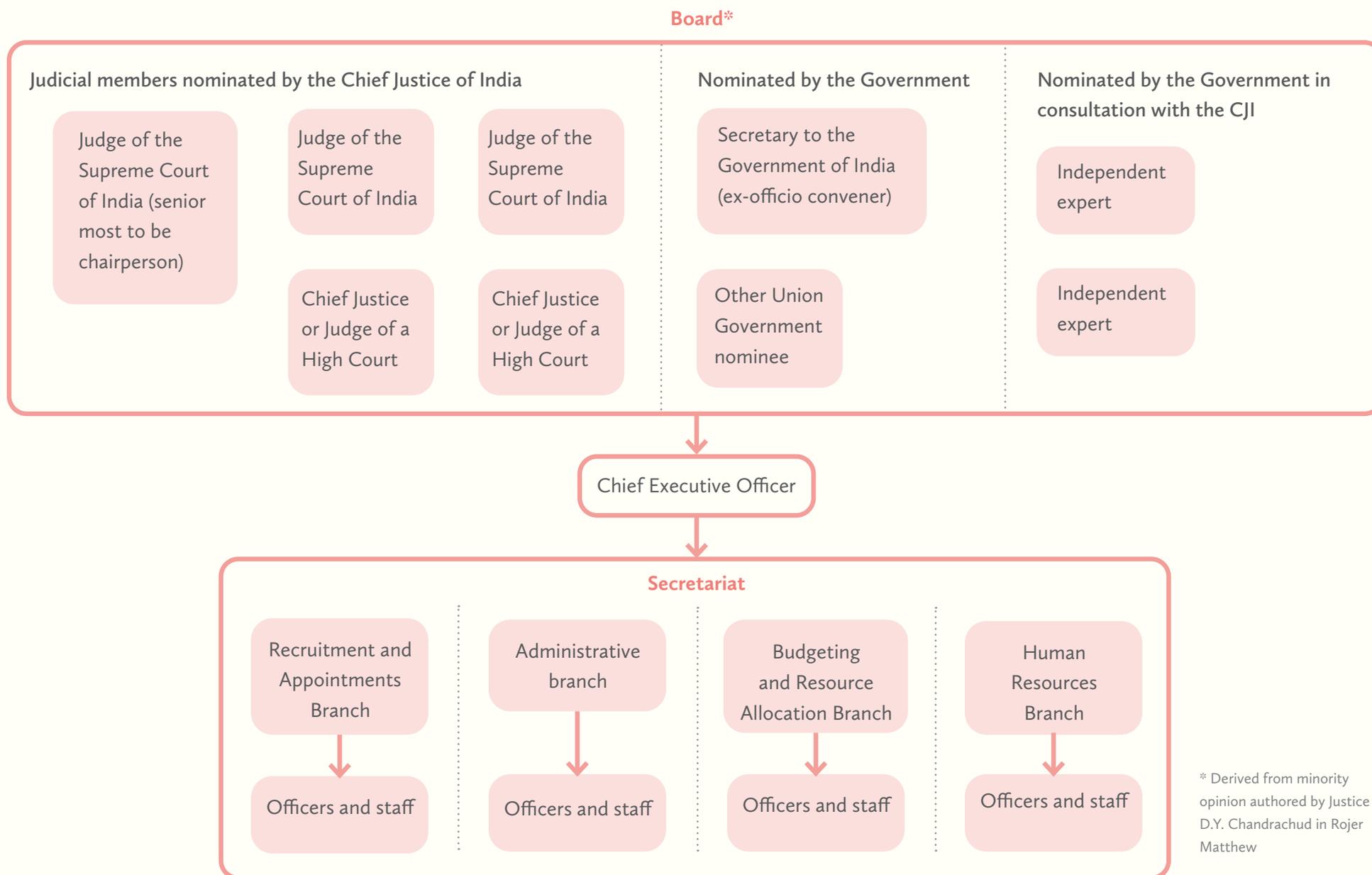


Figure 5 : Proposed Organisational Structure for the NTC



* Derived from minority opinion authored by Justice D.Y. Chandrachud in Rojer Matthew

Functions of the NTC

The purpose of creating an independent agency for the oversight and support of tribunals, as stated in Supreme Court judgments,¹⁰³ is to ensure their independence, and to enable them to function efficiently. This section discusses the functions that must be vested on the NTC, other activities and powers which would be necessary to support these functions, and the different ways that these activities can uphold the principles of independence and efficiency.

■ 1. Appointment of members

a. Recruitment body

One of the key functions of the NTC described in multiple judgments of the Supreme Court has been the appointment of tribunal members. **The rules, procedure, and authority by which tribunal members are appointed have been recognised as the key to maintaining their independence in several judgments from *L. Chandra Kumar to Madras Bar Association (2020)*.**¹⁰⁴

The capacity to fill vacancies in tribunals has been recognised in *Rojer Mathew* and *Madras Bar Association (2020)* and other judgments as an important part of ensuring their efficiency. In 2019, vacancies in the Central Administrative Tribunal (CAT) were reported to be 38%.¹⁰⁵ The National Green Tribunal (NGT) was in an even worse situation, with only three judicial members and two expert members in the Principal Bench in New Delhi, when its sanctioned strength at that time was 20 judicial members and 20 expert members.¹⁰⁶

The Administrative Tribunals Act, 1985 (Administrative Tribunals Act) broadly specifies administrative tribunals' composition and qualifications of their members.¹⁰⁷ It also restricts members from being eligible for appointment to offices under the Central Government or any State Government on ceasing to be a member or chairman.¹⁰⁸ It has been amended to refer to Section 184 of the Finance Act, 2017 (Finance Act) regarding qualifications, appointment process, removal process, and service conditions of Chairmen and Members.¹⁰⁹ These acts together provide for the appointment process in numerous administrative and non-administrative tribunals,¹¹⁰ delegating to the Central Government the power to make rules providing for the qualifications, appointment, removal, and service conditions of chairpersons, presidents, and other members of several tribunals.¹¹¹

¹⁰³ *Madras Bar Association (2020)*, paragraphs 1 and 53; and *L. Chandra Kumar*, paragraph 97

¹⁰⁴ *Madras Bar Association (2020)*, paragraphs 1 and 53; and *L. Chandra Kumar*, paragraph 97

¹⁰⁵ *Rojer Mathew*, D.Y. Chandrachud, paragraph 41

¹⁰⁶ *Rojer Mathew*, D.Y. Chandrachud, paragraph 42

¹⁰⁷ Section 6, Administrative Tribunals Act, 1985

¹⁰⁸ Section 11, Administrative Tribunals Act, 1985

¹⁰⁹ Section 10B, Administrative Tribunals Act, 1985

¹¹⁰ These include the Securities Appellate Tribunal, Industrial Tribunal, Intellectual Property Appellate Board, Railway Claims Tribunal, Appellate Tribunal under Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, Airport Appellate Tribunal, Appellate Tribunal under the Information Technology Act, 2000, The Telecom Disputes Settlement and Appellate Tribunal, National Company Law Appellate Tribunal, Film Certification Appellate Tribunal, Customs Excise and Service Tax Appellate Tribunal, National Consumer Disputes Redressal Commission, Debts Recovery Tribunal and Debt Recovery Appellate Tribunal, Appellate Tribunal for Electricity, Armed Forces Tribunal, National Green Tribunal, and administrative tribunals established under Article 323A of the Constitution and the Administrative Tribunals Act.

¹¹¹ Section 184 of the Finance Act, 2017, and Section 10 of the Administrative Tribunals Act, 1985.

As the discussion of judicial interventions in [part III of Section B](#) shows, the rules framed under these acts, particularly relating to the process of appointment of chairpersons, presidents, and other tribunal members, have been a source of much concern, in relation to the independence of tribunals under these rules.¹¹² The 2020 rules, the provisions of which were at the centre of the *Madras Bar Association (2020)* case, raised issues prompting the Supreme Court to direct certain changes to the rules and recommend the constitution of the NTC to achieve uniformity and consistency in these issues across tribunals.

The 2020 Rules provide for a process of appointment where a Search-cum-Selection Committee is constituted for each tribunal.¹¹³ These typically comprise the Chief Justice of India or a Supreme Court judge as their nominee serving as the chairperson of the committee, two Secretaries to the Government of India (whose departments are specified for each tribunal), the chairman. If the appointment is for a chairperson or president of the tribunal, then the outgoing member occupying that post is a member of the committee, and the sitting occupant of that post is a member, if the committee is appointing any other member.¹¹⁴ The qualifications of members for each tribunal are listed in the schedule attached to the rules.¹¹⁵

In *Madras Bar Association (2020)*, the Supreme Court issued directions regarding the search-cum-selection committees' composition and the process of appointment. One of the issues raised in the case was that the composition of the selection committees set out in the 2020 Rules includes Secretaries to the Government of India belonging to the nodal department for each tribunal. Given that these departments are frequent litigants in these tribunals, the independence of the committees is potentially compromised. The question of independence was also raised regarding the

presence of outgoing chairpersons or presidents of tribunals in a committee when they are seeking reappointment. In addition, in *Rojer Mathew*, the Supreme Court observed that the lack of judicial dominance in the composition of the committees is a threat to their independence. In *Madras Bar Association (2020)*, the Supreme Court noted that the provisions in the 2020 rules with respect to these committees were unchanged from the 2017 rules which struck down in *Rojer Mathew*.¹¹⁶

In *Madras Bar Association (2020)*, the Government suggested modifications to the 2020 Rules to ensure judicial dominance in the search-cum-selection committees, which the Supreme Court accepted. These are the following:

1. The Chief Justice of India or their nominee as the committee chairperson would have a casting vote.¹¹⁷
2. Where the chairperson/president is not a judicial member, a retired judge of the Supreme Court or a High Court nominated by the Chief Justice of India would be on the committee instead.¹¹⁸

¹¹² The rules have been challenged several times in the past prompting the government to make changes to ensure adherence to the guidelines issued by the Courts. However, as seen again in the 2021 rules introduced recently in the Rajya Sabha, the government has sought to override the decisions of the court on certain aspects like fixing the tenure of tribunal members at four years instead of the recommended 5-7 years.

¹¹³ Rule 4, Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2020.

¹¹⁴ Rule 3 and Schedule, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2020.

¹¹⁵ Rule 4 and Schedule, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2020.

¹¹⁶ *Madras Bar Association (2020)*, paragraph 27

¹¹⁷ *Madras Bar Association (2020)*, paragraph 27

¹¹⁸ *Madras Bar Association (2020)*, paragraph 28

3. The Secretary of the sponsoring government department would continue to be a member of the committee, but would do so without a vote.¹¹⁹ Instead, the committee would contain the Secretary to the Department of Justice in the Ministry of Law and Justice and a Secretary to the Government of India from a department other than the sponsoring department, to be nominated by the Cabinet Secretary.

The *Madras Bar Association* (2020) judgment held that the NTC should be created and that overseeing appointments to tribunals should be one of its responsibilities. In *Rojer Mathew*, the Supreme Court specified that the NTC should appoint sub-committees to oversee appointments.



The Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 (2021 Ordinance) was promulgated on 4 April 2021 abolishing certain tribunals and transferring their jurisdiction to the High Courts. The ordinance also amends the composition of Search-cum-Selection Committees.

Therefore, instead of delegating the powers to the executive to frame rules that determine appointments to the tribunals, the legislature should empower the NTC to frame rules and oversee the process of appointment. Following the principles set out in the *Madras Bar Association* judgment, we recommend that the composition of the NTC, or any sub-committee under it that conducts appointments to tribunals, guarantees the independence of tribunals from executive control. **There must be adequate judicial representation, and the conditions of eligibility for membership of the NTC or any sub-committee should uphold these principles.** Following the consolidation of tribunal administration under the NTC, **we recommend that a single sub-committee under the NTC should be responsible for the appointment of judicial members to all tribunals. Sub-committees should be formed to appoint technical members.** The NTC should ensure that tribunal's composition is such that their independence is maintained while also considering the area of specialisation of the tribunal.

¹¹⁹ *Madras Bar Association* (2020), paragraph 29

b. Procedure of recruitment

As per the *Rojer Mathew* majority judgment, the determination of qualifications of tribunal members were held not to be an essential legislative function, and as such, can be delegated.¹²⁰ **As with other aspects of the appointment process and service conditions, we recommend that the NTC be responsible for setting the qualifications necessary for becoming a chairperson, president, or other members of the tribunals administered by it. These qualifications should be uniform for judicial members, across all tribunals. Qualifications for technical members should have comparable standards of experience and education in the relevant area of expertise, to the extent possible.** Where necessary, the NTC should be able to advise the Parliament on amendments to parent statutes to achieve this.

The 2020 Rules provide for the Search-cum-Selection committees to determine the procedure of recruitment and selection of tribunal members, only specifying that it should account for ‘suitability, a record of past performance, integrity, as well as adjudicative experience’, as is relevant for the requirements of the tribunal.¹²¹ As per this rule, a committee is to recommend a panel of two to three persons for each post, from among which the appointment to the tribunal would be made by the Central Government. The Supreme Court directed that this rule should be amended so that the committees recommend only a single name along with a second name in a waiting list, to remove the degree of executive control over the appointment process under the 2020 Rules. The requirement of a second name on the waiting list is to account for possible rejection of candidates upon examination by the Intelligence Bureau.

In order to safeguard tribunals’ independence, multiple models of recruitment have been proposed. The NTC could appoint a sub-committee to set eligibility criteria for the appointment of members and can choose either an ‘open advertisement model’, or a model based on competitive examinations. In the former, applicants would be sought through public advertisements issued by a sub-committee within an NTC.¹²² This would be followed by an interview phase and submitting a shortlist to the NTC, who would make the appointment by majority decision, and the central government would make the final appointment accordingly.¹²³ The latter would involve conducting an open entrance examination through the NTC itself or a public body such as the UPSC.¹²⁴

The Supreme Court held that the Central Government should make appointments based on the recommendations of the committee within three months of their completing the selection process.¹²⁵ This was due to the observation that delays in appointments result in backlog in tribunals, preventing them from fulfilling their purpose as efficient means of resolving disputes.

¹²⁰ However, the minority judgments authored by Justice D.Y. Chandrachud and Justice Deepak Gupta dissent on this specific issue.

¹²¹ Rule 4 (2), Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2020

¹²² *Rojer Mathew*, paragraph 85, and Order dated 07 May 2018, from the same case.

¹²³ Vidhi Legal Policy, ‘Reforming the tribunals framework in India.’

¹²⁴ Vidhi Legal Policy, ‘Reforming the tribunals framework in India.’

¹²⁵ *Madras Bar Association* (2020)

The issue of vacancies is associated with the failure of various tribunals to achieve their objective of delivering efficient justice. In addition to filling vacancies, the calculation of the required strength of judges must be conducted by balancing various factors such as the volume of a tribunal's workload, the composition of this workload with respect to subject matter, and the variation in the amount of time taken to dispose of a matter as per geographical and regional factors. This may be achieved by implementing a "time-weighted caseload method" of strength calculation.¹²⁶ The method involves empirically measuring the average time taken to dispose of each type of matter at a given location, and scaling it by the number of cases of each type to estimate the tribunal's annual workload. Based on the amount of time available to tribunal members in each year, the estimated number of members required can be estimated.

The Supreme Court did not issue any directions regarding how the responsibility for overseeing appointments is to be transferred from Search-cum-Selection Committees to the NTC, and what legal and organisational arrangements are necessary to facilitate this transition. Therefore, further work is necessary for implementation planning, resource allocation, and policy formulation are to achieve efficient and effective consolidation of responsibility in this regard.

■ 2. Disciplinary proceedings and removal of members

As per the 2020 Rules, the Search-cum-Selection Committees are responsible for overseeing disciplinary proceedings, following a preliminary screening of complaints by the Central Government.¹²⁷ Whether the Central government's role in receiving and screening complaints encroaches on tribunals' independence was an issue considered in the *Madras Bar*

Association (2020) case.¹²⁸ The Supreme Court held that the Search-cum-Selection Committee is entitled to either accept or reject the report of scrutiny by the Central Government and conduct an independent inquiry, the result of which is binding.¹²⁹ The Supreme Court then directed the Central Government to amend the 2020 Rules to reflect this.¹³⁰ As per Rule 8 (5), the committee is not bound by the Civil Procedure Code, 1908 in conducting this inquiry, but must abide by the principles of natural justice. It does, however, have the power to regulate its own procedure. The *Madras Bar Association* (2020) judgment held that disciplinary proceedings should be the responsibility of the NTC. **As with appointments, the transfer of this role from Search-cum-Selection Committees and the Central Government to the NTC requires the development of a robust and well-considered legal framework to ensure that the independence of tribunals is maintained. The nature of misconduct for which disciplinary proceedings can be instituted should be the same across all tribunals, and the framing of rules and procedure for the conduct of disciplinary proceedings would be a crucial early objective of the NTC.**

The majority judgment in *Rojer Mathew* observed that the procedure of removal of tribunal members as prescribed by the 2017 Rules weakened the independence of tribunal members. As per these rules, the Central Government was empowered to appoint a committee specifically for the

¹²⁶ *Madras Bar Association* (2020), paragraph 47

¹²⁷ DAKSH. 2020. *Calculating Judges' Strength in India: A Time-Based Weighted Caseload Approach*. Bengaluru: DAKSH

¹²⁸ Rule 8, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2020

¹²⁹ *Madras Bar Association* (2020) paragraph 45

¹³⁰ *Madras Bar Association* (2020)

purpose of removing tribunal members if it was of the opinion that there were reasonable grounds to do so.¹³¹ The Supreme Court held that the rules were not explicit in how these committees would be constituted and what the role and representation of the judiciary would be within them, and therefore the rules were struck down as unconstitutional.¹³² This has since been amended in the 2020 Rules, which state that removal is to be conducted by a Search-cum-Selection committee.¹³³ In *Madras Bar Association* (2020), the Supreme Court accepted this provision contingent on the Search-cum-Selection Committee making the final decision regarding the removal of members.¹³⁴ As noted earlier, in the same judgment, the Supreme Court directed amendments to provisions specifying membership of the Search-cum-Selection committee, which would be necessary for the independence of tribunals in the context of removal of members as well. **These rulings highlight the constitutional importance of a process of removal of members that is independent from executive control – especially considering the frequency with which the executive is a litigant in tribunals.**

The NTC will take on many of the roles of Search-cum-Selection Committees, including the oversight of disciplinary proceedings against tribunal members. As with the other responsibilities, the NTC needs to abide by the principles set forth by the Supreme Court in its decisions on the process of removal of tribunal members. There should be adequate representation of the judiciary in any sub-committee or any other such body under the NTC that is responsible for conducting inquiries. The NTC's decisions on removal of members should be final, appealable only when the Supreme Court and High Courts find it appropriate on grounds of constitutionality or natural justice.

3. Budgeting

The Supreme Court has directed that expenditure of tribunals has to be charged to the Consolidated Fund of India, in order to ensure its independence.¹³⁵ As such, the Board of the NTC would be responsible for approving its expenditure, as is the case for other bodies whose expenditure is charged to the Consolidated Fund of India, such as the CVC.¹³⁶

The NTC should appoint staff with expertise in public budgeting to implement effective, efficient budgeting practices.¹³⁷ The NTC will bear the responsibility for ensuring that the resource needs of each tribunal are met, both for their regular operation and for modernisation and reform initiatives. **Budget preparation should be closely linked with other needs,** such as estimating the required strength of tribunals and filling of vacancies, appointment of staff, and maintenance and improvement of infrastructure. Codifying and implementing regulations governing the expenditure of the NTC would be an important early objective for its establishment.

The Supreme Court has directed the Government of India to conduct a Judicial Impact Assessment (JIA) to estimate the impact of creating tribunals upon the resource and personnel requirements of tribunals, without which

¹³¹ *Madras Bar Association* (2020) paragraph 45

¹³² *Madras Bar Association* (2020), paragraph 53 (1)

¹³³ Rule 7, 2017 Rules

¹³⁴ *Rojer Mathew*, paragraph 169

¹³⁵ Rule 8 (2), 2020 Rules

¹³⁶ *Madras Bar Association* (2020)

¹³⁷ *Rojer Mathew*, paragraph 184

tribunalisation would lead to delays and backlog of cases.¹³⁸ JIAs must be conducted to enable tribunals to fulfil their purpose as efficient means of resolving disputes, and it would be appropriate that they are conducted by the NTC given its independence and its responsibilities.

■ 4. Salary, allowances, and other service conditions

In *R. Gandhi, L. Chandra Kumar, Rojer Mathew, and Madras Bar Association* (2020) the Supreme Court held that executive control of service conditions threatens the independence of tribunals, and that there is a lack of uniformity in service conditions, though the Finance Act and rules made thereunder were intended to mitigate this. Salaries, house rent allowance, and other conditions of tribunal members are presently set by the 2020 Rules as per Section 184 of the Finance Act, framed by the Central Government. In *Madras Bar Association* (2020), the Supreme Court directed the amendment of the 2020 Rules so that the term of Presidents or chairpersons of tribunals would be five years or until they reach 70 years of age, whichever is earlier. This is because the duration specified under the rules, which was four years or until the member reaches 65 years of age, was regarded as insufficient to develop the technical expertise which tribunals require, due to delays in appointments. However, the 2021 Ordinance has set the tenure at four years in clear contravention of the Supreme Court's direction.



The Rojer Mathew judgment held that setting salaries, allowances, conditions pertaining to leave, and other service conditions, can all be delegated by the legislature.

We recommend that the NTC is given this responsibility by statute.



The *Rojer Mathew* judgment held that setting salaries, allowances, conditions pertaining to leave, and other service conditions, can all be delegated by the legislature. We recommend that the NTC is given this responsibility by statute. However, the statute must retain or introduce restrictions on the variation of service conditions to ensure the independence of tribunals. For example, the prevention of service conditions from being varied to the disadvantage of any tribunal member, chairperson, or president after their appointment must be retained,¹³⁹ and the conditions of service should be the same for all tribunal members of equivalent rank across all tribunals. The service conditions set by the NTC should be based on a detailed study of those necessary to attract the best candidates.

