SECTION 255(7) OF THE INCOME-TAX ACT, 1961: FACELESS INCOME-TAX APPELLATE TRIBUNAL - DOES IT PASS THE TEST OF CONSTITUTIONAL VALIDITY?

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INTRODUCTION

The Income Tax Appellate Tribunal (Hon'ble ITAT) country's first tribunal instituted for administering the appeals under Direct Taxes Act. It is known as the "Mother Tribunal" of India. With its institution in 1941, the tribunal has been discharging it functions in a fair and efficient manner. It was the success of Hon'ble ITAT that inspired the Government to establish similar tribunals. The rulings of the tribunal are final and the next appellate forum from it is its jurisdictional High Court. The appeal in High Court is only admitted if there is a substantial question of law, that makes Hon'ble ITAT the last fact-finding authority.

By virtue of section 86 of the Finance Act, 2021, an amendment was carried on to section 255 of Income-tax Act ("the Act") to bring in new sub-section (7), (8) and (9) with effect from April 01, 2021. The amendment proposed to replace the existing tribunal with "'National Faceless Income Tax Appellate Tribunal Centre". The amendment proposes to change the current mode of physical hearing to a virtual faceless hearing thereby eliminating interface between the appellants.

The manoeuvre of faceless process started with scrutiny assessment. Eventually, the functioning before Commissioner of Income-tax (Appeal) [CIT (A)] was redeveloped in faceless format. Now subsequent to the amendment, the intent of the Government is to change the functioning of the Tribunal into a faceless format thereby eliminating an opportunity of an oral hearing in all the fact-finding stages.

The objective of this research paper is to analyse the constitutional validity of the amended section 255 of the Act. It is divided into four chapters that analyses the due process of law with respect to the functioning of the tribunal, legislative competence, state of law in other countries for faceless courts, digital revolution in judiciary and concludes based on analysis of each chapter. The author for the purpose of analysing legislative competence has assumed that the course of action for notifying faceless ITAT would be analogous to the one of CIT (A).

DUE PROCESS OF LAW AND FUNCTIONING OF THE TRIBUNAL

- Quasi-Judicial Body

The Hon'ble ITAT is a quasi-judicial body instituted under the Income-Tax Act. In Ajay Gandhi v. B. Singh[1], it was held that "The Income-Tax Tribunal exercises judicial functions and has the trappings of a court." In Rajesh Kumar v. DCIT[2], it was observed that proceedings before Tax Authorities is a part of judicial process. It specifically states that the proceedings before the Hon'ble ITAT shall be considered as judicial proceedings within the meaning of Section 193 and 228 of the Indian Penal Code, 1860 and for the purpose of Chapter XXXV of the Code of Criminal Procedure, 1898 the proceedings of Hon'ble ITAT shall be considered of a civil court.

Rule 33 of the Income-tax (Appellate Tribunal) Rules, 1963 states that:

" **Proceedings before the Tribunal.**
33. Except in cases to which the provisions of section 54 of the Indian Income-tax Act, 1922, and/or section 137 of the Act are applicable and cases in respect of which the Central Government has issued a notification under sub-section (2) of section 138 of the Act, the proceedings before the Tribunal shall be **open to the public**. However, the Tribunal may, in its discretion, direct that proceedings before it in a particular case will not be open to the public."

The importance was oral hearing in open court was highlighted in Naresh Shridhar Mirajkar & Ors. v. State of Maharashtra.[3] It was observed that as a general principle all the cases in court shall be in open court. In order to administer justice in a healthy, impartial, and fair manner, public trials in open court are indubitably necessary. The public scrutiny and gaze of a trial operates as a inherent check against judicial notion and it is a potent tool for instilling public faith in the integrity, objectivity, and rationality for the administration of justice.

[1] [2004] 2 SCC (120)
[2] [2006] 287 ITR (91)
[3] [1966] 3 SCR (744)

In Brajnandan Sinha v. Jyoti Narain[4],it was held that "a body or forum must have power to give a decision or a definitive judgment which has finality and authoritativeness which are essential tests of a judicial pronouncement, if it has to be treated as a 'Court'."

In Suraj Mall Mohta and Co. v. A. V. Viswanatha Sastry[5] it was held by the Supreme Court that the hearings before Income tax officer are judicial proceedings. That it is the right of the assessee to inspect the relevant records and documents before he is called to lead the evidence.

One of the most important advantages is that it ensures that courts follow the rules. Nonetheless, practical factors frequently necessitate balancing the goal of open justice against other objectives like as confidentiality, costs, and national security. There are three reasons why open justice is important: First, it contributed in the pursuit for truth and performed a critical role in educating and instructing the people. Second, it increased accountability and discouraged misconduct. Third, it had a psychological purpose by assuring that justice had been served.

