

# INDISCRIMINATE TRIBUNALISATION AND THE EXCLUSIVE JUDICIAL DOMAIN: AN ANALYSIS OF THE 42<sup>ND</sup> AMENDMENT IN THE LIGHT OF DECISIONS OF THE SUPREME COURT

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## ABSTRACT

*The last three decades have witnessed a sporadic rise in the transfer of the exclusive jurisdiction of our judiciary to administrative tribunals and other similar specialised adjudicatory fora. While this move, legitimised through a constitutional amendment, may have been presumptively benign and welfare oriented, it would distort the foundations of a well functioning institutional concurrence envisaged by our Constitution. Through this essay the author seek to clinically expose the constitutional and doctrinal infirmities in the Supreme Court's interpretation of the 42<sup>nd</sup> Amendment. While agreeing with normative arguments in favour of 'tribunalisation', it argues that the manner and method in which an exclusive judicial function is transferred to tribunals must be such that 'judicial independence' is not compromised. On another level, this paper questions the Apex Court's view that Parliamentary competence to tribunalise is unfettered, implying that any aspect of judicial functioning can be transferred to these specialised fora. While critical of the Court's disregard towards key issues of controversy in Articles 323 A and B, this essay engages in a comprehensive analyses of tribunalisation from the standpoint of the ruling in R.Gandhi v. Union of India.*

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## I. INTRODUCTION

In 1976, the Parliament introduced Chapter XIV A into the Constitution via the 42<sup>nd</sup> Amendment, thereby making provisions for legislative competence with regard to the constitution of specialised adjudicatory bodies in the form of tribunals. This Amendment sourced such competence through the insertion of Arts. 323A and 323B, dealing with Administrative and other tribunals respectively.

While introducing this Bill in the Parliament, the Statement of Object and Reasons accompanying the 42<sup>nd</sup> Amendment spelt out the need to constitute tribunals in the country in the interests of a more efficient and expeditious justice delivery system. The Bill accordingly stated that Chapter XIV A was being inserted in the Constitution “to reduce the mounting arrears in High Courts and to secure the speedy disposal of service matters, revenue matters and certain other matters of special importance in the context of the socio-economic development”.<sup>1</sup> Thus, while preserving the jurisdiction of the Supreme Court under Art. 136 of the Constitution, it sought to provide for tribunals for dealing with such matters, even while modifying the writ jurisdiction of the High Courts under Art. 226 of the Constitution.

Pursuant to this, Art. 323A provided for adjudication or trial by Administrative Tribunals, of disputes relating to recruitment and conditions of services of persons appointed to public services under the control of the Union of India or the State Government; Clause 2 of this Article dealt with the powers of the Parliament with regard to the jurisdiction, powers and authority to be exercised by such tribunals, as distinguished from judicial courts. Art. 323B on the other hand provided for the constitution of tribunals for other matters as was provided for under Clause 2. Consequently, tribunals were established all over the country for various purposes, in conformity with these two provisions.<sup>2</sup> Since tribunals can only be established through a legislative enactment, and given that their functions substituted the High

1 ¶ 5, Statement of Object and Reasons, The Constitution (42<sup>nd</sup> Amendment) Act, 1976.

2 The Electricity Appellate Tribunal constituted under The Electricity Act, 2003; The Telecom Disputes Settlement and Appellate Tribunal constituted under The Telecom Regulatory Authority of India Act, 1997; The Cyber Appellate Tribunal constituted under The Information Technology Act, 2000; The Intellectual Property Appellate Board under The Patent Act, 1970 and The Copyright Board under The Copyright Act, 1957.

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Courts' jurisdiction, such statutes were considered unacceptable among many quarters of the legal fraternity and challenged on several occasions.

The most significant among these was the Apex Court's ruling in *S.P.Sampath Kumar v. Union of India*<sup>3</sup> which held that tribunals, where so established, could replace the entire jurisdiction of the High Court on matters permitted under Art. 323A and 323B. If these tribunals were interpreted as substitutes to the High Courts then the principle that effectively emerged was that on issues covered by such statutes, the High Courts' powers of judicial review under Arts. 226 and 227 were also lost to tribunalisation. Such was the interpretation provided in upholding the vires of these statutes that in subsequent decisions, the tribunals' powers were interpreted to include the ability to invalidate legislative provisions and executive action.<sup>4</sup> Since tribunals were a creation of the Parliament and not constitutionally prescribed, and members of these tribunals included personnel from the civil services as well, various questions were raised in the context of the separation of the State's powers and the independence of these tribunals. Such challenges, however, always lay against the statute that constituted a tribunal<sup>5</sup> and not against the provisions of Chapter XIV A of the Constitution.

The Constitutionality of the 42<sup>nd</sup> Amendment was not challenged until 1993, when a 3-judge Bench of the Andhra Pradesh High Court<sup>6</sup> struck down Clauses 2(d) and 3(d)<sup>7</sup> of Arts. 323A and 323B respectively, for violating the High Courts' powers of judicial review, which now formed part of the Basic Structure of the Constitution.<sup>8</sup> This decision created a furore in legal circles, particularly because while several statutes in pursuance of these provisions had been a subject

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3 S.P. Sampath Kumar v. Union of India, AIR 1987 SC 386 [Supreme Court of India]. [Hereinafter, "Sampath Kumar"]

4 J.B. Chopra v. Union of India, AIR 1987 SC 357 [Supreme Court of India]; [Hereinafter, "J.B.Chopra"] MB Majumdar v. Union of India, (1990) 3 SCR 946 [Supreme Court of India]. [Hereinafter, "Majumdar"]

5 See L. Chandrakumar v. Union of India, AIR 1997 SC 1125 [Supreme Court of India]. [Hereinafter, "L. Chandrakumar"] In all these cases, the challenge lay against the vires of the statute that created them and not against Arts. 323A or 323B, The Constitution of India, 1950.

6 Sakinala Harinath v. State of Andhra Pradesh, (1993) 3 ALT 471 [Andhra Pradesh High Court]. [Hereinafter, "Sakinala Harinath"]

7 These two provisions provide that laws made in pursuance of Arts. 323A and 323B, The Constitution of India, 1950 could exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Art. 136, The Constitution of India, 1950 with respect to all or any of the matters falling within the jurisdiction of the said tribunals.

