Historical Paradoxes on Emergence of Administrative Tribunals: Measuring Compliance With These in Bangladesh

Sharmin Aktar

Abstract

Administrative Tribunal has become an indispensable forum to provide a more expeditious, less formal and sometimes less expensive method than the courts for resolving complex disputes to be decided by adjudicators with expertise in the particular field. Recognizing the reality of the concept and considering the demand of the global community, the article aims to explore emergence of administrative tribunals in two opposite legal systems, namely, Common and Civil law. The paper analyses the establishment of this alternative forum from the context of Bangladesh, who relies on Civil Law system taking a little departure from that of Common Law. To substantiate historical phases in different contexts, it interrogates theories, namely, Rule of Law and Separation of Power, which are related to each other on conceptual founding. The article concludes with the view that despite lots of criticisms surrounding emergence of administrative tribunals, this special justice system evolved and enriched Bangladesh side by side the countries noted in the study, though it is not free from vice and does not comply with all requirements suggested by normative analysis.

Introduction and Objectives of the Study

The development of administrative tribunals has been shaped within two opposite streams. Of them, one touches Continental countries wherein there is a special system of administrative courts whose sole concern is with administrative law. Other stream existing in Common Law countries takes a departure from the previous one denying the existence of administrative tribunals, which overwhelmingly creates a paradox. The most striking difference between Common Law and Civil Law system is the absence within Common Law system of any separate administrative courts as they developed in Civil Law countries. The division between the two, so far as emergence of administrative tribunals is concerned, has its firm roots in theoretical discourses. The article is designed to explore historical inconsistencies underpinning the outgrowth of administrative tribunals from the viewpoint of Civil and Common law legal system of with specific reliance on Bangladesh as a base country. The study looks into the emergence of British, USA and

*Lecturer, Department of Land Management and Law, Jagannath University, Dhaka
French administrative tribunals in finding out the establishment of this forum from the context of Bangladesh. Except Bangladesh three countries are chosen for the purpose of this article, though lots of countries are within the ambit of Common and Civil Law systems. To the end of disclosing the growth of administrative tribunals of Bangladesh, the article further briefly narrates Rule of Law and Separation of Powers which are closely related to this domain.

**Methodology**

The whole study is based on qualitative research design. Qualitative research method included content analysis by reviewing of scholarly literature, published writings, cases of the Appellate Division of the Supreme Court of Bangladesh, the Administrative Tribunals Act, 1980, the Administrative Tribunals Rules, 1982 and other incidental laws. The research was relied on both primary and secondary data. It was depended for primary data on the Constitution, Bare Acts, Rules and case laws. Side by side to reach to a satisfactory result, secondary data, like, books, articles, newspaper, annual reports, internet surfing, government’s documents and reports, historical evidence, research publications, presentation papers were reviewed.

**Evolution of Administrative Tribunals in Civil Law System: Focusing on France**

Administrative Tribunals have their roots traced from French system of Administrative Tribunals. In France, there exists dual system of adjudication, namely, Droit Civila, which is equivalent of civil law or municipal law and is administered by civil courts, and Droit administratif, the other branch of law, is equivalent to administrative law and is administered by different set of courts. This French system of two sets of courts was the product of French Revolution as there was a strong demand from the suffering people for a strong and effective check on the excesses of administration. The political thought prevailing in 1789 was in favour of stopping ordinary courts from interfering in activities of the administration. Regarding this issue, Napoleon’s work as a law reformer began while he was still First Consul. As early as 1797, he wrote in his diary:

> We are very ignorant of political and social sciences. We have not yet defined executive, legislative and judicial powers. I see but one feature which we have defined clearly in 50 years—the sovereignty of the people; but we have done no more to settle what is constitutional than in the distribution of powers. The legislature should no longer
overwhelm us with a thousand laws, passed on the spur of the moment, nullifying one absurdity by another and leaving us, although with 300 folios, a lawless nation. 7

The 1791 Constitution had provided: “lestribunaux ne peuvent entreprendresur les fonctions administratives ouci les . . . administrateurs pour raison de leurs fonctions”. 8 In the Constitution of 1799 Napoleon revived the Conseil du Roi under the title of Conseil d’Etat, 9 conferred upon it jurisdiction to adjust administrative disputes and required its authorization for proceeding against government agents, except ministers, for acts connected with their duties. 10 So the droit intermediaire, the law of the revolutionary period between the first session of the Assemblee Champetre of 1789 and the coming to power of Napoleon Bonaparte in 1799, altered the traditional social order with almost unparallel speed and thoroughness. 11 All the institutions, namely, the absolute monarchy, the interlocking powers of king, nobility, clergy, and judiciary, the old territorial division of the country into provinces, the feudal regime of land, the courts system, and the tax system of the ancient regime were rooted out in very short order. 12