¹³⁸ Rules 3(e), 3 (f), and 3 (g) of Central Vigilance Commission (Duties and Powers of Secretary) Regulations, 2021.

¹³⁹ DAKSH and CBGA. 2018. *Memorandum to the Fifteenth Finance Commission*, Available online at <https://dakshindia.org/memorandum-to-the-fifteenth-finance-commission/> (accessed on 19 February 2021)

■ 5. Administrative oversight

A key goal of establishing the NTC is ensuring that tribunals are administratively independent from the executive branch of government, which has been established in *L. Chandra Kumar, Rojer Mathew, and Madras Bar Association* (2020). At present, they are administered by their parent departments, and are dependent on them for financial and infrastructural support. The Supreme Court observed in *L. Chandra Kumar* that consolidation of tribunal administration would considerably improve the performance of tribunals, as the administration of tribunals is not subject solely to the decision-making of the President or Chairperson. Since this office is typically held by a judicial member, they may lack the administrative experience and expertise to run a tribunal efficiently in non-adjudicative areas, and they may be overburdened with adjudicative responsibilities to devote adequate time to this role.¹⁴⁰ Non-judicial responsibilities include case management, overseeing management of records and documents, from receiving applications to storage; maintenance of infrastructure, premises, and other facilities; and overseeing personnel.¹⁴¹ This requires a range of expertise, including human resource management, infrastructure management, information technology and information systems, customer service, and analytical skills.¹⁴² These lie outside the qualifications of Chairpersons and Presidents of tribunals, who are typically judicial members and whose expertise therefore lies largely in adjudication.

The NTC can oversee research to support further reforms in both adjudicative and administrative areas. It can conduct research into reforming the procedure of adjudication that tribunals follow, making them more uniform to the extent that supports their mandate, allowing for variation due to the subject matter at hand. Since the body would have the requisite

expertise and independence to understand the needs of the tribunals system, it should also be consulted before any legislation impacting the tribunals is introduced in the Parliament. There are examples from various countries of separate bodies providing administrative support to the tribunals like the 'Administrative Tribunals Support Service of Canada' (ATSSC) in Canada. Similar services are provided by the executive agency 'Her Majesty's Courts and Tribunals Service (HMCTS) in the UK. HMCTS provides a range of administrative services to both courts and tribunals, and is responsible not only for day-to-day administration such as registry services, but also for overseeing administrative reform and modernisation. These examples are discussed in further detail later in this paper.

a. Performance Standards and evaluation

The NTC would be an ideal body to monitor the performance of tribunals, given that this must be an independent process. **It can develop and utilise performance metrics concerning efficiency and disposal timelines for cases,¹⁴³ as well as for administrative processes. It should also be empowered to take decisions based on these evaluations. Based on these metrics, the NTC should frame and enforce case flow management rules for tribunals to meet their objective of delivering justice more efficiently.**

¹⁴⁰ *Rojer Mathew*, paragraph 189

¹⁴¹ This is presently guaranteed by Section 184 (2) of the Finance Act, 2017.

¹⁴² Harish Narasappa. 2017. 'Maximising Judicial Time: Measures to Combat Delay and Pendency in Subordinate Courts', in Harish Narasappa, Shruti Vidyasagar, and Ramya Shridhar Thirumalai (eds.), *Approaches to Justice in India*, EBC Publishing; Dutta et. Al. 'How to Modernise the Working of Courts and Tribunals in India'.

¹⁴³ Dutta et. al. 'How to Modernise the Working of Courts and Tribunals in India'

b. Human resources and administrative support

The appointment of staff to support the tribunal is largely left up to the Union Government, and they are typically overseen by the Chairperson/ President of the tribunal. As per many parent legislations, the oversight of tribunal administration, including of tribunal staff,¹⁴⁴ is the responsibility of the President or Chairperson.¹⁴⁵ At present, administrative staff are typically brought on deputation, and there is a dearth of sufficient personnel with adequate training and expertise.¹⁴⁶ **The constitution of an NTC empowered to appoint, train, and supervise a cadre of administrative staff to run the tribunals system would relieve Chairpersons and Presidents of their administrative responsibilities, and instead give these responsibilities to officers with administrative expertise, potentially yielding great benefits.** The NTC would need to devise a procedure to forecast staffing requirements necessary to support tribunal members after having estimated the number of required members as per the weighted caseload method described above.

At present, administrative oversight of tribunals suffers from two key problems: lack of independence from the Central Government, and concentration of responsibility on the senior most members. In the minority judgment of the *Roger Mathew* case, Justice D.Y. Chandrachud recommended the creation of an All India Tribunals Service, along the lines of the UK model of tribunal administration. **The appointment of a secretariat under the independent oversight of the NTC would remedy these issues by providing tribunals with requisite administrative and managerial expertise, relieving tribunal chairpersons and presidents of these responsibilities, and keeping them free from the control of the executive.** The NTC could take advantage of its independence to undertake numerous reforms which could considerably boost the performance of tribunals. The NTC can both

conduct administrative reforms, as well as assist the tribunals themselves in conducting reforms to the adjudicative process.

c. Physical Infrastructure

The lack of physical infrastructure and the concentration of tribunal benches in specific locations has, in fact, reduced access to justice as compared to when such jurisdiction belonged to High Courts; whereas litigants previously had access to High Courts in each State, the number of benches in national tribunals is typically fewer, costing litigants time and resources.¹⁴⁷ The NTC should undertake a study of litigants' needs and create benches of tribunals accordingly. Consolidation of tribunal administration under the NTC would make this more economically feasible. **Rationalisation, consolidation, and effective management of physical infrastructure, ranging from tribunal premises to information technology (IT) infrastructure, would enable more efficient use of resources by tribunals.** Doing so through a nodal authority such as the NTC, rather than through sponsoring departments, would both simplify this effort and ensure the independence of the NTC from the executive.

¹⁴⁴ Narasappa.. 'Maximising Judicial Time: Measures to Combat Delay and Pendency in Subordinate Courts'

¹⁴⁵ For example, see: Surbhi Bhatia, Manish Singh, and Bhargavi Zaveri. 2019. 'Time to resolve insolvencies in India', *The LEAP Blog*, available online at <https://blog.theleapjournal.org/2019/03/time-to-resolve-insolvencies-in-india.html> (accessed on 20 February 2021)

¹⁴⁶ Section 13 (2), Administrative Tribunals Act; Section 27 (2), Foreign Exchange Management Act, 1999; Section 90, (2) and (3), Trade Marks Act, 1999; Section 12, Railway Claims Tribunal Act, 1987; Section 14, TRAI Act, 1997; Section 418, Companies Act, 2013; Section 5D (7), Cinematograph Act, 1952

¹⁴⁷ Prashant Reddy, 2019, The Courts And The Constitution, conference

d. Process Re-engineering

Rationalisation of administrative procedures and harmonising them across tribunals can greatly increase efficiency. This may be achieved through process re-engineering, an exercise by which unnecessary steps are identified and eliminated, making use of digital technology.¹⁴⁸ At present, there is a reliance on physical documents, records, and files in the administration of tribunals. While some tribunals such as the NCLT have transitioned to electronic processes, such as for filing and case number generation,¹⁴⁹ these procedures may follow a similar process to that in their traditional, physical equivalents. Process re-engineering involves re-designing or eliminating parts of these processes rather than overlaying digital technology on existing ones.¹⁵⁰ Rather than the disparate and ad-hoc approach to digitisation that would occur if tribunals continue to be administered separately, the NTC can help all tribunals to participate in and benefit from this exercise.

e. Technological Infrastructure

Digitisation in courts has been ongoing under the E-Courts Mission Mode project. Just as this has had the potential to deliver great benefits to litigants in courts, similar arguments may be made for modernisation of tribunals under the NTC. The digitisation of records has led to the creation of a large volume of data on cases, which can be used to analyse tribunal performance and help plan reform. This data can be used to support tribunal members to perform regular tasks more efficiently. Case management systems that are integrated with other online services can help manage cases more efficiently, and would enable easier access to documents for litigants and others.¹⁵¹ The expansion of remote hearings through video conferencing and audio would help make tribunals more accessible and affordable to litigants.



Data on cases and their durations can support a more efficient listing of hearings through the use of scheduling algorithms akin to those used in logistics.



Data on cases and their durations can support a more efficient listing of hearings through the use of scheduling algorithms akin to those used in logistics. It can also be used to support processes such as calculation of required strength of tribunal benches, allocation of resources, as well as procedural reform through comparative studies.¹⁵² Digitisation enables the development of tools to conduct legal and technical research which can support both tribunal members and lawyers. Integrating payments systems with online tribunal services enable both online payment of fees and fines, but also the tracking of compliance with orders through this facility. The linking of tribunal records with records of courts and government departments such as Registrar of Companies or land records can also help track execution of and compliance with orders.

¹⁴⁸ DAKSH. 2019. Whitepaper series on Next Generation Justice Platform, Paper 2: Transition and Implementation. Bengaluru: DAKSH.

¹⁴⁹ National Company Law Tribunal. 2020. Order dated 24 December 2020. *Insolvency and Bankruptcy Board of India*, available online at <https://www.ibbi.gov.in/uploads/legalframework/coegda77beb8bcef58bfe30414582903.pdf> (accessed on 18 February 2021)

¹⁵⁰ Michael Hammer and James Champy. 2009. *Reengineering the Corporation: Manifesto for Business Revolution*. New York: HarperCollins.

¹⁵¹ Financial Sector Legislative Reforms Commission, Ministry of Finance, Government of India. 2013. *Report of the Financial Sector Legislative Reforms Commission, Volume I: Analysis and Recommendations*

¹⁵² National Company Law Tribunal. Order dated 24 December 2020.

Therefore, the NTC should initiate the development of consolidated digital services and databases across tribunals, and should be empowered to contract with vendors to develop these systems. One approach to making digitisation effective would be to create a 'digital platform'. At the core of this idea is storing all data held by an institution in an authoritative database, making it available, and enabling others to build software that uses it (called 'modules'). These modules would communicate with this database for a specific purpose, such as e-filing.¹⁵³ A digital platform is essentially an information system based on the creation of a basic set of natively digital support services that all agencies need (in this case, tribunals). These include payment, document submission and management, and identity verification, among others.¹⁵⁴ This is known as digital infrastructure. Other systems are able to communicate with the infrastructure using Application Programming Interfaces (APIs), which are a set of protocols for different computer systems to share information with one another. A module can be made for every task for which a tribunal must perform. As they require, tribunals may use a set of default modules developed under the NTC for each task, whether for tribunal members to draft orders or to schedule hearings. In addition, the NTC and an appointed software vendor or the NIC can develop or modify modules for individual tribunals as required, with no disruption to the other tribunals. In addition to this, creating such a system enables tribunals' data to be made open to the public, subject to privacy restrictions, fostering much greater transparency.¹⁵⁵

Access to tribunals can benefit from opening APIs to the public, as citizens would then be able to develop their own modules that enable them to fill gaps that are beyond the scope of the NTC's capabilities. For example, using an API for e-filing, they could create an app to remotely file cases which provides guidance to litigants in local or non-official languages, and explains the trial procedure to them in accessible terms.¹⁵⁶ Such an extensive digitisation programme requires that the legal framework for the NTC not only enables it to provide tribunals with IT infrastructure, but also to contract or otherwise collaborate with other organisations from both the public and private sector. The legal framework must also provide for a means to protect both the privacy and transparency of data held by tribunals.¹⁵⁷

The following table delineates the functions of the NTC vis-à-vis functions of the legislature and of each individual tribunal.