8 Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 [Supreme Court of India]. [Hereinafter, "Kesavananda Bharati"]

of controversy in matters before, the Court had specifically refrained from ruling on the vires of the 42<sup>nd</sup> Amendment itself. For a High Court to rule against a Constitutional Amendment passed by the Parliament in pursuance of its constituent powers, became a matter of sufficient urgency to be considered by the Apex Court. This was done in *L. Chandrakumar*,<sup>9</sup> where the Court sought to prospectively review the correctness of six of its own prior rulings<sup>10</sup> on interpretations given to the jurisdiction and powers of tribunals constituted by the Parliament, in the backdrop of the decision of the Andhra Pradesh High Court. Two questions were sought to be answered by the Court here. *First*, whether provisions in Art. 323A and 323B, allowing for the ouster of the entire jurisdiction of all Courts except that of the Supreme Court under Art. 136, ran counter to the High Courts' and Supreme Court's inviolable powers of judicial review under Arts. 226 and 32. *Secondly*, whether the tribunals, being effective substitutes to the High Courts' jurisdiction, possessed sufficient competence to invalidate statutory provisions and executive orders. A detailed analysis of the case is not necessary here; it suffices this discussion to mention that the Apex Court struck against Arts. 323A and 323B on both these questions and resultantly held Clause 2(d) and 3(d) respectively, to be violating the Basic Structure of the Constitution.

Deliberations in the Parliament prior to the passage of the Bill would indicate that this ruling was not very surprising. While moving the Constitution Amendment Bill in the Lok Sabha, the then Law Minister H.R. Gokhale observed: "*It is not correct to say that a tribunal will have the power to issue writs. That power is not given to the tribunal because the power to issue writs is not the power under the conditions of service of the employees. That was an extraordinary remedy ..... given by the Constitution for certain purposes.*"<sup>11</sup> This points towards the intention of the legislators while enacting the Bill, which by itself would provide sufficient guidance in interpreting the scope of such tribunals.<sup>12</sup>

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9 L. Chandrakumar.

10 Sampath Kumar; J.B.Chopra; Majumdar; Amulya Chandra Kalita v. Union of India, JT (1990) 1 SC 558 [Supreme Court of India]; R.K. Jain v. Union of India, (1993) 4 SCC 119 [Supreme Court of India].

11 See 65 Lok Sabha Debates Col. 121 as quoted in K.I. Vibhute, *Administrative Tribunals and the High Courts: A Plea for Judicial Review*, 29(4) Journal of the Indian Law Institute (1987).

12 It is a sound principle of statutory interpretation, often resorted to by the Courts, that the "intention of the legislature dominates". It is therefore elementary that the primary duty of the Court is to give effect to the intention of the legislature as expressed in the words used by it and only later would external considerations be used. See *Ram Krishna v. State of Delhi*, AIR 1956 SC 476 [Supreme Court of India]; *Ashwani Kumar Ghose v. Aurobindo Bose*, AIR 1952 SC 369 [Supreme Court of India].

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With this ruling then, the issues surrounding the validity of the 42<sup>nd</sup> Amendment as such were put to rest. The scenario post-L. Chandrakumar however, saw a sporadic rise in indiscriminate tribunalisation in India.<sup>13</sup> The jurisdiction of Courts in several areas was starting to get whittled down and being transferred to statutorily created tribunals, under the aegis of the executive and legislative arms of the State. Since tribunalisation, as opposed to the creation of Courts, is a Parliamentary act<sup>14</sup> and not constitutionally prescribed<sup>15</sup> and involved transference of judicial powers to non-judicial bodies, concerns were *first* raised in the context of *separation of powers* in India. *Second*, a considerable involvement of the executive in the selection of the members of the tribunal cast doubts over the 'independence of these adjudicatory fora'. These two critical concerns were coupled with undertones of 'dilution of judicial standards' since it was felt that members of tribunals lacked the requisite judicial expertise to deal with matters that were till now dealt with by the High Courts.

These three very vital issues and a plethora of other concerns surrounding the interpretation of Arts. 323A and 323B, were addressed by a five-judge Bench of the Apex Court in *Union of India v. R. Gandhi*,<sup>16</sup> where challenges lay against the vires of the National Companies (Second Amendment) Act, 2002 that sought to establish the National Company Law Tribunal [Hereinafter, "NCLT"] and the National Company Law Appellate Tribunal [Hereinafter, "NCLAT"]. The vires of this Act were challenged on several counts including the competence of the Parliament to constitute these tribunals. This critical analysis of the Apex Court's ruling in *R. Gandhi* is an attempt to examine the constitutional landscape of tribunalisation in India and to examine its limits, lest it should destroy the paradigm of *judicial independence* and *separation of powers* envisaged by the framers of our Constitution.

Critical aspects of the judgment, the issues raised and the reasoning of the Court will be dealt with in Part I of this paper. In Part II, the researcher will

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13 ¶ 5, Statement of Object and Reasons, The Constitution (42nd Amendment) Act, 1976.

14 Arts. 323A and 323B, The Constitution of India, 1950 provide for the creation of Tribunals by specific enactments by the legislature.

15 The creation of Courts, their jurisdiction and constitution has been specifically prescribed by the Constitution under various provisions. For instance, Art. 124, The Constitution of India, 1950 deals with the Supreme Court while Art. 214, The Constitution of India, 1950 deals with the constitution of High Courts in each state. Similarly subordinate Courts have been prescribed in Chapter VI, The Constitution of India, 1950.

16 *Union of India v. R. Gandhi*, (2010) 3 CTC 517 [Supreme Court of India]. [Hereinafter, "R. Gandhi"]

establish that the Court in *R. Gandhi* defectively sourced the competence of the Parliament to enact the NCLT and NCLAT by a wrongful reading of legislative power under Art. 246 and Chapter XIV A. Notwithstanding this observation of the Court's erroneous interpretation, the researcher will attempt to build a case for Parliamentary competence in this regard. In Part III, it will be the researcher's endeavour to examine the arguments in favour of, and against, the pattern of widespread tribunalisation in the country. Issues relating to the *independence of the judiciary* and the context of *separation of power* emerging therefrom and the Court's impressive resolution of these will be dealt with in Part IV while in the concluding part, the researcher will examine the residuary issues and summarise his analysis.

## II. FACTS AND CRITICAL ASPECTS OF THE RULING IN *R. GANDHI*

The Companies Act was amended as a solution to the inordinate amount of delays and the inefficiency of the existing judicial set-up in dealing with the various problems relating to winding up/dissolution of companies. To examine the condition of the existing laws dealing with winding-up proceedings, the Government constituted a High Level Committee on the law relating to insolvency of companies under the Chairmanship of Justice V. Balakrishna Eradi<sup>17</sup>; the purpose was additionally to remodel the law in line with the latest developments and innovations in corporate laws and governance and to suggest reforms to the procedures followed at various stages in insolvency proceedings of a company in order to avoid unnecessary delay, in tune with international practices in the field. The Committee found that multiplicity of court proceedings was the main reason for delays in such matters. Given that there existed several different agencies dealing with different aspects of Company matters, it was recommended that a solution to this problem would be in consolidating the jurisdiction of all related matters by constitution of the NCLT and the NCLAT. Consequently, the Companies Act was amended in 2002 to provide for constitution of these tribunals and to vest in them all the powers and jurisdiction of the Company Law Board, the Board for Industrial and Financial Reconstruction, the Appellate Authority for Industrial & Financial Reconstruction and the entire jurisdiction of the High Courts relating to Company Law matters.