However, the French Constitution of 1799 established the Council d’Etat which was the beginning of the system of Administrative Tribunals. The Council of State is one of the oldest institutions of France and its history goes back as early as XIIIth century and it was created by King Philip, the IVth. 13 Then the Council was established in order to give King Philip advice on government issues and to assist him in his mission to deliver royal justice to his subjects. 14 During the French Revolution it was suppressed greatly because it was strongly tied to the monarchy. 15 When Napoleon came to power in 1799, the Council of State was re-established in its modern form. On May 24, 1872 an epoch-making piece of legislation was enacted which gave to the Conseil’s decisions the force of judgments, but at the same time revived the provision for a Tribunal des Conflicts to resolve questions of jurisdiction between the Conseil and ordinary courts. 16 In 1889 the Conseil asserted exclusive jurisdiction of actions involving excess of power by administrative authorities. 17 Despite all the changes of political regimes, this Council of State has survived, since then, up to the present Republic. Since French ordinary courts cannot decide on matters concerning the state, lower level administrative courts were established in 1987. 18
Evolution of Administrative Tribunals in Common Law System: Concentration on USA and England

Undoubtedly the growth and expansion of administrative tribunals in Common Law relates to evolution of administrative law. Before proceeding to the former one, the discourse on the latter one calls attention. Administrative law is as old as government itself and it stems from the proliferation, as a functional response to changing needs of the world community. In its modern connotation it was not recognized as a separate branch of law until the nineteenth century. Indeed, such recognition was not widespread until the twentieth century in the Anglo-American countries and the dominance of private law was the reason for this delay. Administrative law is essentially a part of the private law of persons and in England and the United States administrative law was unknown. However, whether or not administrative law has a proper place in Common Law world is now a dead issue, though the debate about distinguishing public law and private law has been wide-ranging and variously focused and the distinction has contributed to a paradox in legal thinking.

Dicey’s theory that anything like a droitadministratif is incompatible with traditions and principles governing the Common Law have been swept away by the inexorable needs of modern industrial society and the welfare state. In the United States the rise of administrative law is contemporaneous with the need for governmental regulation of industry. Such a need led to the creation in 1887 of the Interstate Commerce Commission (ICC). In the years that followed the creation of the ICC the same need for regulation was felt in other parts of the American economic scene. This was especially true during the period following the economic crisis of 1929. The result has been the establishment of a host of regulatory agencies modeled on the ICC. The most important are the Federal Trade Commission, established in 1914, regulating unfair trade practices; the Federal Power Commission, 1930, regulating water, electric, and gas power; the Federal Communications Commission, 1934, regulating broadcasting and wire communications; the Securities and Exchange Commission, 1934, regulating dealings in securities; the National Labor Relations Board, 1935, regulating labor practices; and the Civil Aeronautics Board, 1938, regulating aviation. American administrative law developed from the operation of these different regulatory agencies, vested with significant powers to determine, by rule or by decision, private rights and obligations. During the 1920s courses on administrative law began to be offered in law schools, the American
Bar Association set up a special committee on the subject, and it came increasingly to occupy the attention of courts and lawyers.

On the other hand, in Britain the development of administrative law is intimately connected with the modern growth of social-service functions of the state. During the sixteenth and seventeenth centuries, the Star Chamber was created, a Supreme Court which dealt with crimes of political significance and the Chamber imposed a strict control over the organs of local government and the exercise of judicial and administrative functions. In the first part of the nineteenth century, Parliament swept aside the archaisms that had become encrusted in the Common Law. Toward the end of the century, it was seen that negative reform of this type was not enough; public opinion required the state to bring ever-increasing parts of the population under its guardianship. The growth of social-service agencies led British jurists of the twentieth century to reject Dicey’s denial of the existence of administrative law. In fact, from the historical Diceyan perspective, the various institutional and procedural shifts of the late nineteenth and twentieth centuries towards a distinct public law applied by specialized administrative tribunals or according to special procedures were threatening departures from tradition. The proliferation of various administrative tribunals to resolve disputes of an expanding and increasingly complex administration were belatedly recognized by Dicey, and denounced by Lord Chief Justice Hewart.

Even afterwards, the report of the Committee on Ministers’ Powers of 1932 and the Report of the Committee on Administrative Tribunals and Enquiries (the Franks Committee) led to the Tribunals and Inquiries Act, 1958 which contributed a lot to the development of administrative law in England. In 1963 judicial attitude towards administrative law was changed when the House of Lords revived the principles of Natural Justice. It was given still further impetus by a group of striking decisions in 1968-69. Since then judges have shown no reluctance to reformulate principles and consolidate their gain. They have pressed on with what Lord Diplock in a case of 1981 described as “that progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of English courts in my judicial lifetime.” At present courts are vigorously asserting their powers, now augmented by the Human Rights Act of 1998, and there seems to be no danger of another relapse. England does not lack ‘public law courts’ – most Tribunals (notably the First tier and Upper tribunals) are effectively public law courts. Different Tribunals, e.g., Employment Tribunals etc.
are now functioning in England and so England is now following Continental countries but in a different dimension.