The proceedings before the Assessing Officer and the Commissioner of Income-Tax (Appeal) are internal proceedings. The proceedings before Hon'ble ITAT are open to public thereby not subjected to any influence by the parent bodies of income-tax authorities. The rule inherently promotes transparency, efficiency and impartiality. The amendment to Section 255 of the Act directly threatens the quasi-judicial nature of this quasi-judicial body and therefore, is unconstitutional. The most critical aspect of any quasi-judicial institution is the independence of such institution. Independence of the institution remains intact, when there is no interference, internal or external, in the work of the quasi-judicial authority by any person. Further, it is because of this independent nature of the institution that the faith of the taxpayers has remained intact. The moment, there is any transgress in this feature of the institution, the entire institution would crumble down.

The Hon'ble ITAT being a quasi-judicial body must have its independence. The legislature being a different organ mustn't interfere with the functions of the Judiciary. The underlying principle of Doctrine of Separation of Powers is that one organ of the Government cannot

[4] [1966] 3 SCR (744)
[5] [1954] 26 ITR 1 (SC)

exercise or interfere with the functions of any other organ of the Government. It is settled that the Hon'ble ITAT has trappings of a court and is recognisable as a judicial body. In Keshavanand Bharti v. State of Kerala[6] it was held that separation of powers and independence of judiciary is an important part of the basic structure doctrine. The amendment of section 255 of the Income tax Act dictates upon the most essential functions of the judiciary, which amounts to violation of Doctrine of Separation of Powers.

- Audi Alteram Partem

The concept of natural justice takes effect when no individual is treated unfairly in any regulatory or judicial action. The concept of natural justice is founded on the principle of Audi Alteram Partem. Principles of Natural Justice are not just mere formality. There principles reflect significant rights of a citizen. Audi Alteram Partem forms a part of it. It states that no person shall be judged without being heard. The maxim ensures that the parties to the case will have a fair hearing and that the court will not make its verdict until both sides have been heard. Both parties have the ability to defend themselves.

The Principle of Audi Alteram Partem comprises of two elements:

1. An opportunity of hearing must be provided.
2. Such opportunity must be adequate, credible and reasonable.

In Mineral Development Ltd. v. The State of Bihar[7], it was held that "The concept of reasonable opportunity is an elastic one and is not susceptible of easy and precise definition. What is reasonable opportunity under one set of circumstances need not be reasonable under different circumstances."

The opportunity provided should not be a paper opportunity and the same should not be for name sake. It is crucial for effective operation of the case that the parties to the case are given an opportunity of heard whereby they can present their own contentions and respond to the contentions put forward by their opponents.

[6] (1973) 4 SCC 225
[7] AIR 1960 SC 468

The rule of hearing is an essential part of natural justice and applies in the matters before Hon'ble ITAT. In Uma Nath Pandey & Ors v. State Of UP[8] it was held that when a quasi-judicial institution is deciding on a dispute between the parties, compliance to the principles of natural justice is crucial. That the first and most important element is of audi alteram partem.

In P. N. Eswara Iyer v. Registrar, Supreme Court of India[9], it was held that audi alteram partem is the most fundamental part of judicial framework. It further stated that providing an opportunity of fair hearing to the affected party is profoundly ingrained in the principles of the Constitution.

- Oral Hearing – A Statutory Right

Section 254 of the Act specifically states that an opportunity of being heard is to be given to both the parties to the appeal in Hon'ble ITAT. Thus, it is obligatory on the part of Hon'ble ITAT that such opportunity is provided. It is the duty of the Tribunal to provide an opportunity and effectively conduct the hearing considering the facts, contentions and legal position.
In Automotive Tyres Manufacturers' Association v. Designated Authority[10], it was held that written arguments is not an alternative to oral hearing. An oral hearing allows the authority to observe the persona of the witness and clarify its uncertainties.
Oral hearing is an important ingredient of judicial system. It is a framework where judge is personally involved in the assessment of facts and evidences. In P.N Eswara Iyer v. The Registrar, Supreme Court of India[11], it was held:
"23. The magic of spoken word, the power of the Socratic process and the instant clarity of the bar-Bench dialogue are too precious to be parted with…"
In Chief Election Commissioner of India v. M. R. Vijayabhaskar and Ors.[12], it was stated that:
"20. Courts must be open both in the physical and metaphorical sense. Save and except for in-camera proceedings in an exceptional category of cases, such as cases involving child sexual abuse or matrimonial proceedings bearing on matters of marital privacy, our legal system is founded on the principle that open access to courts is essential to safeguard valuable

[8] AIR 2009 SC 2375
[9] [1980] 4 SCC (680)
[10] [2011] 2 SCC (258)
[11] [1980] 4 SCC (680)
[12] [2021] SCC OnLine SC (364)

constitutional freedoms. The concept of an open court requires that information relating to a court proceeding must be available in the public domain. Citizens have a right to know about what transpires in the course of judicial proceedings. The dialogue in a court indicates the manner in which a judicial proceeding is structured. Oral arguments are postulated on an open exchange of ideas. It is through such an exchange that legal arguments are tested and analysed. Arguments addressed before the court, the response of opposing counsel and issues raised by the court are matters on which citizens have a legitimate right to be informed. An open court proceeding ensures that the judicial process is subject to public scrutiny. Public scrutiny is crucial to maintaining transparency and accountability. Transparency in the functioning of democratic institutions is crucial to establish the public's faith in them....."