Such wholesale transfer of the High Courts' jurisdiction was challenged before the Madras High Court on two counts. *First*, it was contended that the Parliament

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<sup>17</sup> The Justice Eradi Committee On Law Relating To Insolvency Of Companies was constituted on 22-10-1999. It submitted its recommendations on 02-05-2000.

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did not have the competence to vest intrinsic judicial functions that have been traditionally performed by the High Courts for nearly a century in any tribunal outside the judiciary. It was argued that Art. 323B of the Constitution enables the appropriate Legislature to provide for adjudication or trial by tribunals of disputes, complaints or offences with respect to all or any of the matters specified in Clause (2). This list was, however, exhaustive and not illustrative. Given that winding-up/dissolution of companies was not specifically enumerated in it, it did not provide for Parliamentary competence. *Second*, it was argued that constitution of the NCLT and transferring the entire company jurisdiction of the High Court to a tribunal which is not under the control of the judiciary, would violate the doctrine of *separation of powers* and *independence of the judiciary*, which are parts of the Basic Structure of the Constitution. However, the High Court, finding no merit in the first set of arguments, held certain parts of Chapters 1B and 1C to be unconstitutional and ruled that the Act would be perfectly valid once those defects were removed.

This case is significant for various reasons. To begin with, it turned on an interpretation to Arts. 323A and 323B that demonstrate significant power on the part of the legislature to encroach into the exclusive domain of the judiciary and limit the latter's jurisdiction. It is also significant because the case specifically dealt with Parliamentary competency with respect to altering the jurisdiction of the High Court (since the Supreme Court's jurisdiction is kept intact under the mentioned provisions). As the researcher will submit in the later parts of this article, the High Court and the Supreme Court together form the backbone of the judicial arm of the State and as such, the independence of the judiciary hinges extraordinarily on its insulation from the control of the legislature and the executive. Therefore, an interpretation of these constitutional provisions permitting restrictions on the hitherto exclusive jurisdiction of the High Court would seriously compromise the same. The other reason why this case is significant is because of the interpretation relating to the list of matters in Clause 2 of Art. 323B. If this list is held to be merely illustrative and not exhaustive, it would entail unbridled Parliamentary power to encroach over the exclusive judicial domain. The logical end of this power would be indiscriminate tribunalisation in the country, leaving the judiciary very weak in relation to the other organs.

On three previous occasions in the *post-L. Chandrakumar* era, the Apex Court had the opportunity of dealing with similar functional interpretations of Arts. 323A and 323B but had refrained from examining such issues.<sup>18</sup> While all these cases

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18 L. Chandrakumar; Union of India v. Delhi Bar Association, (2002) 4 SCC 275 [Supreme Court of India]; State of Karnataka v. Vishwa Bharati Housing Building Cooperative Societies, (2003) 2 SCC 412 [Supreme Court of India].

held that the Parliament possessed the requisite competence to effect changes in the original jurisdiction of the High Courts and Supreme Court, they did not deal with two critical issues. These were:

- i) To what extent the powers and jurisdiction of High Courts (excepting judicial review under Arts. 226 and 227<sup>19</sup>) can be transferred to tribunals?
- ii) Whether the "wholesale transfer of powers" as contemplated by the Companies (Second Amendment) Act, 2002 would offend the constitutional scheme of *separation of powers* and *independence of judiciary* so as to aggrandize one branch of the government over the other?

The importance of *R. Gandhi* then lies in that it tried to solve the conundrum of Parliamentary competence in this regard, though – as it will be later argued – unsatisfactorily. The majority in the case upheld the High Court's ruling, holding that Parliamentary competence in this respect was proper. The Court ruled that Art. 323B was but an enabling provision and not the sole repository of Parliamentary competency to establish tribunals. What then is the source of legislative competency? The Court answered this question by referring to Entries 77, 78, 79 and Entries 43, 44 read with Entry 95 of List I<sup>20</sup> and Item 11A read with Entry 46 of List III<sup>21</sup> of the Seventh Schedule. The said Articles cannot, therefore, be interpreted to mean that they prohibit the legislature from establishing tribunals

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- 19 Since this matter was settled in *L. Chandrakumar* where Arts. 323A(2)(d) and 323B(3)(d) were struck down.
  - 20 "77. Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practice before the Supreme Court."  
"78. Constitution and organisation (including vacations) of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practice before the High Courts."  
"79. Extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of a High Court from, any Union territory."  
"43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations, but not including co-operative societies."  
"44. Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities."  
"95. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List; admiralty jurisdiction."
  - 21 "11A. Administration of Justice; constitution and organisation of all courts, except the Supreme Court and the High Courts."  
"46. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List."



not covered by those Articles, provided there is legislative competence under the appropriate Entry in the Seventh Schedule.<sup>22</sup>

The Court also engaged in a discourse on tribunalisation, drawing heavily from comparative references in order to establish that a true paradigm of *separation of powers* cannot exist in a welfare state such as India; in doing so, it built a case for the need for tribunalisation in India.<sup>23</sup> Briefly put, the Court did this in three steps. It first examined the issue of *separation of powers*, explaining that India did not incorporate the doctrine in its true form and that deviations from the doctrine were in fact permitted by our Constitution.<sup>24</sup> Next, the Court tried to establish a context for arguing that tribunalisation in a welfare State such as ours is an absolute necessity. In the words of Raveendran J.,

*"All litigation in courts get inevitably delayed which leads to frustration and dissatisfaction among litigants. In view of the huge pendency, courts are not able to bestow attention and give priority to cases arising under special legislations. Therefore, there is a need to transfer some selected areas of litigation dealt with by traditional courts to special Tribunals. As Tribunals are free from the shackles of procedural laws and Evidence Law, they can provide easy access to speedy justice in a 'cost- affordable' and 'user-friendly' manner."*<sup>25</sup>

Finally, the Court concluded this argument by making recommendations towards the better functioning of tribunals in India.<sup>26</sup>

The Court subsequently looked into the issues surrounding the vires of Chapters 1B and 1C of the Act. The concern here was whether judicial functions can be transferred to tribunals manned by persons who are not suitable or qualified or competent to discharge such judicial powers or whose independence is suspect. Advancing reasoning along the lines of the requirement of *procedural*

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22 In the next section, the researcher will explain why this interpretation of the Court is constitutionally defective, giving reasons based on both normative rules of interpretation and the true interpretation of the said Entries of Schedule VII, The Constitution of India, 1950. It will be submitted that the issue of Parliamentary competence is not satisfied by referring to either Art. 323B, The Constitution of India, 1950 or the abovementioned Entries. Therefore, the Court could not have upheld the same.