It is found that important landmarks in the history of Tribunals have been the reports of three major official inquiries, namely, the Donoughmore Report,\textsuperscript{34} the Franks Report,\textsuperscript{35} and the Leggatt Review.\textsuperscript{36} Accordingly, so far as service matters are concerned, if it is looked to the back, it appears that Administrative Tribunals were developed in England before the 20\textsuperscript{th} century, during the 20\textsuperscript{th} century and after.\textsuperscript{37} The King’s Council and the Court of Star Chamber are the oldest Tribunals in England before the 20\textsuperscript{th} century and others existing during that period were Tribunals relating to customs and excise, income tax, and railways. At the beginning of the 20\textsuperscript{th} century, a number of Tribunals were established by statutes, namely, the Old Age Pensions Act, 1908; the Education Act, 1921; the Housing Act, 1919; the Unemployment Insurance Act, 1920; the Roads Act, 1920; the National Health Insurance Act, 1924 etc.\textsuperscript{38} In 1929 there was a sharp reaction against the growth of these adjudicatory bodies.\textsuperscript{39} Lord Hewart, the then Chief Justice, wrote a book titled ‘the New Despotism’, where he launched a scathing attack on the ousting of the court’s jurisdiction and vesting it in the hands of bureaucracy.\textsuperscript{40} The proliferation of various Administrative Tribunals was strongly criticized by him.\textsuperscript{41} The view of the learned Chief Justice had an impact on the thinking of the English government, and it was because of such a reaction that the British government in the same year appointed a Committee on Minister’s Power headed by Lord Donoughmore known as Donoughmore Committee.

Describing the criticism by Lord Hewart against Administrative Tribunals as not well founded, the Committee in its report emphatically supported the independence of Tribunals and reached to a conclusion that there is nothing radically wrong about the existing practice of Parliament in permitting the exercise of judicial and quasi-judicial powers by Ministerial Tribunal.\textsuperscript{42} The Committee made great contribution to the development of Tribunal system in England, although the report of the Committee has, in many respects, been criticized as being unduly legislative and irrational.\textsuperscript{43} Besides, the Committee did nothing to raise their profile.\textsuperscript{44} This led to the setting up of another Committee on Administrative Tribunals and Inquiries under the Chairmanship of Sir Oliver Franks. Soon after the publication of the Report of the Franks Committee, the Tribunals and Inquiries Act of 1958 was passed in England and since then, their status as a part of the judicial system came to be fully recognized. Half a century later, in 2007, following the Report
of another official committee, chaired by a retired judge of the Court of Appeal, Sir Andrew Leggatt, the enactment of the Tribunals, Courts and Enforcement Act of 2007 has put the Tribunal system onto a completely new statutory footing and embedded them even more solidly into the fabric of the judicial system.\textsuperscript{45}

**Analysis on Differences Between Two Domains: Revealing Grim Reality**

In Continental countries there is a special system of administrative courts whose sole concern is with administrative law.\textsuperscript{46} The most striking difference between Common Law and Civil Law system is the absence within the Common Law system of any separate administrative courts as they developed in Civil Law countries. In France the subject has its beginnings in the post revolutionary era, with the setting up of the Conseil d'État at the end of 1799 and the creation within it in 1806 of a separate section to decide cases touching on the validity of administrative action, a function performed by law courts in Anglo-American countries.\textsuperscript{47} The existence of a separate administrative court and its development of autonomous legal principles focused the attention of French jurists upon administrative law as a distinct subject worthy of doctrinal attention.\textsuperscript{48} Due to the presence of jurists, the Council very early began to develop legal standards with which to temper the arbitrary control exercised by the Council over the governmental machinery.\textsuperscript{49} That is why, the predominant aspect of French administrative law, unlike other types of French law, is that it is judge made, in spite of the fact that legislative statutes concerning administrative activity abound, and indeed are multiplying at a truly alarming rate.\textsuperscript{50} At present in most of the Civil Law countries including France, two distinct set of courts are running, one is ordinary courts for civil and criminal cases and the other is administrative courts for administrative matters.\textsuperscript{51}

Therefore, it appears that Administrative Courts in France exist side by side the hierarchy of regular courts.\textsuperscript{52} A main characteristic of judicial system of France is the division between administrative and ordinary courts.\textsuperscript{53} Both these type of courts have their own organization, jurisdiction and procedure.\textsuperscript{54} This complete separation between civil and administrative courts, that might appear a little strange according to Common Law standards, is fairly familiar to most Civil law countries.\textsuperscript{55} They are meant to keep the servants and officials of the state within their grant of power and to provide citizens certain remedies against arbitrarive actions.\textsuperscript{56} The basis of French organization of Administrative Tribunals is the continuous development or division of
Administrative Courts in France exist in both the local and national level; on the local level, Administrative Courts are known as Administrative Tribunals and on the national level, the system is headed by the Council of State, that is, Conseil d’Etat. The order of administrative jurisdictions has three levels of courts: Administrative Tribunals, the Administrative Courts of Appeal and the Council of State, at the top, that acts as a juge de cassation, that is, as a court reviewing only legal and procedural aspects of judgments, but not the assessment of the merits of the case. In England, tribunals are major component of administrative justice system, though some of them are part of the civil justice system; Employment Tribunals are the most well-known example. Tribunals that belong to administrative justice system are, in effect, although not technically, administrative courts and the most important of these are the First-tier Tribunal (FTT) and the Upper Tribunal (UT).

The above discussion shows that administrative law in France is applied by special administrative courts, while in England it is applied in the same courts. Common Law countries did not distinguish between courts for private and public law. For instance, in matters of civil liability, the state was, and often still is, just a normal party in courts of general jurisdiction. Alternatively, Civil Law countries differentiated private from public law. Yet, in the twentieth century, public and administrative law emerged as distinct fields of academic research.

