CASE LAW

1997 (69) ECR 401 (SC)

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 481 of 1989
WITH

S.L.P. (Civil) No. 16059/92, W.P. (Civil) No. 918/92, R.P. (Civil) No. 704/90 in C.A. No. 1212/90, C.A. No. 3/92, C.A. No. 169/94, C.A. No. 1532-33/93, S.L.P. (Civil) No. 3986/93, S.L.P. (Civil) No. 11596/94, C.A. No. 2350/93, C.A. No. 3518-19/92, S.L.P. (Civil) No. 17549/94, C.A. No. 7614/94, C.A. No. 844/95, C.A. No. 2196/94, C.A. No. 5149-51/92, W.P. (Civil) No. 789/90, W.P. (Civil) No. 1274/90, S.L.P. (Civil) No. 1069/96 WITH I.A. No. 5, S.L.P. (Civil) No. 10643-10647/96, S.L.P. (Civil) No. 12735/96, S.L.P. (Civil) No. 19496/96, W.P. (Civil) No. 247/95, W.P. (Civil) No. 412/95.

March 18, 1997

[Before: **A.M. Ahmadi, *CJI*, M.M. Punchhi, K. Ramaswamy, S.P. Bharucha, S. Sagir Ahmad, K. Venkataswami & K.T. Thomas, *JJ*]**

L. Chandra Kumar v. *Union of India & Ors.*

HELD: Judicial Review—Power of judicial review over legislative action vested in High Courts and Supreme Court under Articles 226 and 32 of the Constitution is integral to our constitutional scheme and an essential feature comprising the basic structure of Constitution. *".....To express our opinion on the issue whether the power of judicial review vested in the High Courts and in the Supreme Court under Articles 226/227 and 32 is part of the basic structure of the Constitution, we must first attempt to understand what constitutes the basic structure of the Constitution. The Doctrine of basic structure was evolved in* ***Kesavananda Bharati's*** *case. However, as already mentioned, that case did not lay down that the specific and particular features mentioned in that judgment alone would constitute the basic structure of our Constitution. Indeed, in the judgments of Shelat & Grover, JJ., Hegde & Mukherjee, JJ. and Jaganmohan Reddy, J., there are specific observations to the effect that their list of essential features comprising the basic structure of the Constitution are illustrative and are not intended to be exhaustive. In* ***Indira Gandhi's*** *case, Chandrachud, J. held that the proper approach for a Judge who is confronted with the question whether a particular facet of the Constitution is part of the basic structure, is to examine, in each individual case, the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of our Constitution as a fundamental instrument for the governance of the country.* (supra *at pp. 751-752). This approach was specifically adopted by Bhagwati, J. in*

Minerva Mill's case (supra *at pp. 651-672) and is not regarded as the definitive test in this field of Constitutional Law.*

"....We find that the various factors mentioned in the test evolved by Chandrachud, J. have already been considered by decisions of various Benches of this Court that have been referred to in the course of our analysis. From their conclusions, many of which have been extracted by us in toto, *it appears that this Court has always considered the power of judicial review vested in the High Courts and in this Court under Articles 226 and 32 respectively, enabling legislative action to be subjected to the scrutiny of superior courts, to be integral to our constitutional scheme."*

2. Interpretation of Constitution—Powers of the Judges of High Court & Supreme Court—The power of High Courts and the Supreme Court to test the constitutional validity of legislation and to interpret the constitution can never be ousted or excluded. *".....The Judges of the superior Courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate Courts and Tribunals do not fall foul of strict standards of legal correctness and judicial independence. The constitutional safeguards which ensure the independence of the Judges of the superior judiciary are not available to the Judges of the subordinate judiciary or to those who man Tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the functions of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded."*

3. Judicial superintendence—Powers vested in High Courts to exercise judicial superintendence over the decisions of all courts and tribunals in their jurisdiction, are a part of the basic structure of the Constitution and divesting of the same to be avoided. The subordinate judiciary or Tribunals not to exercise power of judicial review of legislative action to the exclusion of High Courts & Supreme Court, *".....We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all Courts and Tribunals within their respective jurisdiction is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided.*

"...However, it is important to emphasise that though the subordinate judiciary or Tribunals created under ordinary legislations cannot exercise the power of judicial review of legislative action to the exclusion of the High Courts and the Supreme Court, there is no constitutional prohibition against their performing a supplemental — as opposed to a substitutional — role in this respect."

