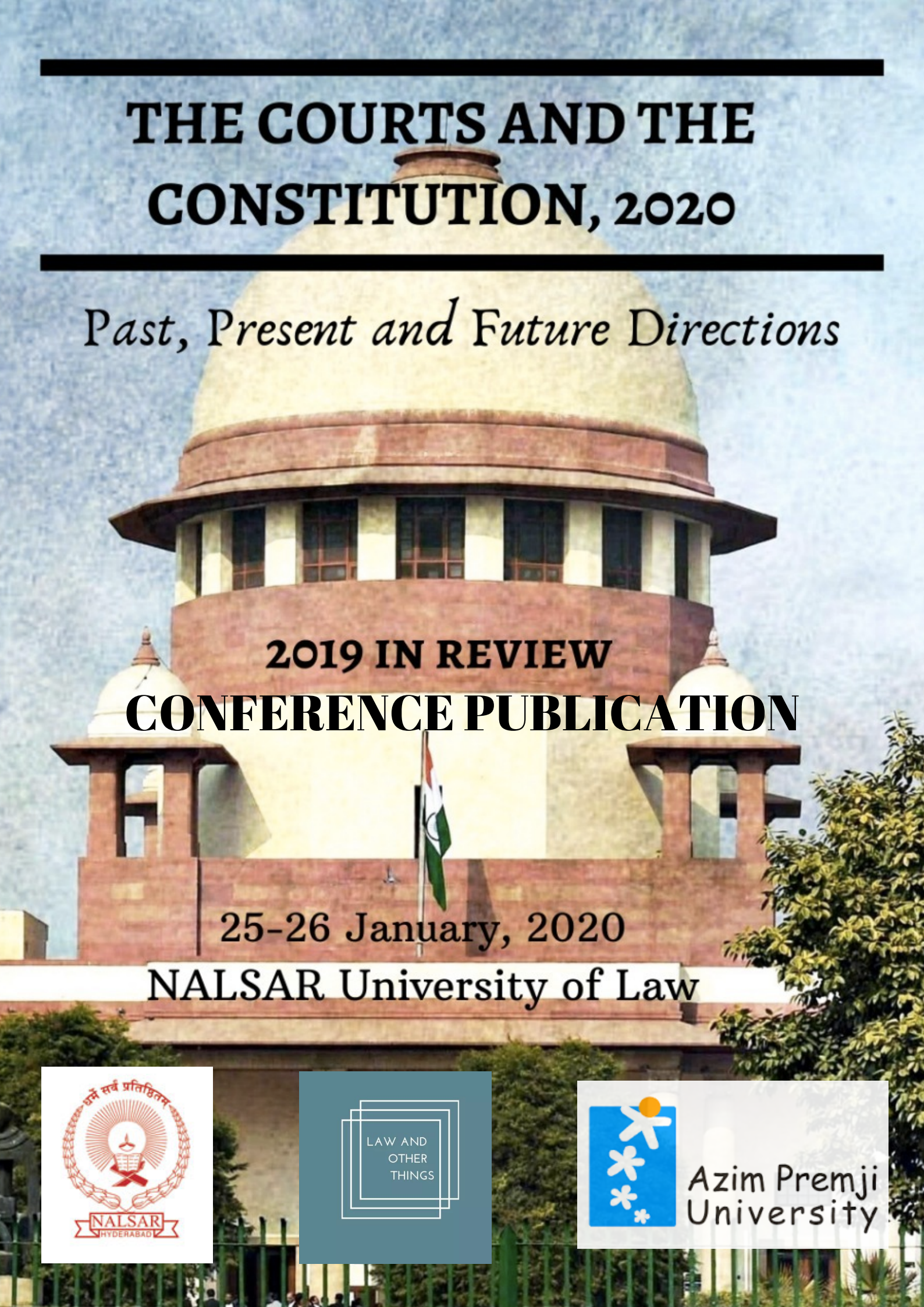
THE COURTS AND THE CONSTITUTION, 2020

Past, Present and Future Directions



2019 IN REVIEW

CONFERENCE PUBLICATION

25-26 January, 2020

NALSAR University of Law

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NALSAR HYDERABAD

LAW AND OTHER THINGS

Azim Premji University

ACKNOWLEDGEMENTS

NALSAR University of Law

Prof. Faizan Mustafa
Vice Chancellor
Prof. N. Vasanthi
Head, Centre for Constitutional Law, Public Policy & Good Governance
Prof. Sidharth Chauhan
Faculty Advisor

Azim Premji University

Prof. Sitharamam Kakarala
Director, School of Policy & Governance
Prof. Arun Thiruvengadam
Faculty Advisor
Prof. Neeraj Grover
Programme Coordinator, LL.M in Law and Development

Law and Other Things

Vikram Raghavan
Lead Counsel, World Bank

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2019 IN REVIEW

EDITORIAL NOTE

It is with great pleasure that we release this publication developed from the proceedings of the second edition of *The Courts and the Constitution Conference.* The Conference was organised by the NALSAR University of Law, Hyderabad, in association with the School of Policy and Governance, Azim Premji University and the editorial team of the Law and Other Things Blog from 25-26 January, 2020.

The idea behind this annual conference is to take the opportunity of the Republic Day weekend to have a *Year-in-Review* exercise to analyze some of the key constitutional law judgments delivered in the preceding year and discuss their long-term impact. The Conference also provides an opportunity to bring members of academia, bar and the bench together to discuss and deliberate upon these decisions which have a bearing upon the future of the Republic, its citizens and its governance.