23 In Part III, the researcher will submit arguments in favour of the Court's reasoning, contending however that the Court has failed to prescribe the limits of such a need for tribunalisation.

24 ¶¶ 15-17, R. Gandhi.

25 ¶ 18, R. Gandhi.

26 ¶ 20, R. Gandhi.

*due process*, the Court examined the constitution and eligibility requirements of members manning the tribunals. In doing so, certain provisions of these Chapters were struck down as being against the vires of the Constitution. The background to these arguments was based in the arena of *independence of the judiciary*. It was reasoned that if these Tribunals were in fact performing the functions of judicial bodies, their functioning must be as similar as possible to that of the judicial bodies and therefore must be, ironically, as free from executive interference as possible. Given that the executive has a pivotal role in the selection of these members, and that high level members of the civil services do in fact constitute the technical members of these tribunals, this issue was like an attempt to save a wrecked ship. The Court went forward in this regard by passing guidelines as to who would be appropriate to be appointed as members, who wouldn't and what would be the minimum qualifications necessary for a person to be so appointed.<sup>27</sup>

The Apex Court thus upheld all aspects of the statute, barring reserved portions of Chapters 1B and 1C. This decision has attracted mixed responses from various quarters, and as the researcher's arguments will expose, such responses are justified. While it would seem that the Court was rather predisposed towards ruling in the Government's favour regarding competence, this 7-judge Bench has been very pragmatic in its approach towards the procedural components of this Act. Notwithstanding the merits of the ruling, in the concluding section, the researcher will sum up his main arguments and recommend an alternative model that could have been adopted by the Court.

### III. LEGISLATIVE COMPETENCE WAS SOURCED IN A DEFECTIVE READING OF CONSTITUTIONAL PROVISIONS

The preliminary question before us is whether Chapter XIV A is the sole repository of Parliamentary power to constitute tribunals or whether such a power can be traced to other parts of the Constitution as well. If the former were the case, then we would be compelled to examine if the power conferred under Art. 323B is unbridled, enabling the constitution of any kind of tribunal, or if the list provided by Clause 2 is necessarily exhaustive. On the other hand, if the source of Parliamentary competence is traced to other parts of the Constitution, then the

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<sup>27</sup> All these aspects have been looked at in Part IV, which contains an analysis of the Court's observations on the Basic Structure Doctrine, its application of the doctrine of procedural due process and other issues and how these have assisted the Court in its ruling. The submissions here would all be in favour of the Court's application of these norms, observing however that in certain respects the Court's stand might be slightly paradoxical.

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question would be what is the real need to amend the Constitution to insert a mere enabling provision such as this.

The Court in *R. Gandhi* did not really answer this question. Although it was contended before it by the Madras Bar Association that Art. 323B is the sole repository of legislative competence, the Court did not accept this contention. Instead, the source of parliamentary power was held to be derived from Entries 77-79 read with Entries 43 and 44 of List I; the competence to establish additional tribunals then, according to the Court, could be established by reading these with Entry 95 of the Union list in the Seventh Schedule. It is submitted that this reading of the Lists is flawed on two levels. *First*, on a primary level, based on normative constructions given to statutory provisions, it would be preposterous to assume that Chapter XIV A of the Constitution was inserted only as an enabling provision if (as the Court held) Parliament already had the competence to tribunalise. Furthermore, even if this was merely an enabling provision, it would make little sense to enumerate a list of permissible matters for tribunalisation that was intended to be merely illustrative, since a broad power to institute tribunals should already have been conferred under the said Entries. *Second*, assuming that legislative competence could in fact be traced to the Entries, it will be established that the said Entries deal only with the constitution of 'Courts' and not 'tribunals'. Given that the Constitution has in various parts expressly drawn a distinction between 'Courts' (strictly construed) and 'tribunals', it would be constitutionally defective to remove the distinction when it comes to other parts. While the Entries in the Lists are to be broadly construed,<sup>28</sup> it will be established that the extent of such an interpretation cannot contravene constitutionally prescribed limits.

Clause (1) of Art. 323B reads,

*"The appropriate Legislature may, by law, provide for the adjudication or trial by tribunals of any disputes, complaints, or offences with respect to all or any of the matters specified in clause (2) with respect to which such Legislature has power to make laws."*

It is submitted that the words "*all or any of the matters specified in Clause (2)*" were inserted to indicate that legislative competence would extend to only matters enumerated in Clause (2). Now, Chapter XIV A could not have been inserted into the Constitution merely as an enabling provision as such a suggestion goes against a very fundamental norm of Constitutional interpretation - that its provisions are not

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28 See *Union of India v. H.S. Dhillon*, AIR 1972 SC 106 [Supreme Court of India]; *Hoechst Pharmaceuticals v. State of Bihar*, AIR 1983 SC 109 [Supreme Court of India]; *Profulla Kumar v. Bank of Commerce*, AIR 1953 PC 60 [Privy Council].

superfluous but precise.<sup>29</sup> Where an interpretation of one part of the Constitution would render another part wholly superfluous, such an interpretation must be avoided since it is presumed that the Parliament made such an amendment for a specific reason.<sup>30</sup> If the Parliament were aware that its power to create such tribunals could be derived from parts beyond Chapter XIV A, it would be of little doubt that this Amendment would not be necessary. So, if the entire chapter on constitution of tribunals is to be read only as an enabling provision, and, in cases such as *R. Gandhi*, the Court is free to disregard this chapter and locate the power elsewhere, the entire purpose of this part of the Constitution is rendered futile. This would in effect mean that for matters located within Art. 323A and Clause (2) of Art. 323B, legislative competence could be located in the said chapter; for all other matters, it would be located in a joint reading of the Entries.<sup>31</sup> As a result, legislative competence in transferring the jurisdiction of the Courts to statutorily constituted tribunals would be limitless. That obviously cannot be the intention of a document purporting to be a limit on the government's power.<sup>32</sup>