4. Tribunals—Jurisdictional Powers—Competence to test the constitutional validity of a statutory provision/rule—The Tribunals constituted either under Article 323A or under Article 323B of the Constitution competent to test the

constitutional validity of statutory provisions and rules, but debarred to entertain any question regarding the *vires* of their parent statutes—Even in matters where the *vires* of statutory provisions are questioned the function of the Tribunals is only supplementary and appeals against their orders to lie before the Division Bench of High Courts—Order to come into effect prospectively. *".....If the power under Article 32 of the Constitution, which has been described as the "heart" and "soul" of the Constitution, can additionally conferred upon "any other court", there is no reason why the same situation cannot subsist in respect of the jurisdiction conferred upon the High Courts under Article 226 of the Constitution. So long as the jurisdiction of the High Courts under Articles 226/227 and that of this Court under Article 32 is retained, there is no reason why the power to test the validity of legislations against the provisions of the Constitution cannot be conferred upon Administrative Tribunals created under the Act or upon Tribunals created under Article 323B of the Constitution."*

".....we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the concerned High Court may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal."

"The directions issued by us in respect of making the decisions of Tribunals amenable to scrutiny before a Division Bench of the respective High Courts will, however, come into effect prospectively i.e. will apply to decisions rendered hereafter. To maintain the sanctity of judicial proceedings, we have invoked the doctrine of prospective over-ruling so as not to disturb the procedure in relation to decisions already rendered."

5. Tribunals—Malfunctioning—An independent agency should be set up for the administration of all the Tribunals and till such agency is set up the Tribunals should be under a single nodal Ministry to oversee their working. *"....We are of the view that, until a wholly independent agency for the administration of all such Tribunals can be set-up, it is desirable that all such Tribunals should be, as far as possible, under a single nodal Ministry which will be in a position to oversee the working*

of these Tribunals. For a number of reasons that Ministry should appropriately be the Ministry of Law. It would be open for the Ministry, in its turn, to appoint an independent supervisory body to oversee the working of the Tribunals. This will ensure that if the President or Chairperson of the Tribunal is for some reason unable to take sufficient interest in the working of the Tribunal, the entire system will not languish and the ultimate consumer of justice will not suffer. The creation of a single umbrella organisation will, in our view, remove many of the ills of the present system. If the need arises, there can be separate umbrella organisations at the Central and the State levels. Such a supervisory authority must try to ensure that the independence of the members of all such Tribunals is maintained."

6. Setting up of Tribunals—Under our constitutional scheme constitution of various Tribunals is permitted. *"....That the various Tribunals have not performed upto expectations is a self-evident and widely acknowledged truth. However, to draw an inference that their unsatisfactory performance points to their being founded on a fundamentally unsound principle would not be correct. The reasons for which the Tribunals were constituted still persist; indeed, those reasons have become even more pronounced in our times. We have already indicated that our constitutional scheme permits the setting up of such Tribunals. However, drastic measures may have to be resorted to in order to elevate their standards to ensure that they stand up to constitutional scrutiny in the discharge of the power of judicial review conferred upon them."*

7. Tribunals—Power to hear matters involving constitutional issues—Tribunals competent to handle matters involving constitutional issues but such matters not to be handled by a single Member Bench and should be referred to a Bench consisting of at least two members one of whom being a Judicial Member. *"....To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Article 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter."*

"We wish to make it clear that where a question involving the interpretation of a statutory provision or rule in relation to the Constitution arises for the consideration of a single Member Bench of the Administrative Tribunal, the proviso to Section 5(6) will automatically apply and the Chairman or the Member concerned shall refer the matter to a Bench consisting of at least two Members, one of whom must be a Judicial Member. This will ensure that question involving the vires of a statutory provision or rule will never arise for adjudication before a single Member Bench or a Bench which does not consist of a Judicial Member. So construed, Section 5 (6) will no longer be susceptible to charges of unconstitutionality."