In this year's editions, the Conference had seven substantive sessions which thematically discussed the judicial developments in 2019.

The Opening Session on 25th January was a tribute to the memory of Dr. N.R. Madhava Menon, whom we lost in 2019. Prof. Faizan Mustafa, the Vice-Chancellor of NALSAR welcomed everyone to NALSAR and declared the Conference open. He expressed his disappointment that the year 2019 will not be remembered for what the Court *did do*, but for what all it *did not do*. Prof. N. Vasanthi gave an overview of the conference agenda. Prof. Sitharamam Kakarala, Director, School of Policy and Governance, Azim Premji University then took the opportunity to share his anecdotal experiences of having worked alongside Dr. N.R. Madhava Menon. He exhorted the need to move from Legal Education 2.0 to Legal Education 3.0 where NLUs must start paying more attention to their postgraduate programmes. Finally, Vikram Raghavan informed the audience of the objective behind the Law and Other Things Blog and the Conference to facilitate judges, lawyers, litigants, academics and students from across India to engage with the courts and the constitution.

The first substantive panel on the *Institutional Developments in the Judiciary* was opened by its moderator Sidharth Chauhan. Dr. Arghya Sengupta touched upon questions of accountability and independence in the form of appointments, in-tenure transfers, and post-tenure retirement appointments in the higher judiciary. Apurva Vishwanath narrated in detail

the Supreme Court's failure to secure justice to one of its staffer who had accused the former Chief Justice of India of sexual harassment. She discussed how the higher courts have failed at addressing issues of sexual harassment not just in this case but similarly in the past and noted that this must be addressed as a failure in the responsibility of not just those involved but the institution as a whole. Venkat Venkatesan expounded on the role of a legal journalist in holding the judiciary accountable and Anuj Bhuwania talked about how the Supreme Court was merely granting rights without remedies in 2019.

The second panel, moderated by Prof. Arun Kumar Thiruvengadam, dealt with *Federalism* where the focus shifted from courts to other constitutional actors. Prof. Anthony Blackshield AO, Emeritus Professor, Macquarie Law School opened the discussion by explaining unique features of federalism in different jurisdictions. Alok Prasanna Kumar explained the issues with fiscal federalism in India and discussed the issues with the functioning of the GST Council. Malavika Prasad took the session's attention to the issue of de-operationalization of Article 370 of the Constitution *vis-à-vis* Jammu and Kashmir's special status. Suchindran Baskar discussed about the complicated role of governors in a quasi-federal country like India. Lastly, Prof. Rohit De gave a historical context to federalism in India since 1940s and explained the political reluctance to federalism.

The third panel chaired by Prof. Amita Dhanda was devoted to Prof. Shamnad Basheer, another luminary whom we lost in 2019. She opened with a poignant account of her memory of Prof. Basheer. The panel was titled *Emerging Voices* where some of the work carried out by young and emerging scholars was presented. The panel consisted of Dr. Chintan Chandrachud, Kanika Gauba and Manav Kapur, all of whom spoke on the theme of the current tides against the Citizenship Amendment Act, 2019 with a focus on the history of India and its partition in 1947. Dr. Chandrachud analysed the TADA Act through the *Kartar Singh* case and brought out the importance of scholarship that takes a step farther from just focusing on the text and instead looks at the performance.

Day two of the conference witnessed four panels. The first one pertained to *Citizenship* and was opened by the moderator Arvind Narrain. Justice Swaminathan commented upon the importance of engaging with people in order to facilitate a conversation. Aymen Mohammad discussed the refusal of states to enforce union laws. He drew upon federalism and Article 355 of the Constitution so as to point out how the Union was wrongly justifying its protection of the federal units. Dr. Mohsin Alam Bhat drew upon his experiences from Assam so as to

enlighten the audience about the *twilight of citizenship* by explaining the inhumane functioning of foreigners' tribunals. Thereafter, Nizam Pasha stressed upon the need to examine citizenship, the right to rights, in the larger constitutional framework.

The panel on *Law and Religion* saw Professor Faizan Mustafa critiquing the Supreme Court's judgment in the Ayodhya dispute. Sruthisagar Yamunan highlighted the inconsistencies in courts' attempt to strike a balance between social reforms and religious rights of communities. Suhrith Parthasarthy drew the audience's attention to the problematic nature of the Supreme Court's order to review its judgment in the *Sabrimala* case. Professor N. Vasanthi, who was moderating the session concluded by emphasizing the need to have a proper relationship between law and religion.

The panel on *Developments in Equality Jurisprudence* was moderated by Dr. Sudhir Krishnaswamy who posited some grilling questions to the panelists. Arundhati Katju discussed the strategy behind shifting the conversation through *Navtej Johar* and for the bringing out the need on looking at the equality jurisprudence in a broader manner than the Courts have been currently able to do. Dr. Anup Surendranath pointed out how the Supreme Court failed in its application of the test of manifest arbitrariness in the *Bombay Dance Bar* Case and discussed the issue of importing creamy layer into SC/ST reservation jurisprudence. Alok Prasanna Kumar sought to explain how the 103rd Constitutional Amendment fell afoul of the Basic Structure doctrine and confused the objective of reservations as one of handing out charity.

The last session on *Reforming Tribunals* was moderated by Vivek Reddy. He prompted the speakers to speak on the possibility of removing tribunals, instead of reforming them. T. Prashant Reddy and Arun Thiruvengadam discussed the existing inefficiency of tribunals and the Court's decision in *Rojer Mathew* case. The conference ended with a vote of thanks by Sidharth Chauhan.