Decisive Theories vs Growth of Administrative Tribunals

Two principles, namely, ‘Rule of Law’ and ‘Separation of Powers’, are connected closely with emergence of administrative tribunals. The first one, namely, the concept of Rule of Law is of old origin. Sir Edward Coke is said to be the originator of this concept, when he said that “the King must be under God and Law” and thus vindicated the supremacy of law over the pretensions of the executives. The concept of Rule of Law has been developed by Dicey in the course of his lectures at Oxford University in his book The Law of the Constitution published in 1885. According to him, “whenever there is discretion, there is room for arbitrariness”.

Rule of Law is not a well-defined legal concept, and the first concept propounded by Dicey, amongst three, means all people and institutions are subject to and accountable to law that is fairly applied and enforced, which is portrayed as the principle of government by law. Rule of Law in its most basic sense, is a system that attempts to protect
the rights of citizens from arbitrary and abusive use of government power.\textsuperscript{71} Rule of Law not only limits the arbitrariness of government but also makes the government more intelligent and articulate in its decision making.\textsuperscript{72} As the literature on Rule of Law is almost endless and it is impossible to consider thoroughly every literature, some of this study examines and evaluates the assumptions and implications of Professor A. V. Dicey.\textsuperscript{73}

The second concept expressed by Dicey, meaning, everyone is subject to ordinary law of the land and officials like private citizens are under a duty to obey the same law,\textsuperscript{74} is relevant to the present article. Utmost effort was spent under the second concept to make a difference between English legal system and that of France.\textsuperscript{75} He criticized French legal system of \textit{droit administratif} in which there were distinct Administrative Tribunals for deciding cases between officials of the state and citizens.\textsuperscript{76} According to him, “exemption of civil servants from the jurisdiction of ordinary courts of law and providing them with special tribunals was the negation of equality”.\textsuperscript{77} He stresses that “there should have no special court or Administrative Tribunal for state officials as is found in French \textit{Droit Administratif}.”\textsuperscript{78} If there is any special court or Administrative Tribunal in any country, there will have no ‘Rule of Law’ in accordance with this second concept discussed by Dicey.

What Dicey says with respect to French Administrative Tribunals is not exactly true.\textsuperscript{79} In fact, Dicey misunderstood the real nature of \textit{droit administratif}.\textsuperscript{80} On the other hand, Dicey’s view was also not right when he presumed that there is no administrative law in England, as the old prerogative remedies did not provide a historical basis for a distinct public law or for administrative law.\textsuperscript{81} Even during his period in England, the Crown and his servants enjoyed special privileges and there were special tribunals having legislative and adjudicating powers.\textsuperscript{82} Dicey himself recognized his mistake later on and observed that “there exists in England a vast body of administrative law.”\textsuperscript{83} Sir Ivor Jennings also elaborated the concept of Rule of Law. In his ‘Law and the Constitution’, he attacked Dicey saying that “Rule of Law framed by Dicey exist in a democratic government which comes through free elections.”\textsuperscript{84} This is in fact the second generation perspective.\textsuperscript{85} There is no conflict between administrative law and Rule of Law. Both aim at controlling arbitrariness of public officials and making them accountable.

The concept was later on extended by the International Commission of Jurists and it was known as the ‘Delhi Declaration’, 1959, which was subsequently confirmed at Lagos in 1961. This Declaration sets three
ideals of Rule of law, namely, (a) establishing and maintaining conditions so that the dignity of man as an individual can be upheld by functions of the legislature; (b) adequate safeguards against abuse of power by the executive are not enough for establishing Rule of Law rather there must be the existence of effective government capable of maintaining law and order and of ensuring economic and social conditions of life for society; and (c) last of all, independent judiciary and a free legal profession. The ‘Delhi Declaration’ of 1959 necessitates adding a few more words. Adequate safeguards against abuse of executive power are not enough rather the government has to be capable of upholding justice and the judiciary to be independent.

Beside the concept of Rule of Law, there is another theory connected closely to Administrative Tribunals and this is the theory of Separation of Powers. Probably the principal doctrinal barrier to the development of administrative process has been the theory of Separation of Powers. Aristotle, Calvin, Jean Bodin advocated Separation of Powers but the writings of Locke and Montesquieu gave the theory of Separation of Powers a base on which modern attempts to distinguish between legislative, executive and judicial power are grounded. Locke divided political power between an executive and legislature, each having independent fiduciary trusts to act for the public good. Locke’s model was dualistic and this is the forerunner to modern separation of powers theories. In the theory it is shown that the legislature is the sole or primary institutional check on executive power. Although Locke argued that the executive has a prerogative power to make exceptional decisions in emergencies, decisions without any institutional accountability whatsoever are not prerogative ones at all. On the other hand, this sort of excessive power of the executive manifests an illegitimate exercise of power, which, in extreme circumstances, threatens tyranny and invites legislative or popular resistance. Furthermore, even in Common Law countries where parliamentary sovereignty prevails, the legislature is no longer the only check but also the courts. However, Locke’s reputation as an author of the separation doctrine is unwarranted as he neither unequivocally recommended it nor conceived it in the modern tripartite form.