¹⁵³ DAKSH. 2019. Whitepaper series on Next Generation Justice Platform, Paper 1: The Vision. Bengaluru: DAKSH.

¹⁵⁴ DAKSH. 2019. Whitepaper series on Next Generation Justice Platform, Paper 1: The Vision. Bengaluru: DAKSH.

¹⁵⁵ DAKSH. 2019. Whitepaper series on Next Generation Justice Platform, Paper 1: The Vision. Bengaluru: DAKSH.

¹⁵⁶ DAKSH. 2019. Whitepaper series on Next Generation Justice Platform, Paper 1: The Vision. Bengaluru: DAKSH.

¹⁵⁷ DAKSH. 2019. Whitepaper series on Next Generation Justice Platform, Paper 3: Legal Framework. Bengaluru: DAKSH.

Table 1 : A comparison of the NTC’s functions with those that will be retained by tribunals themselves and the Union or state legislature, as the case may be, which establishes tribunals by law

	National Tribunals Commission/ State Tribunals Commission	Tribunals themselves	Parliament/ State Legislature (through parent statute of each tribunal or through constitutional amendment)
Authority to recruit and appoint tribunal members	Yes	No	No
Authority to appoint staff	Yes	No	No
Full control of adjudicatory decision-making	No	Yes	No
Demarcation of jurisdiction of tribunals	No	No	Yes
Determining the process of appeal of tribunal decisions, including specifying whether there is an appellate authority or if decisions are appealed to a High Court directly	No	No	Yes
Scheduling of hearings	No	Yes	No
Power to make rules, regarding disciplinary proceedings, service conditions, procedure,(should it be subject to parliamentary approval)	Yes	No	NA
Specification of procedure to be followed in proceedings	No	Yes	Yes
Authority to conduct disciplinary proceedings	Yes	No	No
Authority to prepare and approve budgets for the operation of the NTC and individual tribunals	Yes	No	No
Authority to determine salaries, allowances, and other service conditions	Yes	No	No
Responsibility for administrative oversight and technology infrastructure	Yes	No	NA

iv Need for Judicial Impact Assessment – Preventing ‘over’ tribunalisation

The Supreme Court in *Rojer Mathew* directed the Union Government to undertake a Judicial impact assessment (JIA), “to rationalise and amalgamate the existing Tribunals depending upon their case-load and commonality of subject-matter after conducting a Judicial Impact Assessment, in line with the recommendation of the Law Commission of India in its 272nd Report.” Despite the Supreme Court’s clear direction, several tribunals were abolished vide the Tribunals Reforms (Rationalisation And Conditions Of Service) Ordinance, 2021 without undertaking any judicial impact assessment.

Judicial impact assessment (JIA) means estimating impact on the courts/tribunals due to changes in legislation or from a judicial interpretation.

Additional manpower required, impact on workload and productivity, increase in budgetary resources are some of the typical areas that JIAs have been designed to address in many countries. It is possible to use these approaches to go beyond supply side factors and include output and outcomes for litigants and citizens.

The need for a robust and well-functioning NTC has been made clear in the preceding parts of the paper. One has to be mindful of the systemic impact of tribunals that are significantly more efficacious and efficient than courts. When carried to an extreme, such an imbalance may lead to further tribunalisation of the justice system, and erosion of trust in the functioning of the courts. It should also be kept in mind that not all disputes are amenable to resolution by tribunals.



Recommendations of the New Zealand Law Commission's 85th Report 'Delivering Justice For All: A Vision for New Zealand Courts and Tribunals' are relevant in this context:

"There is a growing tendency for groups or sectors of the community to agitate for a new tribunal to be created whenever a problem emerges, often because it is perceived that the existing court system does not respond in a suitable, proportionate or cost-effective way to the demands which need to be dealt with."

One of the main reasons for the current diversity of tribunals is that they have generally been established indiscriminately, sometimes in response to a particular issue or pressure point, without an eye to coherence or a principled structure. As the history of our tribunals demonstrates, there is a risk of fragmentation and inconsistency in this approach.

In our view, whenever there is a call for a new tribunal, a principled analysis should be undertaken, rather than an approach based on an expedient reaction to the immediate issue. The following questions could usefully be asked by policy makers at the outset:

- Can this matter be dealt with through the ordinary mechanisms of the general courts? Are there compelling reasons related to subject matter or process which require a tribunal?
- If it is thought that a tribunal is required, can an existing tribunal deal with this matter, rather than creating a new one? We suggest that in the future, this is a decision in which the President of the unified tribunal framework should play an important advisory role."

A scientific evaluation of proposals for either creation of more tribunals, or expanding the jurisdiction of existing tribunals, would be required so as to balance a tendency towards over-tribunalisation. For this purpose, the NTC should be mandated and empowered to:

- 1. Carry out JIA for proposed legislations and judicial interpretation that would impact tribunals under its administration.**
- 2. Specify the process to be followed in carrying out the JIA.**
- 3. Put out in the public domain the results of the JIA immediately after the finalisation of the report.**

A broad framework for JIA has been provided in a 2008 report by India Development Foundation, "Judicial Impact Assessment: An Approach Paper". The methodology needs to be updated for new sources of data, and other analytical advancements in the field.

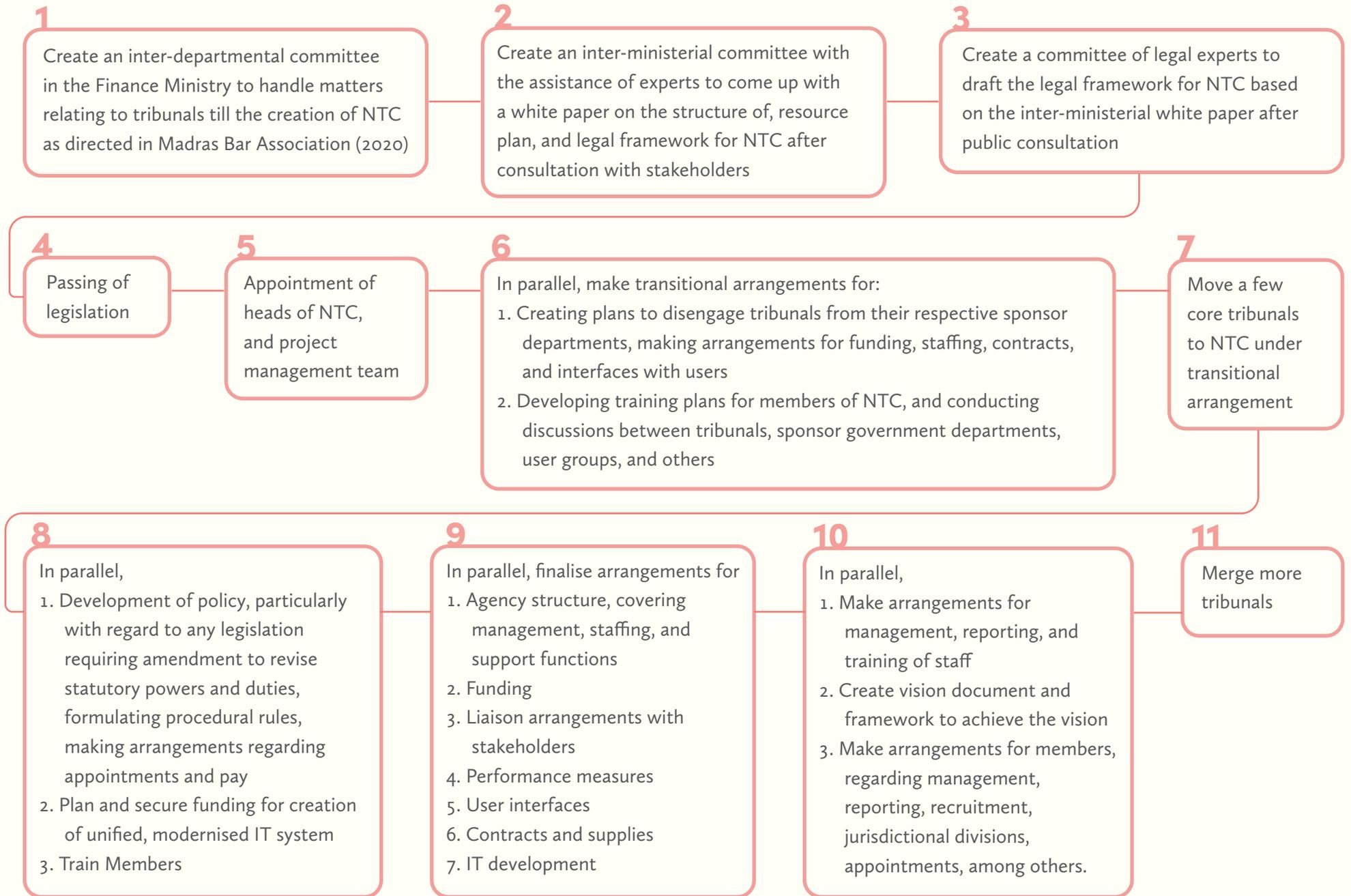
PATHWAY TO CHANGE

The Leggatt Report that provided an implementation sequence for creation of a user focused Tribunals service in the UK is largely relevant to the Indian context. Some steps unique to the current situation are required to make the process effective.

We recommend the following sequential plan to make the transition smoothly and effectively:



Figure 6 : A roadmap to creating and appointing the NTC



INTERNATIONAL EXPERIENCE

Tribunals as quasi-judicial authorities exist in numerous jurisdictions, and some form of quasi-judicial review of administrative decision making exists in many common law countries. For the purpose of this paper, however, we will only examine the UK and Canada, as tribunals in both countries were previously organised similar to those in India, with parent ministries or departments being responsible for the oversight of each. Both countries then implemented reforms to make tribunals more independent and efficient, involving administrative restructuring that has much in common with what is envisioned for the NTC. A discussion of the tribunals' systems, administrative structure, financial arrangements, appointment processes, and the functions performed by any nodal agencies is given below.



i Canada

■ 1. Tribunal system structure

In Canada, there are multiple quasi-judicial boards and tribunals, each established to adjudicate disputes over a specific area of law at the federal level, and may be responsible only for enforcing specific acts of legislation. Most are established by an act of the Canadian Parliament.^{158 159} While tribunals themselves operate as independent bodies, they are provided with administrative support from a dedicated agency, as discussed below.