We found immense value in the ideas discussed during the panels held at the Conference and felt that they must be made available to a larger audience, hence this publication. We hope you enjoy reading this report, which seeks to share the collated learnings from the conference with law students and legal fraternity in order to further the discourse on major legal developments taking place in India and the role played by the Indian judiciary.

We are currently releasing this report Panel by Panel and will soon make available the compiled version. We also plan to release a special publication expanding upon the themes

which were discussed during the Conference. We hope you find this publication as a useful resource.

This Publication would have obviously been impossible without those who made the Conference possible in the first place. The dedicated team of student volunteers that we have is the backbone of our organizing team. Beyond us students and our faculty, what really makes this Conference possible is the dedicated staff at NALSAR to whom we are extremely grateful. We would like to particularly thank the IT Department led by B Md Irfan Sir for their constant support.

We are grateful to our dedicated team of rapporteurs without whose assistance and excellent transcribing this publication could not have been developed. We would also like to acknowledge Gitika Lahiri for her assistance in the design of this publication and Vishal Rakhecha for his technical assistance towards the digital release of this report.

We are also extremely grateful to our speakers who took the time out of their schedules to go over these transcripts and dealt with our multiple emails. Finally, we would like to acknowledge the constant support and encouragement of Prof. Arun Kumar Thiruvengadam, Prof. Sidharth Chauhan, Vikram Raghavan and our Vice Chancellor, Prof. Faizan Mustafa without whom neither the Conference nor this publication would have been possible.

Any errors are of course, ours and ours alone.

Best,

Dayaar Singla and Gayatri Gupta

Editors

THE COURTS AND THE CONSTITUTION

ON REFORMING TRIBUNALS

Moderator
Vivek Reddy
Advocate, High Court of Telangana

Dr. Arun Kumar Thiruvengadam
Professor, Azim Premji University

Prashant Reddy
Advocate & Researcher, Bangalore
Previously Lead, Judicial Reforms, Vidhi

2019 IN REVIEW

INTRODUCTION

The last panel for the 2nd edition of *The Courts & The Constitution* focused on the issue of tribunals and the implications of the *Rojer Mathew* judgment, delivered in November 2019.

The panel moderator, Vivek Reddy, moved away from the theme of 'reforming tribunals' and instead prompted the speakers to speak on the possibility of abandoning the experiment of tribunals altogether and re-designing the structure of High Courts.

T. Prashant Reddy started his presentation by giving a brief background on judicial tribunals, including the various reasons for their creation and the failure of tribunalisation in India. He touched upon the detrimental bearing of tribunals on centralization of judicial power, reduced access to justice, and impact on federalism. He concluded that litigation of tribunals is symptomatic of a larger crisis in the rule of law.

Dr. Arun Kumar Thiruvengadam has divided his presentation in four sections. Section I provided a brief introduction. Section II analysed the *Rojer Mathew* judgment and discussed the issues of money bill, excessive delegation, and unconstitutionality of the Rules under the Finance Act. Section III addressed the question posed by the moderator, and he suggested that the faults pointed in the Tribunal system were merely reflective of faults which existed otherwise in the legal system as a whole too. Lastly, Section IV took note of the law and politics surrounding the Foreigners Tribunals.

We hope that you enjoy reading through these comprehensive presentations on tribunalisation in India. We would like to acknowledge the assistance of Harsh Jain & Mayuresh Kumar in performing an excellent job in transcribing the proceedings for this panel. The video of this panel discussion can be accessed at the NALSAR University of Law YouTube channel.

VIVEK REDDY[1]

I think the issue of tribunals is not just important for academicians, but also for law students and lawyers. Increasingly our High Courts are now becoming courts which just hear criminal and civil appeals and probably some writ petitions related to civil subjects. All specialized subjects are now going to a separate branch of the judiciary. This new judicial architecture was designed way back in 1987.

There have been 6-7 constitutional benches dealing with the issue of tribunals. My question to the two panelists – Is it now time to abandon this experiment?

Historically, whenever there was pressure on the Government to deal with specialized affairs, we would slice executive power away from the Government and create an independent regulatory agency like TRAI, SEBI or recent Consumer Protection Authority. Similarly, tribunals were an attempt to slice judicial powers away from our conventional High Courts and put them in a dedicated body. Two reasons were given – these dedicated bodies will deal with these disputes with *speed* and *expertise*. Speed and expertise were the two clear arguments.

Almost 30 years in, they have not shown themselves in a remarkable way either on speed or on the issue of expertise. The expertise argument is no longer relevant after the recent *Rojer Mathew Case* because now the proposal is that if they perform judicial functions which a High Court used to perform; we must have the same people sitting over the Tribunals. So, the expertise argument is gone. And on speed, the less said, the better.

So. with every constitutional bench, they have been trying to work in safeguards as to how to make the Tribunals better. But if by the end of the day, we end up in a system where you have the same functions being performed at the Tribunals, minus those safeguards, then is it time to abandon the experiment of tribunals, get these disputes back to High Courts with specialized divisions within the High Court like a tax division, or an insolvency division?

This will enable us to get this expertise within the High Court and you will have the same safeguards provided by the Constitution. The *Rojer Mathew Case* rightly held that we cannot treat the Supreme Court as an appellate body for almost every dispute, we cannot short

[1] Cite as Vivek Reddy, *On Reforming Tribunals*, The Courts & The Constitution- 2019 in Review, NALSAR University of Law, 26th January, 2020.
* Transcribed by Harsh Jain, Edited by Gayatri Gupta.

circuit the High Court and go straight to the Supreme Court from the Tribunals. The Supreme Court is getting clogged even though it is functioning at full capacity. So, these disputes necessarily have to go to the Supreme Court through the High Courts. That is one critical message that *Rojer Mathew Case* has given.