8. Appeals—Appeals against the orders of the Tribunals to lie before the Division Bench of High Courts. *"....We may add here that under the existing system, direct appeals have been provided from the decisions of all Tribunals to the Supreme*

Court under Article 136 of the Constitution. In view of our above-mentioned observations, this situation will also stand modified. In the view that we have taken, no appeal from the decision of a Tribunal will directly lie before the Supreme Court under Article 136 of the Constitution; but instead, the aggrieved party will be entitled to move the High Court under Articles 226/227 of the Constitution and from the decision of the Division Bench of the High Court the aggrieved party could move this Court under Article 136 of the Constitution."

".....we hold that all decisions of Tribunals, whether created pursuant to Article 323A or Article 323B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls."

9. Administrative Tribunals—Appointment of administrative Members—The Tribunal not to consist of only judicial members, administrative members being officers having grass-roots experience, to be selected from amongst those who have some background to deal such cases. *".....In the case of Administrative Tribunals, it has been pointed out that the administrative members who have been appointed have little or no experience in adjudicating such disputes."*

".....It is stated that in the short tenures that these Administrative Members are on the Tribunal, they are unable to attain enough experience in adjudication and in cases where they do acquire the ability, it is invariably on the eve of the expiry of their tenures. For these reasons, it has been urged that the appointment of Administrative Members to Administrative Tribunals be stopped. We find it difficult to accept such a contention. It must be remembered that the setting-up of these Tribunals is founded on the premise that specialist bodies comprising both trained administrators and those with judicial experience would, by virtue of their specialised knowledge, be better equipped to dispense speedy and efficient justice. It was expected that a judicious mix of judicial members and those with grass-roots experience would best serve this purpose. To hold that the Tribunal should consist only of judicial members would attack the primary basis of the theory pursuant to which they have been constituted. Since the Selection Committee is now headed by a Judge of the Supreme Court, nominated by the Chief Justice of India, we have reason to believe that the Committee would take care to ensure that administrative members are chosen from amongst those who have some background to deal with such cases."

10. Exclusion of the Jurisdiction of High Courts—Article 323A clause 2(d); Article 323B clause 3(d); Sec. 28 of Administrative Tribunal Act, 1985 and Clauses in other legislations stipulating exclusion of the jurisdiction of High Courts held to be unconstitutional. *".....In view of the reasoning adopted by us, we hold that clause 2(d) of Article 323A and clause 3(d) of Article 323B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323A and 323B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Article 226/227 and upon the Supreme Court under Article 32 of the Constitution is part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other Courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323A and Article 323B of*

the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the concerned Tribunal falls. The Tribunals will, nevertheless, continue to act like Courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated."

Case-law Referred

1.	S.P. Sampath Kumar v. UOI [(1987) 1 SCC 124]	Referred
2.	J.B. Chopra v. UOI [(1987) 1 SCC 422]	—do—
3.	M.B. Majumdar v. UOI [(1990) 4 SCC 501]	—do—
4.	Amulya Candra Kalita v. UOI [(1991) 1 SCC 181]	—do—
5.	R.K. Jain v. UOI [(1993) 4 SCC 199]	—do—
6.	Dr. Mahabal Ram v. ICAR [(1994) 2 SCC 401]	Followed
7.	Kesavananda Barah v. State of Kerala [1973 (4) SCC 225]	Referred
8.	Special Reference No. 1 of 1964 [(1965) 1 SCR 413]	—do—
9.	Indira Nehru Gandhi v. Raj Narain [1975 (Supp) SCC 1]	—do—
10.	Minerva Mills Ltd. v. UOI [(1980) 3 SCC 625]	—do—