■ 2. Administration

Tribunals in Canada receive administrative support from a body called the 'Administrative Tribunals Support Service of Canada' (ATSSC). **It performs registry services including functions such as receiving and managing filings, collecting fees and other payments; case flow management including management of workloads, legal and research services; information management services; Information Technology (IT) services to support other functions; training; management of property and infrastructure; human resource management, financial management, and other management services.**¹⁶⁰

The ATSSC is a statutory authority, and it is overseen by the Minister of Justice and the Attorney General of Canada.¹⁶¹ It is run by a Chief Administrator, appointed by the Governor in Council for a five-year period, and employees are appointed at the request of the Chief Administrator by the Canadian Public Service Commission.¹⁶² The Chief administrator is

supported by a deputy.¹⁶³ The ATSSC has a separate secretariat for each tribunal, each of which is responsible to an executive director.¹⁶⁴ Funds for the ATSSC are appropriated by the Canadian Parliament as part of its annual budget, from the Consolidated Revenue Fund of Canada.¹⁶⁵

¹⁵⁸ See section 9, of the Canada Labour Code, (R.S.C., 1985, c. L-2) for the Canada Industrial Relations Board, Section 18 (1) of the Cultural Property Export and Import Act (R.S.C., 1985, c. C-51) for the Canadian Cultural Property Export Review Board, Section 48.1 (1) of the Canadian Human Rights Act (R.S.C., 1985, c. H-6) for the Canadian Human Rights Tribunal; Section 3 (1) of the Competition Tribunal Act (R.S.C., 1985, c. 19 (2nd Supp.)) for the Competition Tribunal, Section 20.7 (1) of the Public Servants Disclosure Protection Act (S.C. 2005, c. 46) for the Public Servants Disclosure Protection Tribunal

¹⁵⁹ See Environmental Protection Tribunal of Canada. 2020. 'About the Tribunal', 03 April, available at <https://www.eptc-tpec.gc.ca/en/about/about-eptc.html>; Sections 243-245 of the Canadian Environmental Protection Act, 1999 (S.C. 1999, c. 33)

¹⁶⁰ Administrative Tribunals Support Service of Canada. 2020. Departmental Results report 2019-20, available at <https://www.canada.ca/content/dam/atssc-scddata/documents/2019-20-drr-main-report-en.pdf>

Administrative Tribunals Support Service of Canada. 2019. Departmental Results report 2018-19, available at <https://www.canada.ca/content/dam/atssc-scddata/documents/drr-201819-en.pdf> (accessed on 5 February 2021)

¹⁶¹ Section 3, Administrative Tribunals Support Service of Canada Act (S.C. 2014, c. 20, s. 376), also see <https://www.canada.ca/en/administrative-tribunals-support-service.html> (accessed on 5 February 2021)

¹⁶² Section 15, Administrative Tribunals Support Service of Canada Act (S.C. 2014, c. 20, s. 376) and Section 24(1), Public Service Employment Act (S.C. 2003, c. 22, ss. 12, 13)

¹⁶³ Government of Canada. 2020. 'ATSSC Organizational Structure', Government of Canada, 21 May, available online at <https://www.canada.ca/en/administrative-tribunals-support-service/structure.html> (accessed on 5 February 2021)

¹⁶⁴ Government of Canada. 'ATSSC Organizational Structure'

¹⁶⁵ Section 18, Administrative Tribunals Support Service of Canada Act (S.C. 2014, c. 20, s. 376)

3. Appointments

Tribunals are constituted and overseen by the minister holding the relevant portfolio,¹⁶⁶ or the Governor in Council.¹⁶⁷ This refers to the Governor General,¹⁶⁸ who is the acting by and with the advice and consent of the ‘Queen’s Privy Council for Canada’, which is ‘the group of cabinet ministers, former cabinet ministers and other prominent Canadians appointed to advise the Queen on issues of importance to the country.’¹⁶⁹ The Governor in Council is also typically responsible for appointing members as chairpersons or to other senior posts. In some tribunals, the Governor in Council must consult the relevant minister.¹⁷⁰ For the Environmental Protection Tribunal, however, officers are appointed by the Minister of the Environment themselves.¹⁷¹ Overall, it is evident that tribunals’ appointments are not independent from the executive branch in general, and the ministries that are responsible for them in particular.

Canadian federal tribunals do not necessarily require that members are sitting judges or have judicial experience, though some do. Tribunals which do not require members to have been judges include the Environmental Protection Tribunal, Industrial Relations Board, Canadian Cultural Property Export Review Board.¹⁷² The Competition Tribunal has six judicial members, though non-judicial members outnumber them,¹⁷³ and the Specific Claims Tribunal is composed entirely of judges.¹⁷⁴



Tribunals in Canada receive administrative support from a body called the ‘Administrative Tribunals Support Service of Canada’ (ATSSC). It performs registry services and administrative support for all tribunals, including case management, IT, and managing its resources and infrastructure.



¹⁶⁶ See Section 243 of the Canadian Environmental Protection Act, 1999 (S.C. 1999, c. 33)

¹⁶⁷ Section 6 (3) Specific Claims Tribunal Act (S.C. 2008, c. 22)

¹⁶⁸ An officer appointed to act on behalf of the monarch, see Section 35 (1), Interpretation Act (R.S.C., 1985, c. I-21) (Canada)

¹⁶⁹ ‘ See Constitution Act, 1867, Interpretation Act (R.S.C., 1985, c. I-21) and Government of Canada. 2020. Queen’s Privy Council for Canada, *Government of Canada*, 14 December, available online at <https://www.canada.ca/en/privy-council/services/queens.html> (accessed on 5 February 2021)

¹⁷⁰ See section 10 (2), of the Canada Labour Code, (R.S.C., 1985, c. L-2) for the Canada Industrial Relations Board, Section 18 (1) of the Cultural Property Export and Import Act (R.S.C., 1985, c. C-51) for the Canadian Cultural Property Export Review Board, Section 3(2) of the Competition Tribunal Act (R.S.C., 1985, c. 19 (2nd Supp.)) for the Competition Tribunal, and Section 8 (1) of the Federal Public Sector Labour Relations and Employment Board Act (S.C. 2013, c. 40, s. 365) for the Federal Public Sector Labour Relations and Employment Board

¹⁷¹ Section 243, Canadian Environmental Protection Act, 1999 (S.C. 1999, c. 33)

¹⁷² See section 247 of the Canadian Environmental Protection Act, 1999 (S.C. 1999, c. 33), section 10 (5) of the Canada Labour Code (R.S.C., 1985, c. L-2), section 18 (2) of the Cultural Property Export and Import Act (R.S.C., 1985, c. C-51), and .

¹⁷³ Section 3 (2) of the Competition Tribunal Act (R.S.C., 1985, c. 19 (2nd Supp.)), and section 6 (2) of the Specific Claims Tribunal Act (S.C. 2008, c. 22)

¹⁷⁴ The Specific Claims Tribunal requires members to be judges of superior courts, which are provincial courts. See section 6 (2) of the Specific Claims Tribunal Act (S.C. 2008, c. 22).

United Kingdom (UK)

1. Tribunal system structure

The present system is divided into two tiers consisting of a First-Tier tribunal and an Upper Tribunal, which typically has appellate jurisdiction over cases from the First-Tier tribunal,¹⁷⁵ and which are superior courts of record.¹⁷⁶ Parties generally have the right to appeal a decision of the First-Tier Tribunal to the Upper Tribunal.¹⁷⁷ The Upper Tribunal also has judicial review jurisdiction in certain circumstances,¹⁷⁸ and relief granted in these applications is enforceable as if they were decisions of High Courts. Both tiers are divided into chambers, each of which has specialised jurisdiction for a given type of subject matter.¹⁷⁹ This is unlike in India where tribunals of different specialisation are completely independent from one another. In addition, it is not necessary for judges to be appointed to a chamber for it to function, and non-judge members may also preside over them.¹⁸⁰

All tribunals follow procedural rules formulated by a Tribunals Procedure Committee,¹⁸¹ consisting of the Senior President or their nominee, and appointees of officials such as the Lord Chancellor, a minister whose relevant responsibilities include being accountable to parliament for upholding the independence of the UK's judiciary, and tribunals system and ensuring that they are adequately supported in their operation¹⁸² and the Lord Chief Justice, of England and Wales, who is the head of the judiciary in those countries and who has statutory responsibilities for representing the views of the judiciary to parliament, the 'welfare, guidance, and training of the judiciary'.^{183 184}

The system is overseen by an official with the title 'Senior President of Tribunals,' which is a statutory office.¹⁸⁵ Their responsibilities include ensuring the fairness, efficiency, and accessibility of tribunals, the expertise of tribunal members in the relevant subject matter, and improving methods of dispute resolution.¹⁸⁶

¹⁷⁵ Tribunals, Courts and Enforcement Act, 2007 (UK), Explanatory Notes

¹⁷⁶ Section 3 (5), Tribunals, Courts and Enforcement Act, 2007 (UK), available at <https://www.legislation.gov.uk/ukpga/2007/15/data.pdf> (accessed on 4 February 2021)

¹⁷⁷ Section 11, Tribunals, Courts and Enforcement Act, 2007 (UK)

¹⁷⁸ Sections 15 and 18, Tribunals, Courts and Enforcement Act, 2007 (UK)

¹⁷⁹ Section 7, Tribunals, Courts and Enforcement Act, 2007 (UK). For a chart of the structure of the UK tribunals system which depicts the allocation of jurisdiction in each chamber, see here: <https://www.judiciary.uk/wp-content/uploads/2020/08/tribunals-chart-updated-May-2020.pdf> (accessed on 5 February 2021)

¹⁸⁰ Section 7 (2) and 7 (3) of the Tribunals, Courts and Enforcement Act, 2007 (UK) state that the Senior President may appoint any eligible person to preside over a chamber.

¹⁸¹ Section 22, Tribunals, Courts and Enforcement Act, 2007 (UK)

¹⁸² See Section 1, Courts Act, 2003 (UK), available at <https://www.legislation.gov.uk/ukpga/2003/39/data.pdf> (accessed on 4 February 2021), and the Tribunals, Courts and Enforcement Act, 2007 (UK)

¹⁸³ See Constitutional Reform Act 2005 (UK), Available at <https://www.legislation.gov.uk/ukpga/2005/4/data.pdf> (accessed on 4 February 2021)

¹⁸⁴ Section 20, Tribunals, Courts and Enforcement Act, 2007 (UK)

¹⁸⁵ Section 2, Tribunals, Courts and Enforcement Act, 2007 (UK), available at <https://www.legislation.gov.uk/ukpga/2007/15/data.pdf> (accessed on 4 February 2021)

¹⁸⁶ Section 2, Tribunals, Courts and Enforcement Act, 2007 (UK)

■ 2. Administrative structure

Tribunals in the UK have been administered by an executive agency under the UK's Ministry of Justice, 'Her Majesty's Courts and Tribunals Service' (HMCTS), since its formation in 2011.¹⁸⁷ HMCTS is the product of a merger of the previous executive agency responsible for tribunal administration, the Tribunals Service, and the agency responsible for court administration, Her Majesty's Courts Service. The agency is jointly accountable to, and is backed by agreement between, the Senior President of Tribunals, Lord Chancellor and Lord Chief Justice.¹⁸⁸

The Chief Executive oversees day-to-day operation of HMCTS.¹⁸⁹ They provide management and leadership, develop business plans, and are responsible for the performance of HMCTS and for reporting on it to the Board, Lord Chancellor, Lord Chief Justice, and Senior President. They are accountable to parliamentary committees regarding matters of accounting and administration, and answerable to parliamentary questioning.