The Income-Tax Act is innately very intricate in nature. There are comprehensive elucidations that require complex cross-referencing with relevant evidences and establishing how the circumstances in the case are comparable to the factual information of the rulings and judgments so relied on. There is no replacement for expressing the subtleties of difficult subjects face to face, whether in person or via digital mode, no matter how effectively one communicates oneself. Even during Covid-19 the Hon'ble ITAT was functioning virtually whereby parties were allowed to appear through video-conferencing and the process of oral hearing was followed.

In Charan lal Sahu v. Union of India[13], it was observed that "Justice is a psychological yearning, in which men seek acceptance of their view point by having an opportunity of vindication before the forum or the authority enjoined or obliged to take a decision affecting their right."

- Precedent and Jurisdiction

Precedents play an important role in administration of justice. If the Bombay High Court has provided its verdict on particular issue, it would be a binding precedent on all the ITATs in the state. However, if the National faceless ITAT is instituted then there would arise a jurisdictional issue as to which High Court will have a binding effect on the Tribunal.

[13] [1990] 1 SCC (613)

In The Commissioner of Income-Tax v. Thana Electricity Supply Ltd.[14], it was held that the decision of one High Court cannot have a binding effect on other High Courts or other quasi-judicial bodies outside its territorial jurisdiction. It was further held that even the doctrine of stare decesis doesn't empower the decisions of one High Court to have a binding effect on other High Courts. It is only the decision of Supreme Court that shall have a binding effect on all the courts in the country under Article 141 of the Constitution.

It is settled that decision of High Court shall have a binding effect in its own State. However, the assessment is now carried on by the NEAC which is situated in national capital, through its Regional Assessment Centres. Therefore the situs of the Assessing officer becomes obsolete.

In Suresh Desai Associates v. CIT[15], it was held:
"On account of the abovesaid doctrine of precedents and the rule of binding efficacy of the law laid down by the High Court within its territorial jurisdiction, the questions of law arising for decision in a reference should be determined by the High Court which exercises territorial jurisdiction over the **situs of the assessing officer**. Else it would result in serious anomalies. An assessee affected by an assessment order at Bombay may invoke the jurisdiction of the Delhi High Court to take advantage of the law laid down by it and suited to him and thus get rid of the law laid down to the contrary by the High Court of Bombay not suited to the assessee. This cannot be allowed."

The above ratio settles the fact that the jurisdiction of the High Court will be dependent on situs of the Assessing Officer. However, determination of such situs under Faceless Assessment Scheme still becomes a nodus.

- Fundamental Rights

The Principle of Equality is enshrined in Article 14 of the Indian Constitution. It states "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". It is responsibility of the State to ensure that all Indian citizens are treated equally under the law. It is the responsibility of the state to give equal legal

[14] [1994] 206 ITR 727 (Bom)
[15] [1998] 230 ITR (912)

protection to all citizens of India. However, with the manoeuvre to eliminate interface between department and assessee, the State itself has curtailed the opportunity of hearing to the Assessee thereby violating the right of natural justice.

The principle of reasonableness and rationality in the provisions is the desideratum in Article 14. It must also be observed that oral hearing is offered before other tribunals like, Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Competition Appellate Tribunal (COMPAT) and Securities Appellate Tribunal (SAT) etc.

In Naresh Shridhar Mirajkar v. State of Maharastra[16], Bachawat, J. elaborated on open justice as follows "Long ago Plato observed in his laws that the citizen should attend and listen attentively to the trials. Hegel in his Philosophy of Right maintained that judicial proceedings must be public since the aim of the Court is justice, which is a universal belonging to all save in exceptional cases, the proceedings of a Court of justice should be opened to the public." The object behind the hearing in open court has been to provide legal assistance readily available to a person facing trial and it is in consonance with Article 21 of the Constitution.

[16] 1966 SCR (3) 744

LEGISLATIVE COMPETENCE: MINISTRY OF LAW VIS-À-VIS MINISTRY OF FINANCE

- Timeline of Events and the Intent of the Government

Timeline of events

Sr. No.	Date	Event
1.	1961	The Income-tax Act was enacted that contained the provisions for Appeals to Commissioner of Income-tax (Appeals) and Income-tax Appellate Tribunal.
2.	01.02.2020	Finance Bill, 2020[17] was introduced in the Parliament with an explanatory memorandum.
3.	27.03.2020	Finance Act, 2020[18] was enacted which inserted sub-sections (6B), (6C) and (6D) in section 250 of the Income-tax Act, 1961 empowering the Central Government to notify scheme for faceless appeals to CIT (Appeals).
4.	25.09.2020	Notification No. 76 of 2020 notified by under section 250(6B) of the Act rolling out the Faceless Appeal Scheme, 2020.
5.	01.02.2021	Finance Bill, 2021[19] was introduced in the Parliament with an explanatory memorandum.
6.	28.03.2021	The Finance Act, 2021[20] was enacted which inserted sub-sections (7), (8) and (9) in section 255 of the Income-tax Act, 1961 empowering the Central Government to notify scheme for faceless appeals to Hon'ble ITAT.