However, this created a special problem. Now if we are going to come through the High Court anyway, then do we really need appellate tribunals since the entire point for them was to take cases away from the High Court jurisdiction? Is it time to re-design the architecture of the High Courts, go back and improve and make our High Courts more robust rather than trying to work on tweaking the Tribunals?

T. PRASHANT REDDY[1]

Since there was only one significant judgment last year on tribunals which is not enough for both of us to speak on, I am going to give a bit of a background to tribunals and Arun Thiruvengadam is going to delve deep into the *Rojer Mathew judgment*.

To begin with, I think it is very important to develop some kind of taxonomy when you are dealing with tribunals because the way the phrase tribunals is used today, it covers a large number of quasi-judicial and judicial bodies. So just for the purpose of this discussion, I have broken it into three categories:

The *first* category is classic tribunals like Income Tax Appellate Tribunal- these are tribunals where there exists a right to appeal to the High Courts or under the writ jurisdiction. This allows for some judicial oversight so they are not the last body for determining law.

The *second* category is designated tribunals. For example, under the Unlawful Activities Prevention Act, a high court judge is designated as a tribunal to decide certain issues and make factual determination.

The first and the second category have not raised significant issues regarding judicial independence. They have relatively been non-controversial. Even if you look at jurisdictions like the United States, they have an entire judicial mechanism within the Government, which is basically administrative law judges who will discharge the quasi-judicial functions and once those remedies are exhausted before the administrative law judges, then you can go before one of the Article 3 Courts for a significant judicial review. So, it is not completely unknown to have some kind of courts within the Government to deal with one layer of dispute.

The *third* category is judicial tribunals. These tribunals would be the focus of our discussion today. These are the Tribunals which have taken over the functions of the High Court. This includes the National Company Law Tribunal, the National Tax Tribunal, Intellectual Property Appellate Board, the National Green Tribunal, the Armed Forces Tribunal, The Central Administrative Tribunal, the Debt Recovery Tribunal. As you can see there is a large chunk of work which has basically shifted out from the High Courts to these

[1] Cite as T. Prashant Reddy, *On Reforming Tribunals*, The Courts & The Constitution- 2019 in Review, NALSAR University of Law, 26th January, 2020.
* Transcribed by Mayuresh Kumar, Edited by Gayatri Gupta.

specialized tribunals, the only exception being the Debt Recovery Tribunals, which took over the functions of district judges. There has been this wholesale shift which has happened.

The birth of these tribunals can be traced back to the 42nd Amendment, which was enacted during the emergency. The 42nd Amendment tackled a lot of issues related to judicial reform which surprisingly survived the 44th Amendment, which had revoked a significant portion of the 42nd Amendment. The 42nd Amendment basically provided for two provisions: Article 323A and Article 323B. One was for tribunals for service matters because there were two committees before emergency which had said that high courts were being inundated with service disputes regarding the bureaucracy and had suggested creating some specialized tribunals for dealing with these disputes. The second provision allowed for the category of tribunals in the wide-ranging subject areas mentioned earlier.

There were two important modifications brought in by the 42nd amendment. *Firstly*, the judicial review of the High Court was excluded. *Secondly*, it never laid down any criteria regarding appointment or removal of judges in these tribunals. There was nothing regarding the qualification, which is very surprising because the entire debate about judicial independence in India, whether at the High Courts or the Supreme Court, is usually regarding appointments and removals because those are considered the two most important criteria to determine judicial independence.

Now, I will briefly cover why exactly these tribunals were created. The conventional logic basically says that it was to deal with delays and pendency. This is also what the earlier committee reports like the Swaran Singh Committee said.

However, if you look at it from the political perspective, which a lot of lawyers do, it was Indira Gandhi who was very miffed with the independence of the High Courts and she decided to claw back their power by creating this entirely separate adjudicatory mechanism. The High Courts had no oversight over these tribunals and she thought that the Government could exercise more control over these tribunals.

The *third* reason which is attributed to the Tribunals is procedural in-formalism. This came after the 1976 Amendment, when there was this entire move towards procedural informalism where policy makers declared war on procedure because procedure was seen as hampering efficient disposal of cases. This move failed to take account of the fact that the

courtroom is a site of complex politics between judges, litigants and lawyers, and just tweaking procedural rules is not actually going to change anything.

The *fourth* justification is that it was an attempt to try and bring in specialization. All these tribunals were expected to bring in technical members, along with the judicial members and the idea was for these technical members to provide some kind of technical expertise. Now nobody really knows what exactly that means because in a lot of cases, for example in NGT or IPAB, the cases are simple administrative law issues, which do not require a technical expert to provide input on certain scientific issues.

The *fifth* justification, and this is just a hypothesis, is that the Central Government at some level was very frustrated with the level of progress being made by the State Governments and High Courts in the arena of judicial reforms. The way the Constitution was originally written, the unitary judicial system had a federated system of judicial administration. This meant that every state government had to provide a certain amount of support and funding to high courts to run and reform the civil court system. Perhaps, the Central Government thought this was a way to cut out the middleman, which allowed them to set up Debt Recovery Tribunals etc., which could then be run directly by the Central Government in a more efficient manner.