The term ‘triaspolitica’ or ‘Separation of Powers’ was coined at first by Charles-Louis de Secondat, baron de La Brède et de Montesquieu, the 18th century French social and political philosopher. This principle has been widely used in the development of many democracies since that
time. He, in fact, took the content of the theory from the development in British constitutional history of the early 18th century. In his words:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end to everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

All the elements of the pure doctrine of Separation of Powers are to be found in Montesquieu’s thought. His theory is invoked to challenge the legitimacy of administrative law, although no separation of powers in the strict sense of the term is possible. Government is an organic unity and various parts are closely interwoven. Therefore, absolute separation of powers is both impossible and undesirable and the theory leads to isolation and disharmony. Realizing these, he, later on, added to these ideas the further dimension of a theory of checks and balances between the legislative and executive powers, drawn largely from the theory of mixed government. The theory of Separation of Powers is characterized as a principal conceptual barrier to the changes and growth of administrative law all over the world. At the same time, it is undeniable that for the growth and expansion of Administrative Tribunals, the doctrine has contributed a lot. Moreover, it had its effect on Frenchman. However, the presence of administrative laws is one of the general characteristics which differentiate Common Law systems from that of Civil Law.

In Search of Administrative Tribunals of Bangladesh: From the British Period Till Date

Bangladesh inherited its legal system from English Common Law, where there is no rigid classification of public and private law. In contrast, in France there is a separate system covering disputes concerning public law and DroitAdministratif with Council d’Etat have separate hierarchy to decide all administrative disputes. Instances of countries are not rare which have adopted a mixed or combination of both systems. Bangladesh is one of them which have adopted a mixed system. Nonetheless, in almost every other aspect, the system of administrative
law and tribunals, as developed by France has gone much further than Common Law world in subjecting administrative process to Rule of Law.100

The first ever Administrative Tribunal in this sub-continent was constituted in 1890 under the Railways Act of 1890. The Tribunal was named as the Railway Rates Tribunal. Not only rates were determined by this Tribunal but disputes of railway employees were also decided. Another example of administrative adjudication is found from the Workmen’s Compensation Act, 1923. The Act provided for the appointment of an authority, called, the Commissioner for Workmen’s Compensation. The Commissioner was empowered to decide disputes regarding the liability of any person to pay compensation to an injured workman who had suffered injury during employment. Another Tribunal, namely, Motor Accident Claims Tribunal was constituted under the Motor Vehicle Act, 1939. The same Act provided for the creation of State Transport Appellate Tribunal. After partition in 1947, these adjudicatory institutions continued to exist. In addition to old institutions, some more Tribunals and special courts came into existence because of multifarious activities of social welfare state. In this regard, the following adjudicatory bodies are worth mentioning: Anti-Corruption Courts, Custom Courts, Courts of Banking Judges, Family Courts, Labour Courts, Labour Appellate Tribunal, Provincial Boards of Revenue (Revenue Tribunal for Each Province), Election Tribunal, Court of Income Tax Commissioner, Income Tax Appellate Tribunal, National Industrial Relations Commission (a Tribunal for industrial disputes), Provincial Bar Council Tribunals and Special Courts for Terrorists Activities.

Though there were several Tribunals, but none of these was related to administrative grievances. Since 1947 up till 1969 there was no special forum where civil servants could get their grievances redressed. All matters related with terms and conditions of service and disciplinary actions were to be challenged in civil courts of the country. A separate forum for civil servants was introduced for the first time by the Governor of West Pakistan through an Ordinance, called, the West Pakistan Civil Services (Appellate Tribunals) Ordinance, 1969. The Appellate Tribunals created under the said Ordinance were empowered to deal only with cases of seniority of civil servants. This Tribunal was not so empowered to co-ordinate actual behavior of governmental executive agencies and to regulate administrative discretion. Nevertheless, prior to independence in 1971, there was a Report of the Law Reform
Commission, 1967-70 recommending for the establishment of Administrative Tribunals. The Law Reform Commission in the said report outlined French administrative justice and recommended for two steps, namely, a) Government should set up an Administrative Tribunal to deal with service matters but the High Court’s jurisdiction under article 98 of the Constitution of 1962 should remain intact and b) the Tribunal should be presided over by a retired judge of the Supreme Court or the High Court, who should have the same security of office as a serving judge. After independence, Government did not take steps to set up Tribunals.

Even before the establishment of Administrative Tribunals of Bangladesh, the first Administrative Tribunal concerning service matters in this sub-continent was established in Pakistan. The Pakistan Constitution of 1973 by its article 212 empowered the legislature of the country to make legislation for the establishment of one or more Administrative Tribunals. The Service Tribunals Act, 1973 has been enacted in consonance with this Constitutional provision and Service Tribunals have afterwards been established accordingly in Pakistan. After independence and for 9 years, Parliament did not pass any law establishing any Administrative Tribunal as envisaged in article 117 of the Constitution. As the exclusionary definition of ‘person’ in article 102 (5) did not come into force, the High Court Division exercised the power of judicial review over service matters for about ten years until the passing of the Administrative Tribunals Act of 1980, shortly, the Act, which came into effect on February 01, 1982. The Act established not only an Administrative Tribunal but also an Administrative Appellate Tribunal.