It is imperative to analyse the intent of legislature to understand the future implication of the amendment on the tribunal.

[17] Bill No. 26 of 2020
[18] Act No. 12 of 2020
[19] Bill No. 15 of 2021
[20] Act No. 13 of 2021

The Finance Act, 2020 empowers the Central Government to notify the Scheme for faceless appeals to CIT (Appeals) by amendment to section 250 of the Act.

The relevant extract of section 250:

"(6B) The Central Government may make a scheme, by notification in the Official Gazette, for the purposes of disposal of appeal by Commissioner (Appeals), so as to impart greater efficiency, transparency and accountability by—
(a) eliminating the interface between the Commissioner (Appeals) and the appellant in the course of appellate proceedings to the extent technologically feasible;
(b) optimising utilisation of the resources through economies of scale and functional specialisation;
(c) introducing an appellate system with dynamic jurisdiction in which appeal shall be disposed of by one or more Commissioner (Appeals)."[21]

Subsequently, within six months of such enactment the Faceless Appeal Scheme was brought into existence under sub-section (6B) of section 250 of the Act by Notification No. 76 of 2020 dated 25.09.2020.

The Finance Act, 2021 empowers the Central Government to notify the Scheme for faceless appeals to Hon'ble ITAT by amendment to section 255 of the Act.

The relevant extract of section 255:

"Procedure of Appellate Tribunal
255. (1) ……
……
(7) The Central Government may make a scheme, by notification in the Official Gazette, for the purposes of disposal of appeals by the Appellate Tribunal so as to impart greater efficiency, transparency and accountability by—
(a) eliminating the interface between the Appellate Tribunal and parties to the appeal in the course of appellate proceedings to the extent technologically feasible;

[21] Sub-section (6B) of section 250 of the Income-tax Act, 1961.

(b) optimising utilisation of the resources through economies of scale and functional specialisation;
(c) introducing an appellate system with dynamic jurisdiction.

….
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The Memorandum of the Finance Bill, 2021 elucidates the reasoning behind the amendment, so made, to section 255 of the Act.

The relevant extract from the Memorandum:

"Provision for Faceless Proceedings before the Income-tax Appellate Tribunal (Hon'ble ITAT) in a jurisdiction less manner

……
In order to ensure that the reforms initiated by the Department to reduce human interface from the system reaches the next level, it is imperative that a faceless scheme be launched for Hon'ble ITAT proceedings on the same line as faceless appeal scheme. This will not only reduce cost of compliance for taxpayers, increase transparency in disposal of appeals but will also help in achieving even work distribution in different benches resulting in best utilisation of resources."

It is pertinent to acknowledge that the elaborate scheme for Faceless Appeals has not been discussed in Parliament due to the rising crisis of the pandemic. However, on perusal of the above mentioned provisions it can be observed that the terminology of the section 250(6B) and section 255(7) of the Act is exactly the same except for the appellate authority. It was subsequent to the amendment to section 250 that the Faceless Appeal Scheme for CIT (Appeals) was introduced by the Central Board of Direct Taxes (CBDT). The relevant extract of the Memorandum to the Finance Act, 2021, establishes that the Government is firm on its view to have a Faceless Hon'ble ITAT thereby reducing human interface and disposing off the appeals. Considering the series of events by the Finance Acts and the subsequent notifications it can be evidently **deduced** that the course of action of issuing notification for faceless appeals before Hon'ble ITAT would be **analogues** to that of the notification issued for appeals before CIT (Appeals), whereby rules will be framed under the Ministry of Finance.

[22] Sub-section (7) of the Income-tax Act, 1961.

- Illegal Delegation

The Faceless Scheme for CIT (Appeals) was issued by Central Board of Direct Taxes. The powers to notify the scheme are derived from section 255 (8) of the Act. The Parliament under Article 246(1) of the Constitution of India has an exclusive power to make laws on subjects mentioned in List I in the Seventh Schedule. Parliament also, under Article 246(2) of the Constitution, has power to make laws on subjects mentioned in List III in the Seventh Schedule. Entry 82 of the List I specifies 'Taxes on income other than agricultural income' and Entry 11A of List III specifies Administration of justice; constitution and organisation of all courts, except for Supreme Court and the High Courts. Thus, power to enact laws in respect of administration of justice and tax rests with the Parliament. Such power cannot be exercised by the CBDT by way of an executive notification.