JUDGMENT

Per **A.M. AHMADI, CJI**—The special leave petitions, civil appeals and writ petitions which together constitute the present batch of matters before us owe their origin to separate decisions of different High Courts and several provisions in different enactments which have been made the subject of challenge. Between them, they raise several distinct questions of law; they have, however, been grouped together as all of them involve the consideration of the following broad issues:

(1) Whether the power conferred upon Parliament or the State Legislatures, as the case may be, by sub-clause (d) of clause (2) of Article 323A or by sub-clause (d) of clause (3) of Article 323B of the Constitution, to totally exclude the jurisdiction of 'all courts', except that of the Supreme Court under Article 136, in respect of disputes and complaints referred to in clause (1) of Article 323A or with regard to all or any of the matters specified in clause (2) of Article 323B, runs counter to the power of judicial review conferred on the High Courts under Articles 226/227 and on the Supreme Court under Article 32 of the Constitution?

(2) Whether the Tribunals constituted either under Article 323A or under Article 323B of the Constitution, possess the competence to test the constitutional validity of a statutory provision/rule?

(3) Whether these Tribunals, as they are functioning at present, can be said to be effective substitutes for the High Courts in discharging the power of judicial review? If not, what are the changes required to make them conform to their founding objectives?

We shall confine ourselves to the larger issues raised in this batch of matters without adverting to the specific facts of each of the matters; we shall, however, selectively refer to some of the impugned decisions and the provisions involved to the extent we find it necessary to do so in order to appreciate the policy-conflicts in, and to draw the parameters of, the controversy before us. The broad principles enunciated in this judgment will, at a later time, be applied by a Division Bench to resolve the disputes involved in each of the individual cases.

The present controversy has been referred to us by an order of a Division Bench of this Court, reported in (1995) 1 SCC 400, which concluded that the decision rendered by a five-Judge Constitution Bench of this Court in ***S.P. Sampath Kumar*** v. ***Union of India***, (1987) 1 SCC 124, needs to be comprehensively reconsidered. The order of the Division Bench, dated December 2, 1994, was rendered after it had considered the arguments in the first matter before us, C.A. No. 481 of 1989, where the challenge is to the validity of Section 5(6) of the Administrative Tribunals Act, 1985. After analysing the relevant constitutional provisions and the circumstances which led to the decision in ***Sampath Kumar's*** case, the referring Bench reached the conclusion that on account of the divergent views expressed by this Court in a series of cases decided after ***Sampath Kumar's*** case, the resulting situation warranted a "fresh look by a Larger Bench over all the issues adjudicated by this Court in ***Sampath Kumar's*** case including the question whether the Tribunal can at all have an Administrative Member on its Bench, if it were to have the power of even deciding constitutional validity of a statute or (Article) 309 rule, as conceded in ***Chopra's*** case". The "post-***Sampath Kumar's*** cases" which caused the Division Bench to refer the present matter to us are as follows: ***J.B. Chopra*** v. ***Union of India***, (1987) 1 SCC 422; ***M.B. Majumdar*** v. ***Union of India*** (1990) 4 SCC 501; ***Amulya Chandra Kalita*** v. ***Union of India***, (1991) 1 SCC 181; ***R.K. Jain*** v. ***Union of India***, (1993) 4 SCC 119; and ***Dr. Mahabal Ram*** v. ***Indian Council of Agricultural Research***, (1994) 2 SCC 401.

Before we record the contentions of the learned counsel who appeared before us, we must set out the legal and historical background relevant to the present case.