At present, all over the world the biggest litigant is the government itself. In Bangladesh just three decades ago, lots of cases regarding service matters were hanging in courts and this was a major threat for our judicial system. Prior to the establishment of Administrative Tribunals, the High Court Division had the original plenary jurisdiction of judicial review under article 102 in service matters (concerning the government and public officials) with a regard of appeal to the Appellate Division, and that the civil court’s original jurisdiction under the Civil Procedure Code was subject to the appellate and revisional jurisdiction of the High Court Division, and the Appellate Division had an appellate jurisdiction against the decision of the High Court Division. However, Administrative Tribunals have been established in the country under the Administrative Tribunals Act, 1980 and its present necessity is an undisputed fact. SK
Sinha CJ observed in a case titled, *Government of Bangladesh and Others vs Santosh Kumar Shaha and Others*:

We have almost four hundred thousand cases pending in the High Court Division. The docket is increasing day by day. If this trend continues one day it will not be exaggerated to say that the number will exceed one million in ten years. If this process is allowed, the administration of justice is bound to collapse and the peoples' perception towards the judiciary will erode. This is not healthy for the administration of justice in a democratic country like ours. There may be excesses in the administration and politics and the Tribunal is set up to maintain equilibrium and check the excesses. To meet the above eventuality, it is high time to think over the matter and reduce the docket by decentralizing the power of the High Court Division and Tribunal’s power of Alternative Dispute Resolution should be expanded through subordinate legislations.\(^\text{101}\)

As noted above, article 117 of the Constitution of the People’s Republic of Bangladesh sanctions the setting up of Administrative Tribunals and following this article, the Administrative Tribunals Act, 1980 was enacted on 5 June 1981.\(^\text{102}\) It is a special law dealing with specific issues mentioned therein. The Administrative Tribunals Rules of 1982 have also been made for the discharge of its functions and other incidental matters connected with it.\(^\text{103}\) Accordingly, government by its notification dated the 1st February, 1982, established an Administrative Tribunal at Dhaka for the whole of Bangladesh and on that day the Act came into force. It is noteworthy that Administrative Tribunals of Bangladesh have exclusive jurisdiction over disputes concerning terms and conditions of service of persons who are in the service of the Republic or statutory public authority. There is no controversy and it was emphasized and affirmed in *Sonali Bank vs Ruhul Amin Khan*:

An Administrative Tribunal has exclusive jurisdiction to hear and determine any application made by any person in the service of the Republic or of any statutory authority in respect of the terms and conditions of his service or in respect of any action taken in relation to him as a person in such service but such an application shall have to be made within six months of the making or taking the impugned order or action.\(^\text{104}\)

So far as emergence of Administrative Tribunals in the country is concerned, a question regarding nature of power exercised by them hammers us. It is found that Administrative Tribunals have their habitat in the Constitution in its Part on Judiciary. As these fall under the Part on
Judiciary, it is assumed that they exercise judicial power of the state. This assumption was shot by the observation made by Justice Mustafa Kamal in *Mujibur Rahman vs Bangladesh* in the following words:

I think that the non-obstante clause in the beginning of article 117 (1) excludes this interpretation. Also I think that it was necessary to expressly confer judicial power on Administrative Tribunals. Article 65 of our Constitution vests the legislative powers of the Republic in the Parliament in express terms and article 55 (2), after the 12th Amendment, provides that “the executive power of the Republic shall, in accordance with this Constitution, be exercised by or on the authority of the Prime Minister”. There is no express vesting of judicial power in the Judiciary in our Constitution. I respectfully agree with the rule of construction based on Lord Diplock’s opinion in *Hinds and Others vs the Queen*. If applied to our Constitution, it produces a different result than that submitted by Mr. Ahmed. Our Constitution expressly provides in paragraph 6 of the Fourth Schedule the continuity of the incumbent Chief Justice and the Judges of the erstwhile High Court of Bangladesh in the new dispensation and the transfer of legal proceedings from the previous Courts to the two Divisions of the Supreme Court. Until the provisions of Chapter II of Part VI are implemented, the Constitution provides that the matters provided for therein shall be regulated in the manner in which they were regulated immediately before the commencement of the Constitution. Our Constitution, therefore, expressly intended that the previously existing superior courts shall continue to function, albeit in a new dispensation, and the subordinate courts too shall continue to function. Although the Constitution itself omitted to confer judicial power on the Supreme Court and the subordinate courts by any express provision, there can be no doubt whatsoever that the Supreme Court and the subordinate courts are the repository of judicial power of the state, because they have been previously existing and the Constitution allows them to function, although in a new form.

Tribunals are not pre-existing adjudicative machineries. They are a new creation. Mere placing them in the Part on Judiciary in the Constitution will not make them wielders of judicial power of the state. In their case, there must be an express conferment of judicial power, more so because they are not courts, but tribunals. Since there is none in the Constitution, I hold that Administrative Tribunals do not exercise the judicial power of the state.105

The above noted observation reveals that Administrative Tribunals do not exercise judicial power of the state. More importantly, it appears that Administrative Tribunals are blend of formal court system and
Historic Paradoxes on Emergence

Alternative Dispute Resolution mechanisms. This assertion is clarified while Justice Mustafa Kamal expressed:

Delay in formal court proceedings has recently given rise to a new concept of multitier court-house consisting of the formal court system as well as the Alternative Dispute Resolution mechanisms like conciliation, arbitration and mediation boards. This trend was known to the draftsmen of our Constitution. The Constitution made provisions in article 117 for conferring state’s judicial powers on some Tribunals and enabled the Parliament to make necessary legislation for evolving a system that may in future cumulate some of the attributions which are divided between the formal court system and the growing practice of adjudication of disputes by Tribunals.106