Furthermore, it must be noted that Hon'ble ITAT functions under the directions issued by Ministry of Law and Justice. The CBDT is under the aegis of Department of Revenue in the Ministry of Finance. The President of the Hon'ble ITAT has the authority to constitute Benches, **regulate procedure of the benches**, transfer members, transfer applications or appeals, etc.[23] The procedure with respect to the functioning of the Hon'ble ITAT should principally be determined by the President of the Hon'ble ITAT.

It is pertinent to notice that the CIT (A) is a party before Hon'ble ITAT. CIT (A) functions under the directions of Department of Revenue under Ministry of Finance. It would be out of bounds if CBDT issues notification with respect to the procedure of Hon'ble ITAT as it would be a framework where Department of Revenue is making law for the Department of Revenue.

In A.K. Kraipak v. Union of India[24], the selection of the post of Chief Conservator of forests was made by a committee in which the one of the member was the acting Chief Conservator of forests. It was held that there was presence of bias and the decision made by the committee was against the principles of natural justice.

The law on this issue is settled that a particular department of the government cannot create law for itself thereby preserving the sanctity and fairness in its functioning. Therefore, notification with respect to the procedural aspects of the tribunal issued by CBDT would certainly be an illegal delegation.

[23] https://www.Hon'ble ITAT.gov.in/files/uploads/categoryImage/RTI/OfficersPowers&Functions.pdf
[24] Writ Petitions Nos. 173 to 175 of 1967

POSITION IN OTHER JURISDICTION

The faceless justice system has been adopted by some countries to combat terrorism whereby the trial of the accused are conducted by faceless judges. The tribunals were instituted for such purpose. Such system was primarily adopted as a consequence of extra-ordinary situation where there is threat to national security.

- Colombia

In 1980's Colombia was going through a difficult time. The violence was at its peak as a cause of Guerilla warfare. The M-19 was accused of being funded by narcotic supplier Pablo Escobar in 1985 to assault the Apex Court of Colombia and destroy information that may have led to his extradition. That attack claimed the lives of up to 95 persons, including 11 judges.[25] The state of warfare was such that the violence against administrators, judges, activists etc. was a daily practice for criminals. The judicial systems were tarnished and the judiciary lost the capacity to hold the criminals guilty as it would lead to the death of judges. In 1991, the Colombian government adopted a new constitution and code of criminal procedure to solidify the judicial system and react aptly to the warfare. The new constitution and code of criminal procedure institutionalised the faceless justice reform approach by creating special courts that ensured the secrecy of judges, prosecution officials, and eyewitness testimony.[26] Special courts were instituted to deal with the cases of drugs trafficking, terrorism, extortion and arms trafficking. In the courts, no one but the prosecutor was in knowledge of the identity of the judge. There was no public hearings granted to the accused. The hearings were held in defensive military fortification that had one way mirrors and sound transmitters were installed for the privacy and safety of judges.

The fundamental goal of the faceless justice system was to improve the operation of judiciary during the peak of the security crisis by eliminating injustice and reducing the risk of judicial authorities and witnesses being killed.[27] However, this strategy eventually failed to achieve its goal. Initially the system acted as a bribe-taking platform: justices, law enforcement

[25] Murphy, H., 2021. Colombia elects ex-guerrilla in sign peace possible. [online] U.S. Available at: <https://www.reuters.com/article/colombia election-idUKN1E79U12R20111031> [Accessed 8 November 2021]

[26] Cidh.org. n.d. THE POLITICAL AND LEGAL SYSTEM IN COLOMBIA. [online] Available at: <http://www.cidh.org/countryrep/colombia93eng/chap.3a.htm> [Accessed 8 November 2021].

[27] Luz Estella Nagle, Colombia's Faceless Justice: A Necessary Evil, Blind Impartiality or Modern Inquisition?, P. 912-913

officials, and bureaucratic personnel working in the framework routinely accepted douceur in return for tampering the evidence. The endeavour to protect criminal justice system and increase judicial capability through this method eventually eroded the court's credibility. The efforts of the administration to develop a reputation of judicial credibility and independence were further undermined by corruption scandals and claims of impunity. Human rights and civil liberties were also sacrificed as a result of faceless reforms.