Last justification, and again this is a hypothesis of mine, is that there was a capture at some level by the Indian Legal Service. The Indian Legal Service is the cadre which runs the Law Ministry. One interesting thing that you can see in all of the tribunal related legislations introduced since the Administrative Act 1985 is that it provides for the Indian Legal Service members to sit as technical members on these tribunals and eventually get promoted to the position of Vice Chairperson and Chairperson of these tribunals, which gives them a great way to seize power for themselves. Given that these bureaucrats were in charge of drafting these laws, you could argue that there was some amount of conflict of interest over there.

I think everybody will agree that tribunalisation has been a broad failure. The banking crisis is there because the Debt Recovery Tribunal has been an abysmal failure. You have just created the NCLT and have given it a new role without actually seeing if it can discharge it. They did bring in a certain amount of expertise, in the sense that whatever was there in the statute was complied with. However, the way the expert member qualifications were written in law, they did not really have any expertise. For example, a lot of laws allowed for Indian Legal Service members or Indian Company Law Service members to be appointed as expert members

and it is not clear what level of expertise they were bringing into these kinds of disputes. The other problem is that these tribunals mainly became a post retirement haven for judges and bureaucrats.

The two unintended consequences of tribunalisation are the *overwhelming centralization of judicial power* and the *reduced access to justice*.

The overwhelming centralization of judicial power is displayed with the National Green Tribunal. Previously, you were in a situation where you had about 24-25 High Courts which could exercise judicial review when it came to environmental issues and could hear public interest litigations related to environmental issues. Now, you have consolidated that into one tribunal system, which is run by one Chairperson because he is the master of the roster. Now this one person has an incredible influence on how the jurisprudence on that particular area is going to develop in the next few years! So today if the NGT has a "*development-oriented judge*", then the kind of jurisprudence that you will see coming out of it in the next five years is going to be very different. This kind of concentration of judicial power is something that we really need to talk about.

The second point relates to the reduced access to justice in many ways because high courts earlier were very accessible to people in every state capital. In matters like environmental law, it is NGOs and lone wolf litigants who were filing these matters before the High Courts and now, for example, in Hyderabad I don't think there is a NGT bench. The litigant would now be required to go to Madras to file the case, which probably will not happen. Thus, there is a high probability that tribunalization has significantly curbed access to justice.

The last point is the impact on federalism and representativeness. Earlier, the Governor had to be consulted while making appointments to the High Court and there was a guarantee that there would be people from that state who were sitting on that particular High Court. But now, with the centralized system of appointments at the Central Government level, you need to be in the orbit of influence in Delhi to get appointed to one of these tribunals and there are clear trends that judges from Delhi High Court are given a preference when it comes to appointment in a lot of these tribunals. From a long-term perspective, this is very problematic given the original constitutional scheme. So, there has been a kind of a crisis of confidence in judicial tribunals and there have been a lot of case laws which have struck down certain Tribunals.

Now, I just want to focus on two last issues: First, it has been a very difficult area for jurisprudence for the Supreme Court because the Constitution provides for these tribunals and there is very little they can do to strike them as unconstitutional. One approach they followed was to fall back on the basic structure doctrine to say that you cannot exclude judicial review.

The other is this remarkable quote in the 2010 *NCLT judgment*, where Justice Raveendran reads in the separation of power doctrine into Article 14. Justice Raveendran states:

"The fundamental right to equality before law and equal protection of laws guaranteed by Article 14 of the Constitution, clearly includes a right to have the person's rights, adjudicated by a forum which exercises judicial power in an impartial and independent manner, consistent with the recognized principles of adjudication."

I would describe it as a bit of judicial gymnastics. I really like this conclusion but it does not flow from Article 14, it would be quite a stretch. One way to try and justify it, as Abhinav Chandrachud did, is to say that it is an expression of substantive due process doctrine, except the judgment itself does not articulate it in that manner.

The second interesting observation in this judgment is that the judges and the Madras Bar Association were really grappling with getting bureaucrats out of these tribunals. They came up with this rather weird argument, where the Judge said that,

> *"There may be brilliant and competent people even working as Section Officers or Upper Division Clerks but that does not mean that they can be appointed as Members. Competence is different from experience, maturity and status required for the post… Therefore, when the legislature substitutes the Judges of the High Court with Members of the Tribunal, the standards applicable should be as nearly as equal in the case of High Court Judges. That means only Secretary Level officers (that is those who were Secretaries or Additional Secretaries) with specialized knowledge and skills can be appointed as Technical Members of the Tribunal."*

It is very difficult to locate this in any legal principle because the Joint Secretary is almost at the same age or experience as what most High Court Judges would be. So, this issue of status keeps coming into the conversation on tribunals. It is also there in the *Rojer Mathew Case*. They are both interesting examples of where I like the outcomes, but the reasoning is very tenuous and on very thin ice.

I would conclude by arguing that the adjudication or litigation of tribunals is an example of a larger rule of law crisis. We have this tradition in India where the legislature circumvents judicial verdicts by coming out with statutes which "remedy" the so-called wrongs.

But what is remarkable with the tribunal litigation is that every time the Supreme Court strikes down a law, the bureaucracy just brings it in with slight tweaks. They are not even trying to circumvent the judgment in a lot of cases. They are making the exact same errors that were made the first time around and that shows the unwillingness of the bureaucracy to accept the decisions of the Court. This has long term ramifications for our constitutional democracy. This is mainly a bureaucratic- judicial tift and the political class does not really seem to have any stakes in the game. For example, when Narendra Modi became the Prime Minister, he was not really bothered by the Tribunals that were not really working. But there is something happening in the bureaucracy, as evident from the Finance Act 2017, which was atrocious in the manner it was drafted and the way it tried to seize judicial power.