The alternative view is that Chapter XIV A provides guidance to legislative competence derived from such a reading of the lists. Even if this position is accepted, it only strengthens the position that Clause (2) is to be construed as limiting the power of the legislature. Since it cannot be accepted that both Chapter XIV A and Art. 246 were intended to confer the exact same power, one must be interpreted to guide the other. In such respects, the narrower provision is seen to limit the powers conferred by the broader provision. This rule directly follows from the position of law regarding the situation when one enactment seeks to clarify the position of a previous enactment. In such a case, the subsequent enactment, which has sought to clarify the consequence and true effect of the previous enactment,

29 See V.P. Sarathi, *Interpretation of Statutes*, 436 (4th edn., 2003).

30 *Ghanshyamdas v. CST*, AIR 1964 SC 766 [Supreme Court of India]; *Gamini Krishnayya v. Guraza Seshachalam*, AIR 1965 SC 639 [Supreme Court of India]. See also V.P. Sarathi, *INTERPRETATION OF STATUTES*, 261 (4<sup>th</sup> edn., 2003): "It is well established that a statute should be construed so that each of its provisions is given full effect; interpretations which render parts of a statute inoperative or superfluous are to be avoided." See also comparative references on such a rule of constitutional interpretation in *Quarles v. St. Clair*, (1983) USCA5 1008 [United States Court of Appeal, 5<sup>th</sup> Circuit]; *Duke v. University of Texas at El Paso*, (1981) USCA5 1583 [United States Court of Appeal, 5<sup>th</sup> Circuit]; *Beisler v. Commissioner*, (1987) USCA9 614 [United States Court of Appeal, 9<sup>th</sup> Circuit].

31 This is derived from the maxim *Clausula generalis de residuo non ea complectitur quae non ejusdem sint generis cum iss speciatim dicta fuerint*: A general clause of residuary things does not take in those things which are of the same kind as those which have been specifically mentioned.

32 U. Baxi, *The Crisis of Legitimation of Law*, *THE CRISIS OF THE INDIAN LEGAL SYSTEM*, 4-5 (1980).

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will have to be given utmost importance, and its words must be restrictively interpreted in order to construe the interpretation correctly.<sup>33</sup>

The Court in *R. Gandhi* seeks to locate Parliamentary competency to constitute tribunals in a joint reading of certain Entries of List I and List III along with the powers under Arts. 246 and 247 of the Constitution. Art. 247 provides for Parliamentary powers with regard to the establishment of any additional courts for better administration of laws made by Parliament or of any existing laws with respect to a matter enumerated in the Union List<sup>34</sup> made under the powers conferred upon it by Art. 246(1).

In essence, the Court reasons that if Entries 43 and 44 of List I, dealing with the regulation and winding up of corporations, were to be seen in the light of Parliamentary competence to deal with the constitution, organisation and alteration of the jurisdiction of High Courts under Entries 79 and 95<sup>35</sup>, this would suitably provide for Parliamentary competence with regard to constitution of tribunals on the said matter. Two flaws exist in such reasoning. *First*, the Apex Court misconstrues the distinction of a court strictly so called, such as the High Court; it thereby concludes that Parliamentary prerogative to establish 'Courts' includes the power to constitute 'tribunals'. *Second*, the power to exclude the jurisdiction of the High Courts, referred to in Entry 79 of List I, deals only with so-called 'territorial jurisdiction' and not 'subject-matter jurisdiction'.

In *R. Gandhi*, the Court engages in a detailed analysis, pointing out the distinction between 'Courts' and 'tribunals',<sup>36</sup> observing that while every Court is a tribunal, every tribunal may not be called a court. Courts are agencies of the judiciary which is an organ of a State; this definition is not applicable to tribunals. It is pointed out that while 'Courts' are bound by strict norms of conduct of judicial proceedings and procedural requirements, such is not the case with tribunals. Therefore, while the functions discharged by both may be substantially the same, the approach taken by 'Courts' is different from that of the 'tribunals'.

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33 V.P. Sarathi, *INTERPRETATION OF STATUTES*, 431 (4<sup>th</sup> edn., 2003).

34 Art. 247, *The Constitution of India*, 1950.

35 The Concurrent List (List III, Schedule VII, *The Constitution of India*, 1950) similarly enumerates the matters with respect to which the Parliament and legislature of a state will have concurrent power to make laws. Entry 11A, List III, Schedule VII, *The Constitution of India*, 1950 refers to administration of justice, constitution and organization of all courts except the Supreme Court and the High Courts. Entry 46, List III, Schedule VII, *The Constitution of India*, 1950 refers to jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in List III, Schedule VII, *The Constitution of India*, 1950.

36 ¶ 12, *R. Gandhi*.

This question was delved into in the case of *Harinagar Sugar Mills Ltd. v. Shyam Sundar Jhunjhunwala*<sup>37</sup> where the Apex Court precisely explained the distinction between a 'Court' strictly so called, and a 'tribunal'. This was done succinctly by pointing out that when the Constitution speaks of 'Courts' in Arts. 136, 227, or 228 or in Arts. 233 to 237 or in the Lists, it contemplates Courts of Civil Judicature but not tribunals other than such Courts. This is the reason for using both the expressions in Arts. 136 and 227.

This expatiation of the distinction is critical since it posits such bases in the Constitution itself. Essentially, it points out that the Constitution creates an express distinction between 'Courts' and 'tribunals'. It is observed that what is meant by "Courts" are Courts of Civil Judicature and by "Tribunals" are those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is the power to decide such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State. In the exercise of this power however, a clear division is thus noticeable. *Broadly speaking, certain special matters would go before Tribunals, and the residue goes before the ordinary Courts of Civil Judicature.*<sup>38</sup>

In *R. Gandhi*, the Court sums up the distinction in three points:

- (i) Courts are established by the State and are entrusted with the State's inherent judicial power for administration of justice in general. Tribunals are established under a statute to adjudicate upon disputes arising under the said statute, or disputes of a specified nature. Therefore, all courts are Tribunals. But all Tribunals are not courts.
- (ii) Courts are exclusively manned by Judges. Tribunals can have a Judge as the sole member, or can have a combination of a Judicial Member and a Technical Member who is an 'expert' in the field to which Tribunal relates. Some highly specialized fact finding Tribunals may have only Technical Members, but they are rare and are exceptions.
- (iii) While courts are governed by detailed statutory procedural rules, in particular the Code of Civil Procedure and Evidence Act, requiring an elaborate procedure in decision making, Tribunals generally regulate their own procedure applying the provisions of the Code of Civil Procedure

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37 *Harinagar Sugar Mills Ltd. v. Shyam Sundar Jhunjhunwala*, (1962) 2 SCR 339 [Supreme Court of India]. [Hereinafter, "Harinagar Sugar Mills"]

38 *See Durga Shankar Mehta v. Raghuraj Singh*, (1955) 1 SCR 267 [Supreme Court of India].