The Organization of American States condemned the faceless justice method, citing violations of the principles of natural justice and American Convention on Human Rights.[28]

In spite infructuous system, in late 1990's the Colombian Congress enacted a legislation that would prolong the faceless method of conducting proceedings.[29] As a result of such enactment, protests emerged in the country. The human rights organisations and global institutions started putting pressure on the incumbent Government.[30] On 6th April, 2000, the Constitutional Court of Colombia held that the anonymity and in the framework and functioning of special courts violated due process and principles of natural justice. Eventually the laws on faceless judicial systems were struck down.[31]

- Peru

Around 1980, Peru witnessed an internal armed conflict between the then Peruvian Government and the Maoist guerrilla group Shining Path. In 1992, the then incumbent Government enacted laws to deal with terrorism and treason. The laws enunciate rules pertaining to the trail of persons accused of political violence by undisclosed or faceless prosecutors and judges in faceless civilian courts and tribunals. The laws were implemented at a time when the country was suffering from the effects of increasing terrorist activity. The framework was efficient in convicting guerrilla's however it also lead to unlawful detention of hundreds of innocent people. Since 1992, there have been extensive human rights violations by the faceless justice system.[32]

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[28] http://www.cidh.oas.org. 2021. ADMINISTRATION OF JUSTICE AND RULE OF LAW. <http://www.cidh.oas.org/countryrep/Colom99en/chapter-5.htm.> [Accessed 8 November 2021].

[29] U.K. HOME OFFICE, IMMIGRATION AND NATIONALITY DIRECTORATE COUNTRY ASSESSMENT – COLOMBIA (2002), <http://www.unhcr.org/refworld/docid/3c2b4e097.html> [Accessed 8 November 2021]

[30] Larry Rohter, Secretive Colombian Courts Survive Protests over Rights, N.Y. TIMES, June 20, 1999, http://www.nytimes.com/1999/06/20/world/secretive-colombian-courts-survive-protests-over-rights.html

[31] U.K. HOME OFFICE, supra note 30.

[32] Human Rights Watch/Americas, "The Two Faces of Justice," Hrw.org. 2021. Peru. <https://www.hrw.org/reports/1996/Peru.htm> [Accessed 8 November 2021].

In Berenson Mejía v. Peru[33], the author in this case was confined and subjected to inhumane conditions. The Inter-American Court of Human Rights held that the right of fair trial was violated under Article 1– obligation to respect rights Article 8 – Right to fair trial, of American Convention on Human Rights.

A book titled "The Innocents Have Names" was jointly seven human rights organizations, as well as church groups and independent lawyers in November 1995. The book gave details of 300 cases they were defending.[34] The arbitrariness of the courts and their systematic violations of elementary rights of defence and due process have been criticized by several United Nations human rights bodies, as well as the Inter-American Commission on Human Rights. The absence of credibility in justice delivery system led to corruption and ineffectiveness. Eventually in 1997 the Peruvian government announced it would end the highly criticized practice of trying accused terrorists before "faceless" judges.

The Inter-American Commission on human rights also distinguished "faceless justice system as violation of fundamental rights to the defendant. Its Report of Terrorism and Human Rights[35] denounced the use of "faceless" justice systems practised by the Inter-American Commission on Human Rights as violating the right to be tried by a proficient, distinct, and unbiased tribunal, primarily because the secrecy of the prosecution, justices, and witnesses precludes the defendant of fundamental rights. In such situations, a defendant has no way of knowing who is judging or accusing him, and thus has no way of knowing whether that individual is competent to do so, or whether there is any basis to request that these officials extricate themselves due to incompetence or lack of impartiality. With respect to the security of judges it stated that "*The states are obliged to take all necessary measures to prevent violence against judges, lawyers and others involved in the administration of justice. This may in turn require that certain exceptional measures be taken to protect the life, physical integrity and independence of judges on a case by case basis, always providing, however, that the nature or implementation of such measures does not compromise a defendant's non-derogable fair trial guarantees, including the right to a defense and the right to be tried by a competent, independent and impartial tribunal."*

[33] IACHR Series C no 119 (Official Case No)
[34] APRODEH et al, Los Inocentes Tienen Nombre: 300 Historias de Prisión Injusta en el Perú, (Lima: Grafimace S.A., 1995).
[35] Cidh.org. 2021. Report on Terrorism and Human Rights <http://www.cidh.org/terrorism/eng/toc.htm> [Accessed 8 November 2021].

DIGITISATION OF JUDICIARY

- Need for digitisation

The outbreak of novel corona virus has advanced the use of virtual mediums for conducting the court proceedings. The use of technology has been of prime importance to deal with such situation. Technological developments in legal practice have been given a lot of importance in recent times and acknowledgement of it has led to a thought as to what will be the future of law. It makes one wonder why there has been sudden hype in recent years in analysing technological development as browsing, email, search engines, error free software etc. has already been in the market and impacting the legal business.

Digitisation of judiciary acknowledges the most crucial problem of Indian judicial system i.e. affordable legal service and speedy disposal of trial. The efficiency of lawyers will rise when court visits and lengthy waiting hours become the exception. If this method is applied to similar civil cases, court efficiency will dramatically improve.