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ARUN KUMAR THIRUVENGADAM[1]

I

In continuation with the theme of the panel that focuses on judgments issued by the Supreme Court on tribunals in the year under review, there are a few judgments that should be kept in mind. I should say that there is the *Rojer Mathew judgment*, which I will discuss briefly, and in the context of tribunals, there is also a ruling by Justice Nariman on an NGT order on Sterlite Industries in Chennai, which also should be considered if you are doing a review on tribunals. While I will not be addressing that, I want to talk about something that Nizam Pasha spoke about earlier, which relates to Prashant Reddy's fairly detailed account on the jurisprudence on how tribunals should be constituted. Nizam adverted briefly to the problematic ways in which Foreigners Tribunals under the NRC process are working. Let me reference two important sources on this point: there is an Amnesty International Report and there is a Law and Other Things blog post by Douglas Mc.Donald Norman on the Foreigners Tribunals. I just want to link that up because it might seem that tribunals are this esoteric technical area of the law, but that body of law actually should have a bearing on what is happening as a part of the NRC process. This is a process in which former Chief Justice Gogoi has played a huge role in. As has Justice Nariman, who has also played a significant role in tribunal jurisprudence.

What is puzzling really and so I think has been a theme that has come over the last two days is this question of - How do we square off this inconsistency? I do want to say that in the last few years law and politics has become very visible even to non-lawyers. In some ways this has been a part of the story of the court all along. I do not think the answer is that we just go to the text and we will find answers in it.

This is the age-old dilemma of constitutional adjudication and constitutional interpretation: you try to tether the power of judges and this is what we call the counter majoritarian difficulty. You try to control them or guide their discretion by having certain rules like stick to text, stick to doctrine, stick to precedent. But for a variety of reasons, in every jurisdiction that you can think of, there is a lot of flexibility and there is this kind of

[1] Cite as Arun Kumar Thiruvengadam, *On Reforming Tribunals*, The Courts & The Constitution- 2019 in Review, NALSAR University of Law, 26th January, 2020.
* Transcribed by Harsh Jain, Edited by Gayatri Gupta.

contradiction that we can see. So even in tribunal jurisprudence, we can see these contradictions.

II

We can see this contradiction in the *Rojer Mathew judgment*, which was delivered last year. I will mention an odd aspect of the judgment delivered in the case. This links to what we have talked in earlier panels about judgments and the *Ayodhya judgment*, one of whose most remarkable features is its unsigned characters. As Professor Mustafa said, we do not know the author of the *Ayodhya judgment* as it has not being signed by any judge. The *Rojer Mathew judgment* purports to be the judgment of the entire court and all five judges have signed it. Then, Justice Chandrachud and Justice Dipak Gupta proceed to issue separate judgments. So, I am wondering: what happens if I disagree with myself when I am writing as part of five people and then sign a separate judgment. We know the idea of a separate concurrence, the idea of a dissent, and the idea of a partial dissent. But how can I sign the majority and then sign a separate judgment where I go beyond the majority. This seems to be an academic point, but a fairly important point when you are trying to figure out where these judges stand on specific issues.

The five-judge principal opinion struck down the Rules which seek to govern the way tribunals were created and appointed. The case is also probably important for the money bill question, which the *Aadhaar Bench* resolved pretty unsatisfactorily. There is a direct acknowledgement of that by the main judgment and then in a tactic which is quite common now, the money bill question and whether the Finance Act could be considered a money bill have been referred to a larger bench. So, the money bill question and whether the Finance Act could also be considered a money bill was not answered by the principal judgment. Only Justice Chandrachud answers it and he says that the Finance Act of 2017 could not be a money bill for the same reasons he had articulated in the *Aadhaar case* as well.

The Finance Act had Rules notified under it which sought to govern the way tribunals would be created and appointed, as Prashant said. (If you want a quick summary of what the Rules notified under the Finance Act 2017 did, you can refer to one of the blog posts that Prashant wrote where he explains the problems with the Finance Act). So, these Rules are struck down by the majority judgment, wherein they said that these Rules are struck down completely and they are problematic.

There was an argument of excessive delegation because too much power was left under the Rules to government officials, in terms of how these appointments would be made. The Court clearly had sympathy for that argument, but it said that there are actually a whole range of Supreme Court decisions which lay down how those things can be done, so it cannot be considered as excessive delegation. But the Court directed the Government to draft new rules and said those rules should be in conformity with the case law through which the Supreme Court, as Vivek Reddy noted, has spent two and half decades in building an elaborate jurisprudence. But I feel some degree of sympathy for whoever is going to redraft these rules because, as Prashant has said, it is not as if from these 25 years of case law, you can determine very clear principles. So, the Rules that were struck down on this ground and the Court said you have to draft new rules. In the interim, the appointments to tribunals shall be governed according to the erstwhile law as it stood before the Finance Act, 2017 and the Rule thereunder came into force.

The Court also added that if the Government has difficulties in appointing tribunal members, it should approach the Court for clarification. The position that you will have to go to the High Court and their Article 226 jurisdictions is to be preserved is not a new position emerging from *Rojer Mathew*. This is simply a reiteration of *L. Chandra Kumar* to a certain extent. I know that there is a dispute as to how the *Chandra Kumar* decision is to be interpreted, but this rationale exists in *Chandra Kumar* as well as the long line of cases earlier. So, the idea that you do not exclude the High Court's jurisdiction is important.