Again, under section 5 (1) of the Act of 1980, the government is empowered by its notification in the official Gazette to establish an Administrative Appellate Tribunal for the purpose of this Act. In exercise of this power, the government by its notification dated the 22nd August, 1983, established an Administrative Appellate Tribunal to hear and determine appeals from any order or decision of an Administrative Tribunal.107 It was impossible for a single Tribunal to deal with enormous number of cases and also was hazardous for all the Bangladeshi litigants to come to this only one Administrative Tribunal at Dhaka. These reasons forced law-makers to set up another Administrative Tribunal at Bogra by a notification dated the 30th May, 1992.108 Necessity was felt again to extend the number of Tribunals and finally five more Administrative Tribunals were established by a notification dated the 22nd October, 2001.109 The territorial jurisdiction of five Administrative Tribunals including the previous two were re-arranged by the said notification and in consonance with the notification, seven Administrative Tribunals are now running inside the country, out of which three at Dhaka, one at Bogura, one at Chattagram, one at Khulna and one at Barisal.

Conclusion

After examining Dicey’s Rule of Law thoroughly, it appears that he did not favour droitadministratif, which explores that he is antagonistic to administrative tribunals, though he was not right in drawing such inferences. As a matter of fact, Conseil d’ Etat afforded much more protection to aggrieved parties in France than regular courts afforded to such persons in England.110 It is revealed that actions of French administration were not immune from the judicial scrutiny of the
Conseil. Alternatively, the British Crown enjoyed immunity under the well-known maxim ‘the king can do no wrong’. There is thus no gainsaying the fact that equality before the law was available in England only in strict sense of the term. Indeed, it is to be supplemented that both Dicey, a British man and Montesquieu, a French man based their doctrines on analysis of the British Constitution, making Common Law legal system a place worthy of praise and Civil Law system a place of exercise of absolute and autocratic powers. The most obvious results of Rule of Law and Separation of Powers are to control officials’ will or whim and in achieving the goal, the former’s proponent affected the growth of administrative tribunals in Britain and the latter’s in France.

So far as Administrative Tribunals are concerned, Bangladesh is not exactly the follower of Civil Law system as the forum of this domain entertains only cases concerning selective service disputes. Again, its position surrounding Administrative Tribunals does not resemble to that of British one. It has adopted a structure wherein the forums are not under the control of civil justice system like England and neither these are completely independent as the highest forum is to date the Appellate Division of the Supreme Court. However, the literature review concerning theoretical framework in this paper appears disregarding Dicey’s Rule of Law. Furthermore, the Constitution of Bangladesh does not theoretically support the doctrine of Separation of Powers. Nevertheless, it was decided that “Separation of Powers’ is one of the basic structures of the Constitution.” The law-makers of the country enacted laws and set this justice system in motion upholding the principle of ‘checks and balances’.

Theories in connection with emergence of administrative tribunals of the England, France and Bangladesh, as discussed in the present article, clearly demonstrate that the dominant trend in administrative jurisprudence is to search for an absolute answer based on a logical finality. But the issues, if analyzed from different paradigms, would indicate to us the paradox of sticking to any fixed just decision. Indeed, the search for efficacy constantly remains a never-ending revisiting of issues and at the same time, this never-ending endeavor is bound to be obstructed to some extent by state laws, since legal decisions can hardly wait for infinite knowledge to reach efficacy. The bottom-line of the argument, therefore, is that both administrative autonomy and judicial intervention are comparative processes requiring an appropriate checks and balances between themselves as well as demand
expediency, prevention of violation of Rule of Law and qualitative adjudication.

**Notes and References**

8. It means that the courts shall not exercise administrative functions nor summon administrators on account of them. It was provided by the French Constitution, 1791, Article 3, Chapter V, Title III
10. See, *The Code Penal*, 1832, Article 75
16. *Supra* note 9


22. Supra note 20

23. Supra note 2 p. 75


25. Supra note 21 p. 706.


27. Supra note 21


29. Ridge vs Baldwin, 1, 1964, AC 72

30. Supra note 28 p. 17


32. Supra note 28, p. 19

33. P. Cane, Administrative Law, New York: Oxford University Press, 2011, p. 4


39. Ibid.

40. S. Chhabra, Administrative Tribunals, New Delhi, Deep and Deep Publications, 1990, p. 4

41. Supra note 21


44. *Supra* note 37 at p. 46


46. *Supra* note 1, p. 5


53. *Supra* note 51


55. *Supra* note 13

56. *Supra* note 5, p. 88

57. According to Claude Albert Colliard, division of labour in the French terminology is a particular aspect of the well known division of powers. On the one hand, by reason of such division of powers, administrative questions and disputes cannot be brought before ordinary courts and some statutes of the Revolutionary Period specially provide such prohibitions, while on the other hand, if justice is to be properly administered, it is necessary to specialize the requirements of labour. See for details, Colliard, C. A. ‘Comparison between English and French Administrative Law,’ 25, *Cambridge University Press*, 1939, pp. 114-144, at p. 121

58. *Supra* note 53

60. Supra note 33, p. 316
61. Ibid.
63. Supra note 18, p. 49
64. Ibid.
71. J. A. Chowdhury, An Introduction to the Constitutional Law of Bangladesh, Dhaka, Northern University Bangladesh, 2010, p. 144
72. Ibid.
73. Supra note 69
74. *Supra* note 68, p. 26

75. Dicey’s comparative view relied heavily on De Tocqueville’s critical description of the French Council of State as the institutional means by which officials were exempted from the operation of French law. See for details, *supra* note 21, p. 707

76. *Supra* note 1


79. See for details, W. B. Munro, *The Government of Europe*, London, Macmillan Company, 1938, p. 558. defines administrative law in France as a system of jurisprudence which, on the one hand, relieves public officials from amenability to ordinary courts and, on the other hand, sets up a special jurisdiction to hold them accountable.