As stated above, the day-to-day operation of HMCTs, including administration of tribunals, is the responsibility of its Board and its Chief Executive Officer (CEO).¹⁹⁰ HMCTS is governed by a Board responsible for approving budget allocations, monitoring strategic achievements and progress, approving and monitoring the corporate framework of HMCTS, ensuring efficiency and transparency in planning, and providing guidance to the Chief Executive.¹⁹¹ They are also responsible for providing support to the Senior President.¹⁹² The board consists of an independent non-executive Chair, three judicial representatives including the Senior Presiding Judge for

England and Wales, with one each nominated by the Lord Chief Justice and the Senior President of Tribunals; the Chief Executive and three executive directors nominated by them; and three non-executive directors.

■ 3. Functions

HMCTS performs the full range of administrative activities for UK tribunals. This includes the following:

- Recruitment of Tribunal members, including judges and non-judicial members such as doctors in medical panels, as well as the hiring, management, and training of operational personnel.¹⁹³

¹⁸⁷ Ministry of Justice (UK). 2014. HMCTS framework document, HMCTs, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384922/hmcts-framework-document-2014.pdf

¹⁸⁸ Ministry of Justice (UK). HMCTS framework document.

¹⁸⁹ Ministry of Justice (UK). HMCTS framework document.

¹⁹⁰ Ministry of Justice (UK). HMCTS framework document.

¹⁹¹ Ministry of Justice (UK). HMCTS framework document.

¹⁹² Ministry of Justice (UK). HMCTS framework document.

¹⁹³ HMCTS Annual Report 2018-19, HMCTS Annual Report 2012-13

- Conducting the processing of claims, filings,¹⁹⁴ and documents, as well as implementing common IT infrastructure necessary to do so.¹⁹⁵ These responsibilities include scheduling and caseload allocation in Tribunals, including managing workloads and pendency.¹⁹⁶ Developing and managing websites for online filing of claims and fee payments is one component of this.¹⁹⁷ For example, the Employment Tribunal receives claims online,¹⁹⁸ and 90% of claims were filed online in 2015-16.¹⁹⁹ This was also done for the Social Security and Child Support (SSCS) Tribunal in 2018-19.²⁰⁰
- Providing guidance and support to tribunal users, including for the use of digital services, through websites, in-person assistance, and call centres.²⁰¹
- Management, maintenance, and modernisation of tribunal and court buildings and facilities, and the estate as a whole,²⁰² and
- Receiving and responding to feedback of tribunal users.²⁰³

■ 4. Appointment of members

The Senior President is appointed by a panel of the UK's Judicial Appointments Commission (JAC), who do so upon receiving a request from the Lord Chancellor.²⁰⁴ The Lord Chancellor is also responsible for recommending the appointment of Judges of the Upper Tribunals,²⁰⁵ for they may request the JAC to select and recommend candidates,²⁰⁶ which must be reported to the Senior President.²⁰⁷ Both the first-Tier and Upper Tribunal have judges and non-judges as members.²⁰⁸ Non-judge members of the Upper Tribunal are appointed by the Senior President themselves.²⁰⁹ The Senior President bears the authority to appoint judges and non-legal members to First-Tier tribunals,²¹⁰ which they may delegate to the JAC.²¹¹



Before 2007, the UK was similar to India in that its tribunals were each the result of separate legislation, and administered by the government departments responsible for the relevant policy area. Streamlining administration was one of the motivating factors in adopting the present structure...



¹⁹⁴ HMCTS Annual Report 2011-12

¹⁹⁵ HMCTS Annual Report 2012-13

¹⁹⁶ HMCTS Annual Report 2015-16

¹⁹⁷ HMCTS Annual Report 2011-12

¹⁹⁸ See Employment Tribunals. 'Make a claim to an employment tribunal, Gov.uk, available online at <https://employmenttribunals.service.gov.uk/apply> (accessed on 5 February 2021)

¹⁹⁹ HMCTS Annual Report 2015-16

²⁰⁰ HMCTS Annual Report 2011-12

²⁰¹ HMCTS Annual Report 2018-19

²⁰² HMCTS Annual Report 2011-12

²⁰³ HMCTS Annual Report 2011-12

²⁰⁴ Section 75A, Constitutional Reform Act 2005 (UK)

²⁰⁵ Section 86 (1); Paragraph 1 (1), Schedule 3; and Table 3, Part 1, Schedule 14 of the Constitutional Reform Act 2005 (UK); Paragraph 1 (1), Schedule 3, Tribunals, Courts and Enforcement Act, 2007 (UK)

²⁰⁶ Section 87, Constitutional Reform Act 2005 (UK)

²⁰⁷ Table 3, Part 1, Schedule 14, Constitutional Reform Act 2005 (UK)

²⁰⁸ Sections 4 and 5 of the Tribunals, Courts and Enforcement Act 2007 (UK)

²⁰⁹ Paragraph 2 (1), Schedule 3, Tribunals, Courts and Enforcement Act, 2007 (UK)

²¹⁰ Paragraphs 1 (1), and 2 (1), Schedule 2, Tribunals, Courts and Enforcement Act, 2007 (UK)

²¹¹ Regulations 29 (e), 31-36, and 47 of the Judicial Appointments Regulations 2013 (UK)

■ 5. Finance

Funds are allocated to HMCTS by the UK's economic and finance ministry, Her Majesty's Treasury, (HMT), based on discussions between HMT and the Lord Chancellor.²¹² The Lord Chancellor has a statutory responsibility to ensure that administration of courts and tribunals is adequately funded.²¹³ The Lord Chancellor must communicate with the Lord Chief Justice and Senior President regarding these discussions, and must forward their views to HMT. The Chief Executive is delegated accounting responsibilities from the Ministry of Justice, and is accountable for assets, operational expenditure, and the performance of the agency.²¹⁴

■ 6. HMCTS, the former Tribunals Service, and the Leggatt Report

Before 2007, the UK was similar to India in that its tribunals were each the result of separate legislation, and administered by the government departments responsible for the relevant policy area. **Streamlining administration was one of the motivating factors in adopting the present structure,**²¹⁵ as part of a reform programme proposed in a report, 'Tribunals for Users: One System, One Service', or the 'Leggatt Report'.²¹⁶

HMCTS inherited the functions, responsibilities, and to an extent, the organisational structure of the earlier Tribunals Service.²¹⁷ The Tribunals Service was also overseen on a day-to-day basis by a Chief Executive, with similar responsibilities to the Chief Executive of HMCTS.²¹⁸ It also took on responsibilities such as scheduling, management and allocation of case load, appointment of judges and non-judge members, management

of pendency and timelines, modernisation of buildings, facilities, and IT systems, particularly for caseflow management.²¹⁹ The Tribunals Service was established to implement reforms recommended by the Leggatt Report, which identifies issues in the administration of tribunals at that time, highlighting concerns from a user's perspective.

One issue was a perceived lack of independence resulting from the running of administrative tribunals by the very government departments who were parties to disputes heard in these tribunals.²²⁰ **The report proposed to resolve this by separating ministerial responsibility for appointments and funding of tribunals from the departments whose decisions were adjudicated upon by them.**²²¹ The report also recommended tribunal administration on the grounds of enabling more efficient modernisation and procedural reform, with regard to digitisation of processes, particularly for case management and listing. At the time of writing, disparate procedures and systems across tribunals were observed to be an obstacle not only to users, but also to lawyers, and that the lack

²¹² Ministry of Justice (UK). HMCTS framework document, paragraph 7.2

²¹³ Section 1 of the Courts Act, 2003 (UK), and section 39 of the Tribunals, Courts and Enforcement Act, 2007

²¹⁴ Ministry of Justice (UK). HMCTS framework document, 7.7-7.12, 7.16

²¹⁵ Tribunals, Courts and Enforcement Act, 2007 (UK), Explanatory Notes, available at <https://www.legislation.gov.uk/ukpga/2007/15/notes/contents> (accessed on 4 February 2021)

²¹⁶ Andrew Leggatt. 2001. *Tribunals for Users: One System, One Service*, available at <https://webarchive.nationalarchives.gov.uk/+http://www.tribunals-review.org.uk/leggatthtm/leg-oo.htm> (accessed on 1 February 2021)

²¹⁷ Ministry of Justice (UK). HMCTS framework document.

²¹⁸ Tribunals Service Framework Document

²¹⁹ Tribunals Service Annual Report 2009-10

²²⁰ Andrew Leggatt. *Tribunals for Users: One System, One Service*

²²¹ Andrew Leggatt. *Tribunals for Users: One System, One Service*

of an efficient means of providing them with information contributed to this issue.²²² **The report recommended a single system for all tribunals capable of allocating a person's complaint to the appropriate tribunal, providing them with appropriate guidance, in a manner accessible to users of different needs. Case flow management rules and the deployment of information technology (IT) systems to administer case and document management and provide services such as e-filing were also recommended.**

The motives for constituting the Tribunals Service as an executive agency, as described in the Legatt report, were to create a user-focused service using best practices from both the public and private sectors, run by cohesive, accountable management for which a single minister bears responsibility. The service was envisioned to be more efficient than preceding systems through minimisation of duplication of efforts across tribunals to implement their own administrative setups and develop their own procedures and systems. Other features described in the report include robust, modern business processes backed by capable IT systems and the implementation of performance indicators for disposal timelines, user satisfaction, the fitness of premises, and cost to tribunal users.²²³

The report provides an implementation sequence for the creation of such a service.²²⁴ This involves the following:

1. Stakeholder consultations, including tribunals themselves and tribunal user groups, identification of tribunals for inclusion in core group
2. Creation of consensus between relevant judicial and government agencies regarding timelines, policies upon transfer of administration to the new service, and funding

3. Publication of a whitepaper and policy agreement to constitute the service
4. Appointment of Chief Executive and President, and project management team
5. In parallel, make transitional arrangements for
 - Creating plans to disengage tribunals from their respective sponsor departments, making arrangements for funding, staffing, contracts, and interfaces with users
 - developing training plans for members, and conducting discussions between tribunal, sponsor government departments, user groups, and others
6. Constitute first group of tribunals under the service
7. In parallel,
 - Development of policy, particularly with regard to any legislation requiring amendment to revise statutory powers and duties, formulating procedural rules, making arrangements regarding appointments and pay

²²² Andrew Legatt. *Tribunals for Users: One System, One Service*

²²³ Andrew Legatt. *Tribunals for Users: One System, One Service*, Table B, available online at <https://webarchive.nationalarchives.gov.uk/20090805165418/http://www.tribunals-review.org.uk/leggatthtm/leg-tabb.htm> (accessed on 1 February 2021)