Justice Dipak Gupta disagrees on the excessive delegation point and his judgment addresses that issue at length. Justice Chandrachud provides, I think, a greater elaboration for the main opinion's ruling that these rules are unconstitutional. He also has quite a bit to say on how to deal with the problem (that Prashant has sort of laid out) of the various tribunals, how do you organize them, the various ways to do it. The principal judgment also says that the Government is to conduct a judicial impact assessment of all the Tribunals and their functioning, so I guess this is taken from environmental impact assessment. I think there are now several policy bodies like Vidhi, Daksh etc. which are doing studies on how these tribunals are functioning, and how they are performing overall.

III

Let me now turn to the question that Vivek Reddy as the moderator for our panel put: *Is it now time to abandon this experiment of tribunalisation and instead, focus our energies in*

re-designing the architecture of the High Courts? Let me first say that practicing lawyers have been challenging tribunals for a long time and the argument is that the tribunal system is not doing very well. But as I have argued before, the problem is that of the legal system as a whole. All the problems that you have identified with the tribunals could be argued to exist with the whole judiciary as well. For example, if there's been centralization in one person in tribunals, then we need to also talk about the Chief Justice of India; if there is abuse of the power to allocate cases in tribunals, we need to also speak of the abuse of Master of the Rosters' position, and we need to talk about the power of the Chief Justice of India.

All the faults that we see in the tribunal system, exist in the mainstream judicial system, sometimes to an even greater degree. The argument forwarded by the lawyers for a long time has been that there are problems with tribunals. But there I would say, the definition of Dicey's rule of law includes this argument against tribunals. However, Dicey misunderstood the way the French tribunal system works and this is a result of the typical English intolerance of anything from the Continent.

But the British in later years have been wiser, as have been the Australians. They have understood that Dicey's objections to tribunals need not be taken seriously and they have spent over a century trying to work out a system in which you have a balance between what matters need to be decided by regular courts and what matters need to be sent to tribunals.

So, to the extent that both of you are asking for rationalization, our system is a mess and we do not have clear rules for when cases should go to tribunals and when they should go to regular courts. That criticism is well taken, and I think we need to look for solutions and responses. The Court has directed that we do an impact assessment of the functioning of tribunals, but as we think on ways forward, I would say that other common law systems have dealt with it in particular ways that are worthy studying.

In my chapter on Tribunals, published in the Oxford Handbook of the Indian Constitution (OUP: 2015), I try to make sense of a four-decade long period of case law on tribunals, starting from the 1980s. The starting point, as Prashant indicated, is the 42nd Amendment. To me, perhaps this is why lawyers in India are so virulently opposed to the idea of tribunals. If you look at the history of Article 323-A and Article 323-B, it is very clear that Indira Gandhi, who already controlled the Supreme Court by that time was worried about High Court judges standing up to her, and wanted to bring up a way to hollow out the system of High

Courts during the Emergency period. So that is very clearly the intent. I do not think they made any bones about it, although the Swaran Singh Committee tried to colour it in a different way. We know that during the 44th amendment, the new Janata government did not have the numbers in the Rajya Sabha to undo everything that was done by Indira Gandhi's government, so these provisions remained in the text of the Constitution.

Then when you talk about the complicity of judges in such a project of tribunalisation, again it's not a new trend. There are three broad trends if you look at the cases.

Before I get to the three phases, let us note when tribunals were introduced. I must say that Prashant's classification is a very useful classification. We have tax tribunals from the colonial period and you called them classic tribunals. Then there are designated tribunals. My last submission will be about Foreigners Tribunals that Nizam talked about. They probably come under classic tribunals because these are under the Foreigners Order in 1964 and they flow from that.

The Tribunals that the Supreme Court was concerned with were created through the 42nd Amendment via Article 323A, and Article 323B, and became the subject of the *Sampath Kumar Case*. In 1985, the *Sampath Kumar Case* was decided by Chief Justice Ranganath Mishra and future Chief Justice Bhagwati. Again, it is very interesting to see how the Court interacts with the Government. I will not call it collusion, but it is notable that people challenged the administrative tribunals and the Court came up with a fairly specious logic of describing them as alternatives to the Courts. The Governments, that is the Indira Gandhi and Rajiv Gandhi government after that, were very clear on having the Tribunals and so they are continuing the effort of the Tribunals inaugurated by the 42nd Amendment and the Court salvages them in the *Sampath Kumar Case* using very unsatisfactory legal reasoning.

Soon enough, predicted problems with the structure and functioning of tribunals started emerging. In 1993, Chief Justice M N Rao of the Andhra Pradesh High Court gave a very brave judgment in the *Sakinala Harinath Case*, where he held that the Tribunals created through Articles 323A and B were violative of the basic structure and the *Sampath Kumar Case* just ignored the fact that these provisions sought to take away jurisdiction of regular courts under Article 226 and Article 32.

Four years later, in *L. Chandra Kumar*, a Constitution bench of the Supreme Court agreed with much of what Justice MN Rao said and held that the theory of *Sampath Kumar* of

tribunals being an effective alternative mechanism is wrong. The judges in *L. Chandra Kumar* held that tribunals cannot be substitutes for the Courts and can only play a supplemental role. So that's the first phase from 1985 to 1997. After that there is the phase that continued till 2014 and includes the *R. Gandhi case*, *Madras Bar Association I* & *II case*, *the Debt Recovery Tribunal* and *the Tax Tribunal case*. So, in a way *Rojer Mathew* is not particularly new because it is reiterating the older cases and, in that sense, there is not that much new about its content

IV

I want to conclude with a few comments on the Foreigners Tribunals. It is really quite troubling, as Nizam said, that the same judges who have expressed so much concern about the status of people who are appointed to tax tribunals and consumer protection tribunals do not have similar qualms when it comes to the Foreigners Tribunals. Instead, they have empowered it in ways to take final decisions, to allow no reviews from Foreigners Tribunals, and allowed people with four hours of training to decide questions of life and death for people.