The use of technology found judicial recognition in precedent of this Court in State of Maharashtra v. Praful Desai[36]. This Court held that the term 'evidence' includes electronic evidence and that video conferencing may be used to record evidence. It observed that developments in technology have opened up the possibility of virtual courts which are similar to physical courts. The Court held:- "Advances in science and technology have now, so to say, shrunk the world. They now enable one to see and hear events, taking place far away, as they are actually taking place…Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. In fact he/she is present before you on a screen. Except for touching one can see, hear and observe as if the party is in the same room. In video conferencing both parties are in presence of each other. Recording of such evidence would be as per "procedure established by law"

In Meters and Instruments v. Kanchan Mehta, it was pointed by the Supreme Court that the "Use of modern technology needs to be considered not only for paperless courts but also to

[36] (2003) 4 SCC 601

reduce overcrowding of courts. There is need to categorise cases which can be concluded online without physical presence of the parties where seriously disputed questions are not required to be adjudicated like traffic challans and cases of Section 138 of the NI Act."

- Current status of Digitisation

The initiation in using digital platforms for judiciary began in the year 2004 by an order of Law ministry to institute an e-committee of the Supreme court. The then Chief Justice of India, Mr Justice R.C. Lahoti, suggested the formation of the e-Committee after recognising the essential requirement to transform India's judicial system by the use of modern technologies and to develop a "National Policy and Action Plan" to incorporate Information and Communication Technology ("ICT") in courts. The e-Committee was set up to facilitate the formulation of a National Policy that would allow the Indian judiciary to prepare for the digital age by adapting and implementing technologies and communication tools that would make the judicial system more coherent, benefiting all stakeholders. The present Chairman of the e-Committee is Justice D Y Chandrachud, Judge, Supreme Court of India.

In India the courts are burdened with vast pendency and long delays causing adversity to the litigants. As per the statistics released by the e-courts committee of the Supreme Court, the total pendency of cases before courts is 3.27 crores.

The "National Policy and Action Plan for Implementation of Information and Communication Technology (ICT) in the Indian Judiciary – 2005" gestated the eCourts project. The objective of the project was to:

i. To provide citizen centric service in an time bound and effective manner.
ii. To create, install and utilize the decision support systems.
iii. To develop judicial efficiency to in order to make judicial system more economical, accessible and transparent.[37]

The e-Committee has released three phases in the eCourts project. Phase I and II have introduced e-filing, judicial services like uploading judgments and order, case status, cause list,

[37] ecommitteesci.gov.in. E-Courts Mission Mode Project. <https://ecommitteesci.gov.in/project/brief-overview-of-e-courts-project/> [Accessed 8 November 2021].

display board, e-service of summons etc.[38] The draft vision of phase III has been introduced by the e-committee on April 20, 2021.[39]

Phase III plans to upgrade the electronic infrastructure of the judiciary. The objective of the phase is to provide digital case registry, a comprehensive repository of case laws, machine readable documents, Interoperable Criminal Justice System ("ICJS"), digital case management systems, e-filing, open digital hearings, service of notice, remote digital assistance, administration of legal aid etc.[40]

However, there are certain limitations to Phase III. The theme of Phase III revolutionises the functioning of courts at scratch of judicial system where there are issues of bandwidth, specifically in remote areas.

There also has to be acceptance as well as literacy with respect to digital courts. Justice DY Chandrachud at the inauguration of Model Virtual Courtroom observed that *"There is a major digital divide in India. We cannot really ignore the fact that persons who access our services do not necessarily have an awareness of access to technology. The common litigants do not necessarily have access to technology which we have as judges. Lawyers again, who are critical to the success of the mission, do not, in many instances, have access to technology which we have. For the simple reason that lawyers perform services in id of society across the spectrum, earning a small pittance of a fee for a junior member of the bar, we have to ensure that we bridge the digital divide for the members of bar."*[41]

Another hurdle to the digital courts is paperwork and e-filing. There is no standard paper filing that is used across the nation. Different High Courts have different method of filing. This can be a greatest hurdle to the digitisation of all records as well as e-filing. With respect to e-filing

[38] Doj.gov.in. Brief on eCourts Project. <https://doj.gov.in/sites/default/files/Brief-on-eCourts-Project-(Phase-I-%26-Phase-II)-30.09.2015.pdf> [Accessed 8 November 2021]; Doj.gov.in. Digital Courts Vision & Roadmap Phase III of the eCourts Project. <https://doj.gov.in/sites/default/files/Draft%20Vision%20Document_eCommittee_0.pdf> [Accessed 8 November 2021].
[39] ecommitteesci.gov.in/. Draft Vision document for Phase III of eCourts Project. <https://ecommitteesci.gov.in/inviting-suggestions-on-the-draft-vision-document-for-phase-iii-of-ecourts-project/> [Accessed 8 November 2021].
[40] Ibid
[41] National Informatics Centre (NIC, O). Event Calendar | Orissa High Court, Cuttack. Orissahighcourt.nic.in. <https://orissahighcourt.nic.in/about-orissa-high-court/event-details/135/11/> [Accessed 8 November 2021].