²²⁴ Andrew Legatt. *Tribunals for Users: One System, One Service*, Table A, available online at <https://webarchive.nationalarchives.gov.uk/20090805165420/http://www.tribunals-review.org.uk/leggatthtm/leg-taba.htm> (accessed on 1 February 2021)

- Plan and secure funding for creation of unified, modernised IT system
- Train Members
- Pass primary legislation

8. Merge tribunals under transitional arrangement

9. In parallel, finalise arrangements for

- Agency structure, covering management, staffing, and support functions,
- Funding
- Liaison arrangements with stakeholders
- Performance measures
- User interfaces
- Contracts and supplies
- IT development

10. In parallel,

- Make arrangements for management, reporting, and training of staff
- Create framework document, customer charter, business plan
- Make arrangements for members, regarding management, reporting, recruitment, jurisdictional divisions, appointments, among others
- Pass secondary legislation to include new tribunals

11. The transition is complete when all tribunals have been successfully integrated.



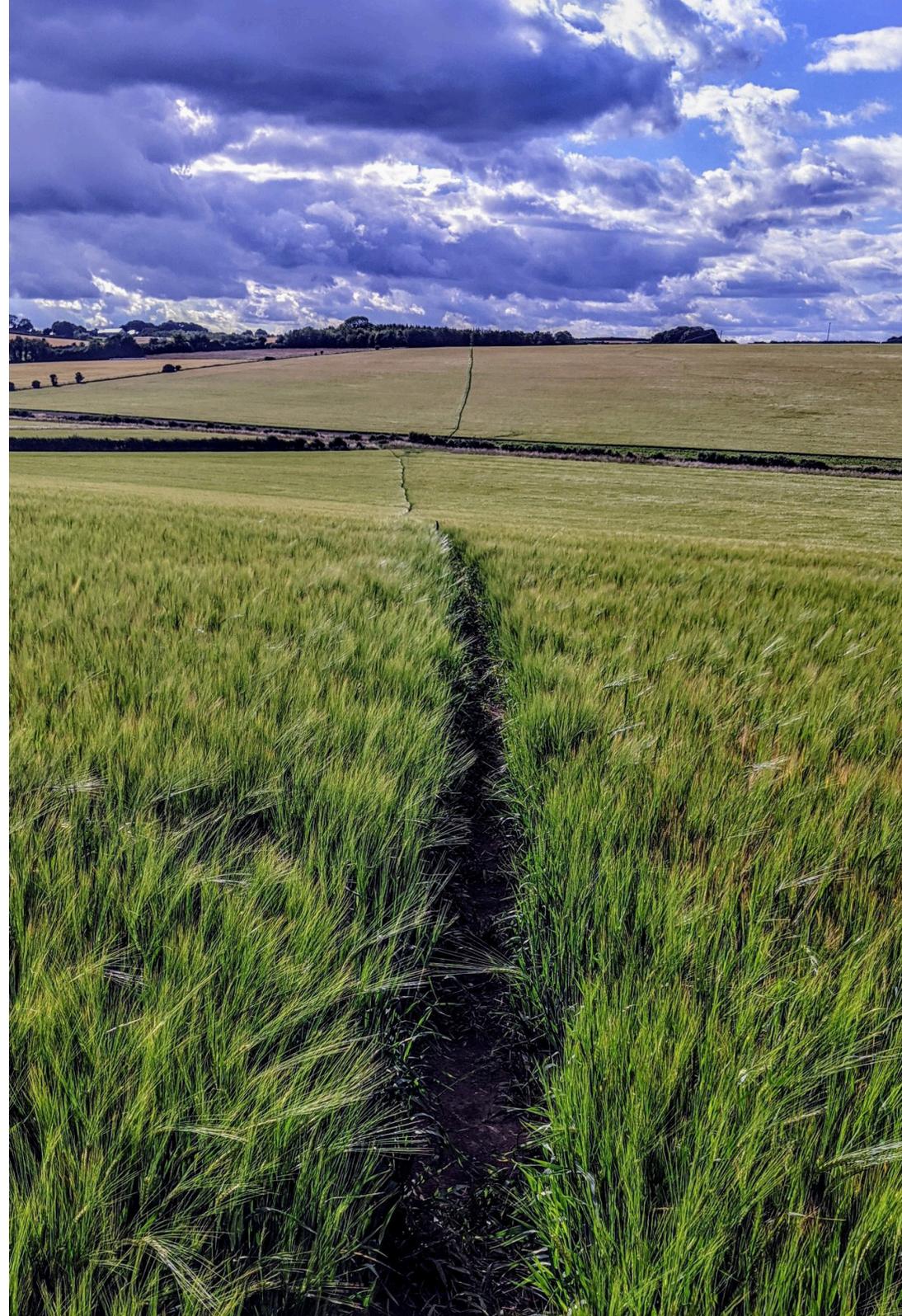
Key learnings from other jurisdictions

The Canadian example proves that it is possible to provide tribunals with registry support from a unified administrative cadre, which can help tribunals operate more efficiently, and reduce their dependence on their parent government departments to an extent. The UK has done the same, though the creation of this service occurred at the same time as the merger of all tribunals into a single overarching body. In addition to supporting the idea that tribunals need to be supported by a unified administrative cadre, the UK example also shows that it is beneficial to create a single body to administer tribunals and be responsible for their oversight, performance, appointment of members, and independence, among others. It also reveals the extent to which planning of the transition to such a body must be done in great detail, taking account of operational, organisational, legislative, and infrastructural arrangements that need to be made during the transition.

CONCLUSION

Since establishing the NTC would entail a fairly radical restructuring of the present tribunals system, involving the transfer of responsibilities from many government departments, a robust transition plan is essential. This paper has attempted to provide a roadmap to begin this process, and an overview of the challenges which must be addressed. These include the structures, arrangements, and practices the NTC should adopt to fulfil its objectives. For progress to be made towards establishing the NTC, these issues should become the subject of dialogue between all stakeholders and agencies who participate in the tribunals system, including litigants, bar association representatives, tribunal members, the judiciary, and representatives of sponsoring departments, to name a few.

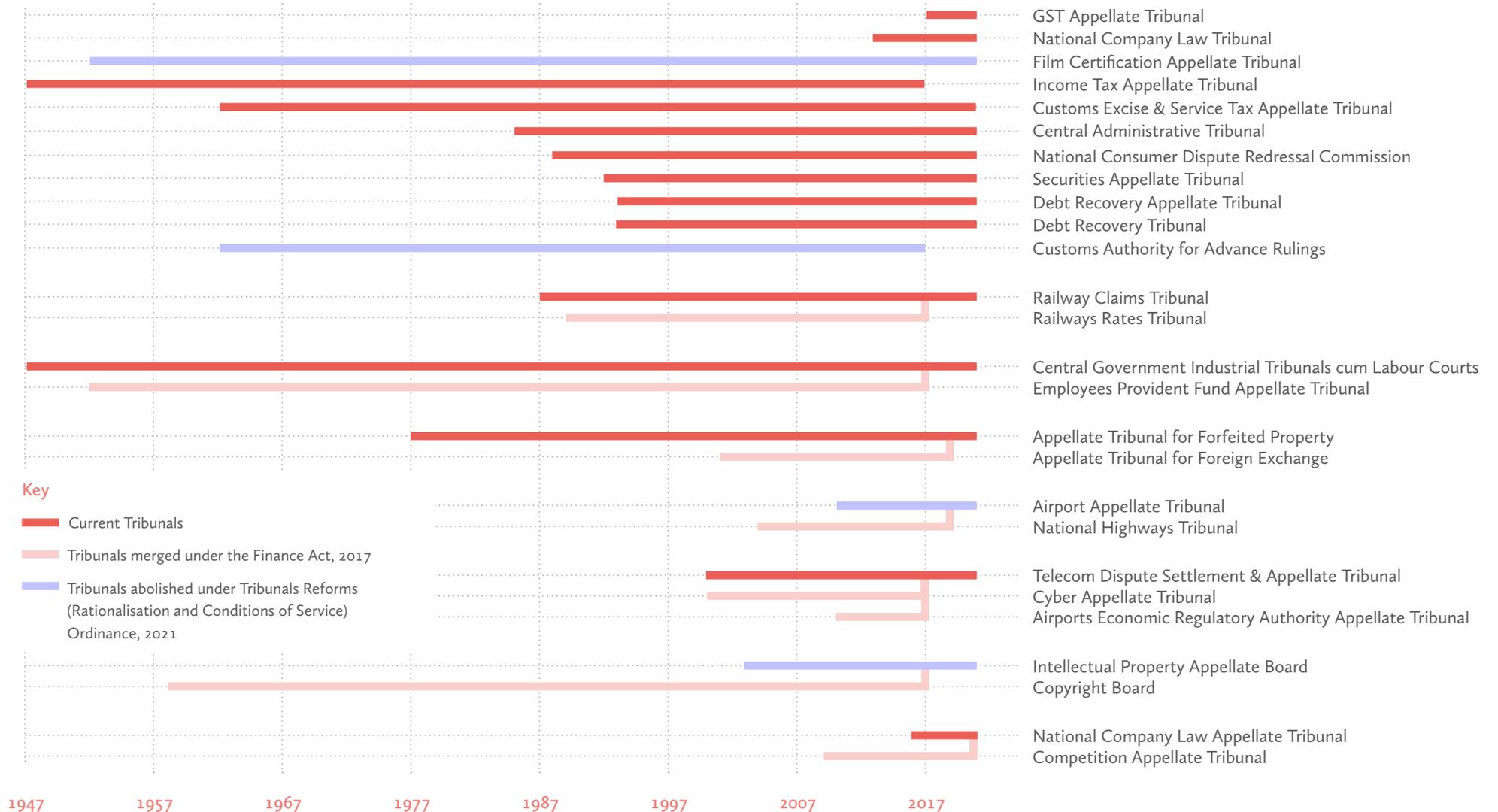
Although some directions issued in the *Madras Bar Association* (2020) judgment have been acted upon, through the promulgation of the 2021 Ordinance, no steps have been taken towards the creation of the NTC at the time of writing this paper. As discussed earlier, the creation of NTC has not gained much traction despite several judgments recommending it time and again. Initiating dialogue and promoting awareness about the idea of the NTC can potentially help overcome the inertia of the government in establishing it.



Annexure A

List of Tribunals created by laws of Parliament

Figure 7 : A timeline of the creation, merging, and abolition of tribunals



Annexure B

In the last few decades several attempts have been made to reform the tribunals system in India. Some of the significant efforts are discussed below:

1. Central Tribunals Division

Pursuant to the decision in *L. Chandra Kumar*, in 2001, the then Law Minister mooted the idea of the Central Tribunals Division in the Department of Legal Affairs under the Ministry of Law and Justice to bring about uniformity in the administration of the tribunals.²²⁵ However, over a decade later in *Navdeep Singh v. Union of India*²²⁶, decided by the Punjab and Haryana High Court, the Ministry of Law and Justice candidly submitted that while it was in favour of creating the Central Tribunals Division, the other ministries under which tribunals were functioning were opposed to the idea. In an affidavit presented to the Court, it submitted that the Department of Legal Affairs and Department of Justice have made efforts since 1997 to set up a Central Tribunal Division (CTD) for the limited purpose of bringing umbrella legislation in respect of tenure, terms and conditions of service of office bearers of the tribunals and to deal with the matters relating to the code of conduct, the enquiry into complaints or allegations against them. It also emphasized that several attempts have been made to collect information about the tribunals and move the proposal for decision by the competent authority for the setting of a CTD. These efforts have failed since most of the Ministries/Departments dealing with the tribunals, have not supported it.²²⁷ Although the High Court ordered the implementation of the law as laid down by the Constitution Bench decisions in *L. Chandra Kumar* and *R Gandhi*, the efforts at creating a CTD fizzled out eventually.