You have to understand why this is so and I think that the 'law and politic' distinction is so apparent here. In the same time that you decide *Rojer Mathew Case* and the 5 judges spent so much time trying to make sure that people on the Tribunals can properly aid the work of courts, it is really troubling that they do not care about the working of the Foreigners Tribunals. Amnesty International's report on the Foreigners Tribunals really makes for a very troubling reading when they give you the statistics of how they function. So, I guess it is a theme that has come up again, as to why so much attention and legal rigor is devoted to a 300-page judgment which deals with a part of the same system while another aspect of the same system is not given that much attention. This is deeply troubling.

My final point is in response to Prashant's theory that tribunalisation is a way for bureaucrats to find post-retirement cushy jobs in the larger judicial system. In the Oxford Handbook that I cited earlier, there is a piece on regulatory institutions and tribunals by TV Somanthan, who is a senior bureaucrat. Somanathan argues that tribunalisation is a way to provide post-retirement jobs to judges. So, I do not know where the truth is and as Prashant alluded it may well be somewhere in the middle. But there is thus a real tension between bureaucrats and judges that we must be aware of.

QUESTION & ANSWER SESSION[1]

Q. [Vivek Reddy] *So, I thought the most impactful of the Rojer Mathew's ruling, which could lead to system reform, is that we have several statutes in India which directly confer appellate jurisdiction to the Supreme Court. The statistics show that almost 20% of the Supreme Court's jurisdiction comes from this. So, for example, from NCLT, it goes to NCLAT and then straight to the Supreme Court jurisdiction. Tax statutes, consumer disputes, securities tribunal, TRAI, all of these statutes allow you to sidestep the High Courts and directly go for the appellate jurisdiction of the Supreme Court.*

Rojer Mathew for the first time says that when you are doing this you are clogging up the Supreme Court and the Supreme Court should spend time debating larger constitutional bench issues, and we are not meant to be a court of appeal. The Supreme Court remanded the matter back to the parliament and said that the Parliament must amend these statutes and come back to us within six months. But forget the reasoning aside, the addition which the Rojer Mathew case makes is that the appellate jurisdiction also has to travel through the High Court.

The entire point of tribunals was to decide these issues faster and the decision of Rojer Mathew's has been the most impactful in this regard. I think the entire reason for tribunals was speed, and if now necessarily you have to travel via the High Court, will this change the future of tribunalisation. How do the panelists think that this will change the future of tribunalisation in India?

A. [*T. Prashant Reddy*] The reason it happened that high courts were given that power in 1996 when *L. Chandra Kumar* was decided, there seems to have been a genuine crisis of confidence about tribunals amongst both the bar and the bench. Both lawyers and judges were not happy. And the question is whether this position has changed significantly over the last 24 years. I think both lawyers and judges will still argue that nothing much has changed over the last 24 years and high courts seem to enjoy much more institutional legitimacy than tribunals. Perhaps, the culture that has built up over 150 years since high courts were the oldest judicial institutions in the country from 1861. So, I don't see this position changing anytime soon unless people in the bar and the bench are more convinced about the legitimacy of these tribunals. They have

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not been able to overcome this crisis of legitimacy that they have been facing since they were created.

A. [*Arun Kumar Thiruvengadam*] I will resist the suggestion that this is an issue of Courts vs Tribunals. We know now what constitutes the docket of the Supreme Court and there is extensive work upon it by a number of scholars. The single biggest factor which accounts for the Supreme Court's docket is the SLPs, which is a discretionary remedy. This is why I keep saying that restraint has to come from the Supreme Court bar and the bench. Stop filing SLPs and stop admitting SLPs. The constitutional jurisdiction of the Supreme Court could be revived and can be salvaged if that is the main focus of the Court.

I would like to see the empirical evidence of how many matters come up from the Tribunals and where that comes up. But really these changes are difficult to bring about. The Court sort of keeps pushing it to other people. Under the Gogoi Court, pendency increased. We now have the largest Supreme Court ever and the pendency is increasing.

So, I don't think the answer is reform of tribunals alone. We also need to look at the political economy of the bar. The same people who will give lectures saying there are too many problems there, look at their own practice and where they are generating unnecessary litigation. The principal people behind the reforms have to be the bar and the bench. Think of all the Tribunal cases and how they are brought by the Delhi Bar Association, Madras Bar Association.

Now the Tribunals have their own bars and that is going to create a difficult political economy because those lawyers will not argue for the disbanding of tribunals which generate a livelihood for them. So, let us not make this about the courts v. tribunals. I think this is a systemic question- it goes down to the way our bar is disciplined, norms of professional regulation, whether there is some regulation of how lawyers' fees are charged. We are acknowledging that these things are problems which create the crisis that we have, and which is a very unique crisis.

That's why comparative insight will not help there because ours is such a peculiar model. It's not just about fixing one downstream effect or the other but we really need to think about much broader issues, as Upendra Baxi termed it in his work, 'Crisis in the Indian Legal System' published in 1982. If there was a crisis in 1982, then this crisis is far deeper and therefore we need to think in a holistic manner as to what is causing these issues.