Part XIVA of the Constitution was inserted through Section 46 of the Constitution (42nd Amendment) Act, 1976 with effect from March 1, 1977. It comprises two provisions, Articles 323A and 323B, which have, for the sake of convenience, been fully extracted hereunder:

PART XIVA
TRIBUNALS

323-A. Administrative Tribunals.—(1) Parliament may, by law, provide

for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government.

(2) A law made under clause (1) may—

(a) provide for the establishment of an administrative tribunal for the Union and a separate administrative tribunal for each State or for two or more states;

(b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;

(c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;

(d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Article 136, with respect to the disputes or complaints referred to in clause (1);

(e) Provide for the transfer to each such administrative tribunal of any cases pending before any court or other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;

(f) repeal or amend any order made by the President under clause (3) of Article 371D;

(g) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as Parliament may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals.

(3) The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.

323-B. Tribunals for the other matters.—(1) 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.

(2) The matters referred to in clause (1) are the following, namely:—

(a) levy, assessment, collection and enforcement of any tax;

(b) foreign exchange, import and export across customs frontiers;

(c) industrial and labour disputes;

(d) land reforms by way of acquisition by the State of any estate as defined in Article 31A or of any rights therein or the extinguishment or modification of any such rights or by way of ceiling on agricultural land or in any other way;

(e) ceiling on urban property;

(f) elections to either House of Parliament or the House or either House of the Legislature of a State, but excluding the matters referred to in Article 329 and Article 329A;

(g) production, procurement, supply and distribution of food stuffs (including edible oilseeds and oils) and such other goods as the President may, by public notification, declare to be essential goods for the purpose of this article and control of prices of such goods;

(h) offences against laws with respect to any of the matters specified in sub-clauses (a) to (g) and fees in respect of any of those matters;

(i) any matter incidental to any of the matters specified in sub-clauses (a) to (h).

(3) A law made under clause (1) may—

(a) provide for the establishment of a hierarchy of tribunals;

(b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;

(c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;

(d) exclude the jurisdiction of all courts except of jurisdiction of the Supreme Court under Article 136 with respect to all or any of the matters falling within the jurisdiction of the said tribunals;

(e) provide for the transfer to each such tribunal of any cases pending before any court or any other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;

(f) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as the appropriate Legislature may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals.

(4) The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.

Explanation.—In this article, "appropriate Legislature", in relation to any matter, means Parliament or, as the case may be, a State Legislature competent to make laws with respect to such matters in accordance with the provisions of Part-XI.

(Emphasis added)

We may now examine the manner in which these constitutional provisions have been sought to be implemented, the problems that have consequently arisen, and the manner in which Courts have sought to resolve them. Such an

analysis will have to consider the working of the two provisions separately.

Article 323A:

In pursuance of the power conferred upon it by clause (1) of Article 323A of the Constitution, Parliament enacted the Administrative Tribunals Act, 1985 (Act 13 of 1985) [hereinafter referred to as "the Act"]. The Statement of Objects and Reasons of the Act indicates that it was in the express terms of Article 323A of the Constitution and was being enacted because a large number of cases relating to service matters were pending before various Courts; it was expected that "the setting up of such Administrative Tribunals to deal exclusively with service matters would go a long way in not only reducing the burden of the various courts and thereby giving them more time to deal with other cases expeditiously but would also provide to the persons covered by the Administrative Tribunals speedy relief in respect of their grievances."

Pursuant to the provisions of the Act, the Central Administrative Tribunal, with five Benches, was established on November 1, 1985. However, even before the Tribunal had been established, several writ petitions had been filed in various High Courts as well as this Court challenging the constitutional validity of Article 323A of the Constitution as also the provisions of the Act; the principal violation complained of being the exclusion of the jurisdiction of this Court under Article 32 of the Constitution and that of the High Courts under Article 226 of the Constitution. Through an interim order dated October 31, 1985, reported as *S.P. Sampath Kumar* v. *Union of India*, (1985) 4 SCC 458, this Court directed the carrying out of certain measures with a view to ensuring the functioning of the Tribunal alongwith constitutionally-sound principles. Pursuant to an undertaking given to this Court at the interim stage by the erstwhile Attorney General, an amending Act (Act 19 of 1986) was enacted to bring about the changes prescribed in the aforesaid interim order.