2. The Tribunals, Appellate Tribunals and Other Authorities (Conditions of Service) Bill, 2014

The Tribunals, Appellate Tribunals and Other Authorities (Conditions of Service) Bill, 2014 was tabled to standardise the service conditions with regard to retirement age, tenure of appointment, reappointment, and various allowances for chairpersons and members of the tribunals/commissions/statutory bodies enumerated in the schedule to the Bill. The Parliamentary Standing Committee in its 74th Report on this Bill made certain recommendations like the exclusion of regulatory bodies from the definition of tribunals²²⁸, a uniform retirement age of 70 years for chairperson and members of all tribunals²²⁹, making regular appointments in the tribunals in

²²⁵ Press Information Bureau, government of India. 2001. 'Administrative Control of Tribunals', *Press Information Bureau, Government of India*, 2 August, available online at <https://archive.pib.gov.in/archive/releases98/lyr2001/raug2001/02082001/ro20820012.html> (accessed on 24 February 2021)

²²⁶ *Navdeep Singh v. Union of India*, Civil Writ Petition No. 10751 of 2012, November 20, 2012, High Court of Punjab and Haryana at Chandigarh

²²⁷ *Navdeep Singh v. Union of India*, Civil Writ Petition No. 10751 of 2012, November 20, 2012, High Court of Punjab and Haryana at Chandigarh

²²⁸ Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, Rajya Sabha, Parliament of India. 2015. *Seventy-Fourth Report: The Tribunals, Appellate Tribunals and Other Authorities (Conditions of Service) Bill, 2014*; paragraph 13, available online at https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/18/18/74_2018_10_14.pdf (accessed on 24 February 2021)

²²⁹ Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, Rajya Sabha, Parliament of India. 2015. *Seventy-Fourth Report: The Tribunals, Appellate Tribunals and Other Authorities (Conditions of Service) Bill, 2014*, paragraph 18

place of tenure appointments²³⁰ uniform grounds for removal²³¹ and creation of the National Tribunals Commission to oversee the selection process, eligibility criteria for appointment, introduction of common eligibility criteria for removal of Chairman and Members as also for meeting the requirement of infrastructural and financial resources.²³² Subsequently, the Bill was withdrawn on August 11, 2017.

■ 3. 272nd Law Commission of India Report, 2017

The Law Commission in its 272nd Report titled “Assessment of Statutory Frameworks of Tribunals in India” made several recommendations for improving the tribunals’ framework like standardizing the conditions on appointment, tenure and service conditions of tribunal members, filling vacancies within 6 months, the equivalence of qualifications of tribunal members with High Court judges, and giving the function of monitoring the working of the tribunals to a single nodal agency, preferably be the Ministry of Law and Justice etc.²³³

■ 4. Merging Tribunals under Finance Act, 2017

The Finance Act of 2017 merged eight tribunals²³⁴ according to functional similarity. Intending to bring uniformity to service conditions of Chairpersons, Members, etc., the Finance Act, 2017 amended the provisions of the parent statute of 19 central tribunals. The move was instituted in the form of a Money Bill and its constitutionality is currently under challenge.²³⁵ The Central Government was also empowered to make rules to provide for qualifications, appointment, the term of office, salaries and allowances,

resignation, removal and other terms of conditions of service of the tribunal members according to which the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 were notified. The constitutionality of several provisions of the Bill was challenged and decided by the Supreme Court in *Rojer Mathew*. Subsequently, the government introduced the “Tribunal, Appellate Tribunal and other Authorities [Qualification, Experience and Other Conditions of Service of Members] Rules, 2020 which were upheld in *Madras Bar Association v. Union of India*²³⁶ with certain modifications.

²³⁰ Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, Rajya Sabha, Parliament of India. 2015. *Seventy-Fourth Report: The Tribunals, Appellate Tribunals and Other Authorities (Conditions of Service) Bill, 2014*, paragraph 21

²³¹ Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, Rajya Sabha, Parliament of India. 2015. *Seventy-Fourth Report: The Tribunals, Appellate Tribunals and Other Authorities (Conditions of Service) Bill, 2014*, paragraph 30

²³² Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, Rajya Sabha, Parliament of India. 2015. *Seventy-Fourth Report: The Tribunals, Appellate Tribunals and Other Authorities (Conditions of Service) Bill, 2014*, paragraph 38

²³³ Law Commission of India. *Report no. 272: Assessment of Statutory Frameworks of Tribunals in India*.

²³⁴ The tribunals that have been merged are:

1. The Employees Provident Fund Appellate Tribunal with The Industrial Tribunal
2. The Copyright Board with The Intellectual Property Appellate Board
3. The Railways Rates Tribunal with The Railways Claims Tribunal
4. The Appellate Tribunal for Foreign Exchange with The Appellate Tribunal (Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976
5. The National Highways Tribunal with The Airport Appellate Tribunal
- 6 & 7. The Cyber Appellate Tribunal and The Airports Economic Regulatory Authority Appellate Tribunal with The Settlement and Appellate Tribunal (TDSAT)
8. The Competition Appellate Tribunal with the National Company Law Appellate Tribunal

²³⁵ The Court in *Rojer Mathew* has referred this question to a larger bench

²³⁶ Writ Petition (Civil) No.804 of 2020, November 27, 2020, Supreme Court of India

■ 5. The Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021

The government has continued the process of streamlining tribunals through this Ordinance. In this second phase, the government has abolished of tribunals or authorities under various Acts by amending the Cinematograph Act, 1952, the Copyrights Act, 1957, the Customs Act, 1962, the Patents Act, 1970, the Airport Authority of India Act, 1994, the Trade Marks Act, 1999, the Geographical Indications of Goods (Registration and Protection) Act, 1999, the Protection of Plant Varieties and Farmers' Rights Act, 2001, the Control of National Highways (Land and Traffic) Act, 2002 and the Finance Act, 2017. This has been done without undertaking any judicial impact assessment, contrary to the direction of the Supreme Court in *Rojer Mathew*. According to the Statement of Objects and Reasons, reducing the number of tribunals shall not only be beneficial for the public at large, reduce the burden on the public exchequer, but also address the issue of shortage of supporting staff of tribunals and infrastructure.²³⁷ However, the Ordinance has sought to override court judgments regarding the service length of Chairperson, Vice-Chairperson and members of tribunals. While the Supreme Court has, in at least three judgments over the last decade²³⁸, mandated that the minimum tenure of Chairperson and members of tribunal should be five years, the Central government has sought to restrict it to four years by inserting a new provision, sub-section (11) in Section 184 of the Finance Act, 2017. This new provision makes it expressly clear that it takes precedence over any judgment, order or decree of any court or any law for the time being in force.

To sum up, over the last decade, both the judiciary as well as the legislature have tried to reform the tribunals' framework in India, albeit without much success. As is evident, there has been a lack of political will to enforce any systemic reforms concerning tribunals once they are created. Whenever an effort has been made, it has either been considered to be half-hearted (by the 74th report of the Parliamentary Standing Committee on the Tribunals, Appellate Tribunals and Other Authorities (Conditions of Service) Bill, 2014) or motivated in a way to affect the independence of the judiciary (as done through the Finance Act, 2017)²³⁹ or in contravention of court guidelines (Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021). The latest direction of the Court to constitute the National Tribunals Commission, presents an opportunity for the Union Government to transform tribunals' system in India.

²³⁷ The Tribunals Reforms (Rationalisation And Conditions Of Service) Ordinance, 2021, available online at <http://egazette.nic.in/WriteReadData/2021/226364.pdf> (accessed on 5 April 2021)

²³⁸ R. Gandhi, *Rojer Mathew*, and *Madras Bar Association* (2020)

²³⁹ Ghosh and Sekhar. 'What We Can Do to Reform the Tribunals Framework in India'

Annexure C

Workload in selected tribunals

44,333²⁴⁰ Central
Administrative
Tribunal
as on July 2017

45,604²⁴¹ Railway Claims
Tribunal
as on 30 September 2016

78,118²⁴² Debt
Recovery
Tribunal
as on 3 July 2016

77,635²⁴³ Customs, Excise
and Service Tax
Appeal Tribunal
as on November 2019

90,082²⁴⁴ Income Tax
Appellate
Tribunal
as on November 2019

21,259²⁴⁵ National
Company Law
Tribunal
as on 31 December 2020

18,829²⁴⁶ Armed Forces
Tribunals
as on 28 February 2021

**(14,325
+ 6670)**²⁴⁷ Central
Government
Industrial
Tribunals-cum-
Labour Courts
as on FY 2019-20

2,835²⁴⁸ National
Green
Tribunal
as on 29 February 2020

²⁴⁰ Law Commission of India. Report no. 272: Assessment of Statutory Frameworks of Tribunals in India, paragraph 3.35, p. 33

²⁴¹ Law Commission of India. Report no. 272: Assessment of Statutory Frameworks of Tribunals in India, paragraph 3.35, p. 33

²⁴² Law Commission of India. Report no. 272: Assessment of Statutory Frameworks of Tribunals in India, paragraph 3.35, p. 33

²⁴³ Tribunal for Direct and Indirect Tax Cases, Lok Sabha Unstarred Question No. 1599, Available at: <http://164.100.24.220/loksabhaquestions/annex/172/AU1599.pdf> (last accessed on March 22, 2021)

²⁴⁴ Tribunal for Direct and Indirect Tax Cases, Lok Sabha Unstarred Question No. 1599, Available at: <http://164.100.24.220/loksabhaquestions/annex/172/AU1599.pdf> (last accessed on March 22, 2021)

²⁴⁵ Performance of NCLT, Lok Sabha Starred Question No. 86, Available at: <http://164.100.24.220/loksabhaquestions/annex/175/AS86.pdf> (last accessed on March 22, 2021)

²⁴⁶ Armed Forces Tribunal, Lok Sabha Unstarred Question No. 2663, Available at: <http://164.100.24.220/loksabhaquestions/annex/175/AU2663.pdf> (last accessed on March 22, 2021)

²⁴⁷ Labour Courts/ Tribunals, Lok Sabha Unstarred Question No. 1329, Available at: <http://164.100.24.220/loksabhaquestions/annex/174/AU1329.pdf> (last accessed on March 22, 2021)

²⁴⁸ National Green Tribunal, Lok Sabha Starred Question No. 399, Available at: <http://164.100.24.220/loksabhaquestions/annex/173/AS399.pdf> (last accessed on March 22, 2021)



DAKSH

63 Palace Road
Vasanthnagar
Bengaluru 560052