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only where it is required, and without being restricted by the strict rules of Evidence Act.<sup>39</sup>

Given that the Court in *R. Gandhi* itself has recognised the constitutionally mandated distinction between Courts and tribunals, it is constitutionally impermissible to eliminate this distinction through such a reading of the said Entries as mentioned above. This distinction between the two terms has been recognised in many other cases.<sup>40</sup> The differences between Courts and tribunals are, moreover, not restricted to the Indian scheme.

It may be observed next that the new Courts permitted by the Constitution under Art. 247, and the Supreme Court and High Courts for each State required under Arts. 124 and 214 respectively, are 'constitutional courts' which are vested with judicial power. Such Courts are different from 'legislative courts' created by virtue of the general right of sovereignty which exists in the Government and which are the creation of statutes. The task of enforcement and interpretation of laws carried out by Constitutional Courts is very different from that carried out by courts or tribunals created legislatively; the former are part of the judicial organ of the State and as such are immune to legislative interference due to the doctrine of *separation of powers* while the latter are subject to statutory limitations on procedure, constitution and jurisdiction. It is for this reason, that the all-important prerogative of judicial review can only be performed by such 'constitutional courts' and is an inalienable feature of our Constitution.<sup>41</sup> Given that the ruling of Apex Court in *L. Chandrakumar* expressly ruled out the exclusion of judicial review of statutes enacted under Chapter XIV A as well as the possibility of invalidation of legislative and executive action by such tribunals<sup>42</sup>, it is submitted that the Court's stand thus far conforms to the researcher's model. In *R. Gandhi*, however, there has been a conspicuous departure.

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39 *R. Gandhi*.

40 *Harinagar Sugar Mills; Associated Cement Companies Ltd. v. P.N. Sharma*, (1965) 2 SCR 366 [Supreme Court of India]; Sampath Kumar.

41 *See Keshavnanda Bharathi; Indira Gandhi v. Raj Narain*, 1975 Supp SCC 1 [Supreme Court of India]. *See also* remarks of M.N.Rao J. in *Sakinala Harinath*: "From the nature of the powers conferred by the Constitution on the Supreme Court and the High Courts, it is axiomatic that they are the sole repositories of the power of judicial review. Power of judicial review implies the power to interpret and enforce the Constitution and this power includes the power to pronounce upon the validity of statutes, actions taken and orders passed by individuals and bodies falling within the ambit of the expression 'State' occurring in Article 12"

42 In *L. Chandrakumar*, the Apex Court overruled the ratio of *J.B.Chopra and Majumdar* that stated the same.

Professor Lawrence Tribe<sup>43</sup> underscores the importance of separating 'constitutional courts' from 'legislative courts/tribunals' in a constitutional democracy following (even in part) the theory of *separation of powers* by illustrating that the exercise of the power of judicial review by a 'constitutional court' may sometimes result in decisions against the wishes of a legislative majority. According to him, such situations are inevitable when the acts of a law-making body are reviewed with reference to the limited powers conferred upon it by the organic document. Any criticism that anti-majoritarian decisions are anti-democratic would therefore be ill-founded. "After all, every right protected by the Constitution is a right protected against majority legislation..".<sup>44</sup>

Comparative reference to this position may be found in the United States. § (1) of Art. III of the United States Constitution vests judicial power "in one Supreme Court and in such inferior Courts as the Congress may, from time to time, ordain and establish". All such Courts are 'constitutional courts' as opposed to 'legislative courts' which may be established by the Congress in exercise of its Sovereign power under Art. I. The powers of the former category of Courts cannot, however, in any circumstances be transferred, or restricted by the Congress while establishing additional courts.<sup>45</sup> The decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>46</sup> was strikingly similar to the position in *L. Chandrakumar*. At issue was whether the Bankruptcy Courts established under The Bankruptcy Act, 1978 and exercising jurisdiction over State law actions could be considered "Article III Courts" exercising the judicial power of the United States. The judges of the Bankruptcy Courts did not have life-tenure and protection against salary diminution - the two important contributing factors for the independence of Judges. Accordingly, their position was held to be distinct from that of the judges of Article III Courts.

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43 See L.H. Tribe, and M.C. Dorf, *ON READING THE CONSTITUTION*, 29 (1<sup>st</sup> edn., 1991) .

44 See Also Sakinala Harinath: "It would appear to us that there is no provision in our Constitution empowering Parliament or the Legislature of a State to divest the Supreme Court or the High Court of the power of judicial review. Clause (3) of Article 32, Clause (4) of Article 226, Article 230 and Article 231 do not either directly or remotely authorise curtailment of the power of judicial review: they operate in a different sphere as already noticed supra... Being creatures of statutory enactments, such Courts or tribunals cannot exercise the power of judicial review which is confided only in the Constitutional Courts by the constitutive provisions of the organic document."

45 See also *National Mugal Insurance Company of the District of Columbia v. Tidewater Transfer Company*, 337 U.S. 582 [Supreme Court of the United States of America].

46 *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 [Supreme Court of the United States of America].



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Given therefore that the High Courts are held in such high regard in the Constitution, it is submitted that a wholesale transfer of the High Courts' original jurisdiction is not permitted, except by an express constitutional amendment, which would ordinarily have to pass the scrutiny of the Basic Structure Doctrine. Whatever be the case, as has been illustrated above, the interpretation of the Court in *R. Gandhi* that Chapter XIV A is merely an enabling provision on legislative competence to establish tribunals and the source of such power is in fact located in a reading of the said Entries is based on a severely flawed interpretation of the Constitution.

## IV. THE LANDSCAPE OF TRIBUNALISATION

It would be pertinent to bring out a very important characteristic of tribunalisation through the observations of one of the first and important authorities that looked into the foray of tribunals into the justice system. This was the *Report of the Committee on Administrative Tribunals and Enquiries ('The Franks Committee')*<sup>47</sup> that was asked to look into the viability and need for the constitution of tribunals and make recommendations about their working. While pointing out that tribunals had an advantage over Courts by way of being cheap, accessible, free from technicalities, expeditious and consisting of members with expert knowledge,<sup>48</sup> the Committee observed that the need for tribunals was primarily as a substitute to the executive functions of a Minister of the Crown or of Government Departments.<sup>49</sup> Proceeding from this standpoint, the committee made some interesting recommendations on the interplay of Courts and tribunals. Therefore, as opposed to the current notion that tribunals are in fact substitutes for the jurisdiction of the Courts, it might be appropriate, for the purpose of understanding the context of tribunalisation, to look at them more as buffers between the executive and the judiciary. This is advisable in the light of three critical features of the current tribunal system: a) That the selection of members of the tribunals often involves significant involvement of the Government; b) A proportion of the members of the tribunal itself are members of the executive; and c) That irrespective of the previous two points, tribunals do in fact perform the functions of ordinary courts, often substituting (or supplementing) the latter's jurisdiction in matters involving substantial questions of law. Therefore, it is not surprising that appeals from tribunals often lie before Administrative divisions of High Courts.<sup>50</sup>

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47 Report of the Committee on Administrative Tribunals and Enquiries, Comd. 218 (1957). [Hereinafter, "Report"]

48 8, Report.