and digitisation of records Justice Chandrachud stated that *"We are in the process of now commencing a very ambitious scheme of digitising court records across the country. We had set up a broad-based committee of High Court judges as well as experts from the private sector and governmental institutions. A detailed SOP has now been prepared which has now been prepared which has now been unveiled for all the chief justices. We have chosen certain High Courts as pilot high courts for the implementation of the pilot project. Another initiative is to have a nationwide consultant for taking the message forward of digitisation of court records across the country. But the e-filing of cases filed by the state government should be looked at from the perspective of digitisation. Now that we are commencing digitisation, we are digitising legacy records, previous records. Five years down the lane, we should not be required to digitise records all over again. That we can avoid by ensuring that we start e filing of cases in tandem with digitisation of old records. Because it is only when we e-file cases today that we will obviate the need for digitisation in the future."*

CONCLUSION

The Hon'ble ITAT is the last fact-finding authority. The Hon'ble ITAT being the last fact-finding authority has greater obligation and duty to provide a hearing to the party affected under the aegis of the act. To deny such opportunity would lead to unfair conclusions and cause injustice to the party. In the matters involving complex laws like the Income-tax Act, proper hearing needs to be provided.

It cannot be denied that presentation of law and facts verbally is significantly simpler than replicating and communicating them in writing. Granting a reasonable appearance, even via video conferencing can be far more effective than bundles of electronically uploaded submissions, which the judge may or may not read.

It is settled that the Hon'ble ITAT has the trappings of a court. The essential element in the proceedings before the court room is public hearing. Public hearing is the mechanism to keep a check on judicial functioning as well as to ensure transparency. When it comes to transparency, an open court hearing is the best method where all arguments occur in the plain sight of the public. In open court hearings the Revenue and the assessee present their cases before the Hon'ble ITAT in a collegial manner. Written submissions in faceless mode is not a substitute to open court hearings for the purpose of ensuring fairness. In reality, it would completely obfuscate the mechanism. Faceless proceedings at CIT (A) were may be justified in part as it was held behind closed doors with only the Assessee, lawyers and the CIT (A) being present. The best performance of courts all across the globe is due to public hearings. A public hearing is transparent, and the extent of leeway is likewise limited.

Institution of Faceless courts in other parts of world have been for a specific purpose to deal with terrorism emerging within the state. The situation in Peru and Colombia created a compulsion on the respective Governments to secure the sovereignty of the nation. The breakdown of judicial machinery by attacks on judges and judicial officers created a situation of judicial emergency in the state. Such internal war must be observed as an exceptional situation. It must also be noted that the system of faceless courts was eventually withdrawn and was highly criticized because of the human rights violations caused to the innocent people. The fundamental principle and the reasoning for such withdrawal was violation of "audi alteram partem."

The judiciary must be at the disposal of the public's rights in order to ensure an actual reformation of the dispensation of justice. In other words, the judiciary's presence is justified by the preservation of human rights against state and private power abuses. This implies that courts must change their stance on the law since basic rights were originally only legitimate within the confines of the law, they are now only valid within the confines of the fundamental rights.

According to the author, digitisation will revolutionise the future functioning of the judicial system. With Artificial Intelligence changing the perspective of each sector of the society, advancement of judiciary through technology is imminent. Technology has prepped into almost every sector of the society including medical, finance, defence, media, accounting etc. The use of technology in delivery of justice has become essential and will evolve in coming times. As observed by Justice D Y Chandrachud at the inauguration of Model Virtual Courtroom - "Virtual Courts Are The New Symbol And New Image Of the Indian Judiciary." With changing times the judiciary also has to evolve to be in lines with the society. However, Faceless Scheme of Appeals cannot be in lines with the concept of using technology for judicial purposes. Technological advancements must not be installed at the cost of suspension of fundamental rights.

The digital courts or a judicial setup can be instituted for the best use to deal with petty offences. The offences where the footfall is huge and needs a robust system to dispose off the matter quickly. In such cases where the punishment is just of an ordinary fine, the cost and burden on both the government and the accused can be reduced. An example like violation of traffic rules can efficiently be tried online where if the person so accused pleads guilty, he/she can pay the fine and the matter is put to rest; and if the pleads not guilty they can be offered proper hearing before the courts. However, in matters pertaining to complex laws like Income Tax, oral hearing must be provided as the facts and law and the connection between them have to be clearly explained.

The amendment to Section 255 must be dropped. However, if the Government is keen to implement the "Faceless Scheme for ITAT" it must ensure that the scheme is in compliance with principle of natural justice and the legislative competence with respect to formulation of rules must also be taken into consideration. The ITAT has been instituted under the Income tax

Act. The Act empowers the government to frame rules. However, the rules must be formulated with great care and requisite due diligence.

The Scheme for Faceless Proceedings before ITAT" must be formulated with great care and should not be plainly analogous to the existing Faceless Appeal Scheme, 2020, in in compliance with principles of natural justice and the principle of "audi alteram partem" i.e. providing a reasonable opportunity to be heard.

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