81. *Supra* note 21, p. 705


84. *Supra* note 71, p. 148

85. Accordingly, Rule of Law means the rule by a democratic law, a law which is passed in a democratically elected Parliament after adequate debate and discussion. So, Rule of Law does not mean rule of any law framed by any government. Rule of the dictatorial laws promulgated by a dictator or usurper without democratic participation of the people cannot qualify as law to be binding upon the people. Thus, laws must be general, public, prospective, clear, consistent, and capable of being followed, stable, impartially applied and enforced. Moreover, laws must be reasonably acceptable to a majority of the populace or people affected (or at least the key groups affected) by the laws. See for details, *Ibid.*

86. Jain and Jain expressed: “If the Rule of Law, as enunciated by Dicey, affected the growth of Administrative Law in Britain, the doctrine of Separation of Powers had an intimate impact on the development of Administrative Law in USA” (Jain, M. P. and Jain, S. N., *Principles of Administrative Law*, Nagpur, Lexis Nexis India, 2013, p. 31

87. K. C. Davis, *Administrative Law Treatise*, K.C. San Diego: Davis Publication Company, 1958, p. 31.Indeed, the theory tells that the powers of legislative, judicial and executive should be separated into three organs and
each organ will be entrusted to specific power and each of them will be limited, independent and supreme within its own sphere, Supra note 24 at p. 32. However, it can be contrasted with the fusion of powers in a parliamentary system where the executive and legislature (and sometimes parts of the judiciary) are unified. Ibid.

88. Supra note 82, p. 216


90. Ibid.

91. Ibid.

92. A practical theory of the Lockean constitution must somehow account for the judiciary’s historical development into an independent, third branch of government.

93. S. Ratnapala, ‘John Locke’s Doctrine of the Separation of powers: A Re-Evaluation,’ 38 (1993) American Journal of Jurisprudence, pp. 173-199, at p. 189. There are two major reasons for this criticism. The first is that Locke insists on the existence of one supreme power, namely, legislature on which all others must be subordinate. This implies that Locke regarded the separation of powers as a convenient arrangement but not something vitally important, Ibid. The second reason is that Locke often treated judicial power as part of the executive power and that his threefold separation of legislative, executive, and federative powers does not correspond to the constitutional model which was propounded by Montesquieu and adopted in modern constitutions to greater or lesser extent, Ibid.

94. ‘Separation of Powers-An Overview,’ <http://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx>, last visited on March 04, 2015. His publication, Spirit of the Laws, is considered one of the great works in the history of political theory and jurisprudence, and it inspired the Declaration of the Rights of Man and the Constitution of the United States, Ibid. Under his model, the political authority of the state is divided into legislative, executive and judicial powers (Ibid). He asserted that, to most effectively promote liberty, these three powers must be separate and acting independently, Ibid.

95. Ibid.

96. Supra note 1, p. 39. Then the king exercised administrative powers, Parliament exercised law making powers and the courts exercised judicial powers, I. P. Massey, Administrative Law, Hyderabad, Asia Law, 1985, p. 40. This structural classification of functions of UK government had later on been changed to the parliamentary form of government, Ibid.
This doctrine implied that the courts must not under any pretext interfere with the liberty of administrative action. This principle was accepted by revolutionary assemblies and a law in 1790 was enacted, which declare that the judicial functions are distinct and must be separated from administrative functions. The Constitution of 1781 also forbids the courts to take any action that interferes in the administrative field. This separation of powers was a logical outcome of two features, which characterized the old regime in France. They are the weakness of the courts and overpowering strength of a centralized administration. Because of this doctrine public officials stood relieved of all the responsibility before the ordinary courts of the state for wrong done by them or for acts done in execution of their official duty. For them a separate court like system arose and this is distinct from the regular courts. There are lots of criticisms of this separate body of law for public servants. But the French people have always advocated for administrative law and they neither see anything wrong in it, nor do they demand for its abolition. On the other hand they regard it as “a palladium of their liberties” and as a protection against arbitrary government action.

100. Supra note 20, p. 143
101. Unreported (AD) date of judgment December 15, 2015
102. According to the Notification dated the 12th January, 1982, the number of the Act was Act No. VII, 1981. Accordingly the said Act shall come into force on the 1st February, 1982. But the first Administrative Tribunal at Dhaka was established by a Notification dated the 1st February, 1982
103. The Rules shall come into force on 12 March, 1982
104. 14 (1994) BLD (AD) 17
105. 44 (1992) DLR (AD) 128
106. Ibid. p. 120
110. Supra note 24, p. 12
111. See for details, the Constitution of the People’s Republic of Bangladesh, Articles 115, 116, 22, 55, 65 and 117
112. Anwar Hossain Chowdhury vs Bangladesh, 41, 1989, DLR, AD, p. 165