49 9, Report.

50 See 8, Report.

The researcher would now like to establish a case for the existence of tribunals in a welfare State such as ours. A disclaimer would be necessary before we proceed: while making the case for tribunalisation, arguments would be made irrespective of the flaws pointed out in the previous sections, which are specific to the Indian constitutional framework. Therefore, the assumption now would be that our Constitution does permit a reasonably wide leeway for the constitution of tribunals. Though this assumption is made here, the researcher will reconcile his arguments in this section with the setup in India in the concluding section.

Referring to the rich experience of the United Kingdom with tribunals as dispute resolution mechanisms, the Court in *R. Gandhi* cites the recommendations of the Leggatt Committee set up to review the delivery of justice through tribunals.<sup>51</sup> This Committee submitted its report in 2001 and thus has the benefit of offering a reasonably accurate analysis of the role of the tribunal system today. One specific portion of this report lists out two distinctive advantages that tribunals offer over ordinary courts. *First*, tribunals are constituted of experts in specialised fields who pool their skills with that of judicial officers to reach decisions that are substantively sound, albeit not lacking in judicial trappings; And *second*, the procedures towards preparation of cases and their hearing can be simpler and more informal than in the courts, leading to faster and more efficient trials.<sup>52</sup>

In the typical design of today's justice system, a tribunal may thus be preferred over ordinary courts owing to the specialised knowledge of its members, and the benefit of being rather liberal in its trappings and procedure. Consequently, they are more convenient, take lesser time, are cheaper and result in more efficient fact-finding. Many of the issues before tribunals concern the merits of cases with relatively little legal content, and in such cases, a Tribunal which usually consists of a legally qualified judge and two additional experts may be preferred to a court.<sup>53</sup>

The Apex Court recognised these merits in its first decisions after the 42<sup>nd</sup> Amendment in *K.K. Dutt v. Union of India*<sup>54</sup> while commending the move of the legislature towards tribunalisation of specialist legislations in the country. *R. Gandhi* and *L. Chandrakumar* support this rationale, and in answering the dilemma posed by the theory of *separation of powers*, justify it in terms of the modern notions of the *welfare State*. Essentially, their claim is that *separation of powers* cannot exist in

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51 ¶ 19, *R. Gandhi*.

52 ¶ 19, *R. Gandhi*.

53 De Smith, *Judicial Review*, 50 ¶ 1.085 (6th edn., 1987).

54 *K.K. Dutt v. Union of India*, (1980) 3 SCR 811 [Supreme Court of India].

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its strict forms specifically owing to the fact that the functions performed by the State today are far more diverse and permeate every aspect of the people's welfare; no one organ of the State could thus perform its functions without the continued assistance of the other.<sup>55</sup>

This position on the dilemma of the *separation of powers* in the context of tribunalisation is resolved by H. W. R. Wade in his treatise on Administrative Law as follows:

*"...social legislation of the twentieth century demanded Tribunals for purely administrative reasons: they could offer speedier, cheaper and more accessible justice, essential to areas involving large numbers of small claims. The process of the courts of law is elaborate, slow and costly. Its defects are those of its merits, for the object is to provide the highest standard of justice; generally speaking, the public wants the best possible article, and is prepared to pay for it. But in administering social services the aim is different. The object is not the best article at any price but the best article that is consistent with efficient administration. Disputes must be disposed of quickly and cheaply... Thus when in 1946 workmen's compensation claims were removed from the courts and brought within the Tribunal system much unproductive and expensive litigation, particularly on whether an accident occurred in the course of employment, came to an end."*<sup>56</sup>

It is, however, unrealistic to imagine that technicalities and difficult legal issues can somehow be avoided by entrusting the administration of complex legislation to tribunals rather than the Courts.<sup>57</sup> This concern relates to the aspect of the *judicial trappings* that tribunals must possess to be effective substitutes to the courts' plenary jurisdiction over specialised matters. R. Gandhi makes very appropriate remarks in this regard by striking at the vires of aspects of the concerned Act that did not ensure the requisite judicial mind-set on the benches of such tribunals. Noticing that the Act lacked sufficient checks to ensure that the tribunals could, in fact, effectively substitute the High Courts' jurisdiction in such a matter, both the High Court and the Apex Court highlighted judicial independence and the actual competence of tribunals to try such matters as primary to legitimising their role as substitutes. In the Court's opinion, a transfer of judicial functions to non-judicial officers, or to members whose independence is suspect, would amount to transferring judicial powers to organs beyond the

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55 ¶ 52, R. Gandhi.

56 H.W.R. Wade & C.F. Forsyth also refer to the advantage of Tribunals in Administrative Law, 773-774 (10th edn., 2001).

57 Report.

judiciary, which would be in conflict with both the doctrine of *separation of powers* and *judicial independence*.

For cases that deal with matters involving substantial questions of law, in addition to issues entailing the technical expertise of the adjudicators in specialised matters, it may seem that tribunals are the best resort. The corollary to this argument would, however, be that the kind of matters that could be transferred to the exclusive jurisdiction of tribunals is very restricted. Indiscriminate tribunalisation would very seriously encroach upon judicial terrain; the argument would then be to constitute divisions within the judiciary itself, equipping them with the requisite expertise and infrastructure to perform the functions that are now being transferred to tribunals.

## V. BASIC STRUCTURE DOCTRINE AND THE FOCUS ON PROCEDURAL *ULTRA VIRES*

Two major concerns that were put forward on behalf of the petitioners were that transfer of the High Court's original jurisdiction to tribunals violated the doctrine of *separation of powers* and the *independence of the judiciary*, both of which were part of the Basic Structure of the Constitution.<sup>58</sup> Obviously, this contention would have to be struck down summarily on the grounds that ordinary laws, not being inserted in the 9<sup>th</sup> Schedule, would not be subject to the Basic Structure challenge.<sup>59</sup> Instead, the Court approached the issue in a rather skewed manner, attempting to circumvent this obstacle by locating *separation of powers* and *independence of the judiciary* as identifiable components of the *rule of law*, which as such is part of our equality protection under Art. 14 of the Constitution. However, in doing so, the Court approaches the issue by advancing the argument of the Apex Court in *State of Karnataka v. Union of India*<sup>60</sup> which held that the Basic Structure challenge could in fact be sustained against ordinary legislations as long as what was alleged to be part of the Basic Structure, could be located in express provisions of the Constitution. The Court then, very creatively, incorporated these two concepts as part of Art. 14, thereby subjecting a law that would have otherwise survived this challenge to the close scrutiny of an *equal protection clause* violation.

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58 See U. Baxi, *The Crisis of Legitimation of Law, THE CRISIS OF THE INDIAN LEGAL SYSTEM*, 4-5 (1980).

59 *I.R. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1 [Supreme Court of India]. [Hereinafter, "I.R. Coelho"]

60 *State of Karnataka v. Union of India*, (1977) 4 SCC 608 [Supreme Court of India].

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In the words of the Court,

*“But, if, as a result of the doctrine, certain imperatives are inherent in or logically and necessarily flow from the Constitution’s ‘basic structure’, just as though they are its express mandates, they can be and have to be used to test the validity of ordinary laws just as other parts of the Constitution are so used.”*

This seems like an appropriate interpretation of the Basic Structure doctrine, given that it would prevent judges from applying their own notions of the doctrine to be part of the Basic Structure of the Constitution. If what was identified as the Basic Structure had been located *in relation to* an express provision, this would be a valid and much needed limitation on the doctrine, on the lines of what the Court attempted to do in *I.R.Coelho v. Union of India*.<sup>61</sup>

The fundamental right to equality of every person then clearly includes a right to have the person’s rights adjudicated by a forum which exercises judicial power in an impartial and independent manner, consistent with the recognized principles of adjudication.<sup>62</sup> Therefore, if access to courts in order to enforce such rights were to be abridged, altered, modified or substituted by directing the person to approach an alternative forum, such a legislative act is open to challenge if it violates the right to adjudication by an independent forum. Such a right would further be part of the person’s rights under Art. 14, which in turn can be related to the Basic Structure of the Constitution.

Once it was established that parts of the Act did in fact violate notions of *separation of powers* and *independence of the judiciary*, the Court sought to remedy this by indoctrinating the concept of *procedural due process* into Art. 14. For instance, if the procedure that was enacted to constitute these tribunals would somehow compromise judicial independence, then such an Act could strike against the requirements of Art. 14. This unique approach to establishing an Art. 14 violation is arguably new to the Indian conspectus. The idea of a *procedural due process* requirement in constituting these tribunals is an excellent means of tackling issues such as this, where existing jurisprudence, strictly speaking, offers little or no aid. Pitted against the rule that the Basic Structure doctrine may only be applied against Constitutional Amendments and laws inserted into the 9<sup>th</sup> Schedule, this principle advocates that the procedure accompanying certain State Actions - say, constitution of tribunals – should be so as to not violate identifiable components

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61 ¶ 19, R. Gandhi.

62 ¶ 41, R. Gandhi.

of Art. 14, thereby circumventing the pre-requisites of such a challenge laid down in *I.R.Coelho*<sup>63</sup> and *Glenrock Estates Pvt. Ltd. v. State of Tamil Nadu*.<sup>64</sup>

## V. CONCLUSION

This judgment is commendable as it answered all the questions presented before it in the most comprehensive and logical manner possible. While taking a firm stance in reviewing the legislation and striking against the parts of it that were considered irresponsible, the Court exhibited exceptional restraint from engaging in judicial law-making. Nonetheless, the Court answered critical questions relating to the context of *separation of powers* and *judicial independence* in a manner that has seldom been done by the Court before; at the same time, it also laid the groundwork for future legislations on similar issues.

However, a conspicuously unaddressed issue in this case was the one relating to the extent of legislative power to create tribunals. By interpreting Chapter XIV A of the Constitution to be a merely enabling provision, the Court has traced Parliamentary prerogative of creation of tribunals to other parts of the Constitution. In doing so, legislative power has in fact been deemed limitless, thereby legitimising the creation of any number of tribunals vested with any sort of functions, including those that are ordinarily performed by ordinary Courts. Given that there is a certain amount of executive interference in the working of such tribunals, this ruling raises significant questions in the realm of the actual sphere of judicial functioning.

The creation of the National Tax Tribunal<sup>65</sup>, the NCLT and the Intellectual Property Appellate Board [Hereinafter, "IPAB"] are but a few examples of the rampant tribunalisation of judicial processes in the country. Earlier this year, closely following on the heels of *R. Gandhi*, a petition was filed before a Division Bench of the Madras High Court challenging the constitutionality of the IPAB,<sup>66</sup> contending that it violated the *separation of powers* and fell afoul of the *procedural due process*

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63 *I.R. Coelho*.

64 *Glanrock Estate Private Limited v. State of Tamil Nadu*, (2010) 10 SCC 96 [Supreme Court of India]: "The prerequisite here being that the basic structure challenge could be applicable against ordinary laws only when they were sought to be inserted into the 9th Schedule, in which case they would have to survive both, 'the rights test' and the 'essence of rights test'."

65 Constituted under the National Tax Tribunal Act, 2005.

66 *Breaking News: Madras High Court admits petitions challenging the constitutionality of the IPAB and the Copyright Board, SpicyIP*, (February 21, 2011) available at <http://spicyipindia.blogspot.com/2011/01/breaking-news-madras-high-court-admits.html>.

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requirements of *R. Gandhi*. Given that these areas like tax law and intellectual property law have thus far been crucial parts of the subject-matter jurisdiction of the High Courts, tribunalisation of these functions raises critical queries about the extent of power conferred upon the legislatures in this regard.

To lay down areas that may or may not be tribunalised is beyond the scope of this paper. One would, however, wonder if the Apex Court would be within its limits if such areas were listed by it. On the other hand, it would certainly not be beyond the competence of the Parliament to enumerate the matters for the purpose of vesting in tribunals the jurisdiction to try them. As has been argued, the matters enumerated in Clause (2) of Art. 323B should have been interpreted by the Court to be an exhaustive list, instead of an illustrative one. Since this was not done, legislative power in this regard cannot be curbed, except by the intervention of a larger Bench of the Apex Court. The only powers of the High Court and the Supreme Court that are secure are those of judicial review. While it is true that judicial review remains a function that is exclusively performed by these courts, it begs a question: *'is that the only true domain of the judiciary and can all other matters be effectively transferred to the exclusive jurisdiction of tribunals?'*