When *Sampath Kumar's* case was finally heard, these changes had already been incorporated in the body and text of the Act. The Court took the view that most of the original grounds of challenge — which included a challenge to the constitutional validity of Article 323A — did not survive and restricted its focus to testing only the constitutional validity of the provisions of the Act. In its final decision, the Court held that though judicial review is a basic feature of the Constitution, the vesting of the power of judicial review in an alternative institutional mechanism, after taking it away from the High Courts, would not do violence to the basic structure so long as it was ensured that the alternative mechanism was an effective and real substitute for the High Court. Using this theory of effective alternative institutional mechanisms as its foundation, the Court proceeded to analyse the provisions of the Act in order to ascertain whether they passed constitutional muster. The Court came to the conclusion that the Act, as it stood at that time, did not measure up to the requirements of an effective substitute and, to that end, suggested several amendments to the provisions governing the form and content of the Tribunal. The suggested amendments were given the force of law by an amending Act (Act 51 of 1987) after the conclusion of the case and the Act has since remained unaltered.

We may now analyse the scheme and the salient features of the Act as it stands at the present time, inclusive as it is of the changes suggested in *Sampath*

Kumar's case. The Act contains 37 Sections which are housed in five Chapters. Chapter I ("Preliminary") contains three Sections; Section 3 is the definition clause.

Chapter II ("Establishment of Tribunals and Benches thereof") contains Sections 4 to 13. Section 4 empowers the Central Government to establish: (1) a Central Administrative Tribunal with Benches at separate places; (2) an Administrative Tribunal for a State which makes a request in this behalf; and (3) a Joint Administrative Tribunal for two or more States which enter into an agreement for the purpose. Section 5 states that each Tribunal shall consist of a Chairman and such number of Vice-Chairman and Judicial and Administrative Members as may be deemed necessary by the appropriate Government. Sub-section (2) of Section 5 requires every Bench to ordinarily consist of one Judicial Member and one Administrative Member. Sub-section (6) of Section 5, which enables the Tribunal to function through Single Member Benches is the focus of some controversy, as will subsequently emerge, and is fully extracted as under:

> "**S. 5(6).**—Notwithstanding anything contained in the foregoing provisions of this section, it shall be competent for the Chairman or any other Member authorised by the Chairman in this behalf to function as a Bench consisting of a single Member and exercise the jurisdiction, powers and authority of the Tribunal in respect of such classes of cases or such matters pertaining to such classes of cases as the Chairman may by general or special order specify:
>
> Provided that if at any stage of the hearing of any such case or matter it appears to the Chairman or such Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members the case or matter may be transferred by the Chairman or, as the case may be, referred to him for transfer to such Bench as the Chairman may deem fit."

Section 6 deals with the qualifications of the personnel of the Tribunal. Since the first few sub-sections of Section 6 are required to be considered subsequently, they may be reproduced hereunder:

> "6. **Qualifications for appointment of Chairman, Vice-Chairman or other Members.**—(1) A person shall not be qualified for appointment as the Chairman unless he—
>
> (a) is, or has been, a Judge of a High Court; or
>
> (b) has, for at least two years, held the office of Vice-Chairman;
>
> (c) . . . .
>
> (2) A person shall not be qualified for appointment as the Vice-Chairman unless he—
>
> (a) is, or has been, or is qualified to be a Judge of a High Court; or
>
> (b) has, for at least two years, held the post of a Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of a Secretary to the Government of India; or
>
> (bb) has for at least five years, held the post of an Additional Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that

of an Additional Secretary to the Government of India; or

(c) has, for a period of not less than three years, held office as a Judicial Member or an Administrative Member.

(3) A person shall not be qualified for appointment as a Judicial Member unless he—

(a) is, or has been, or is qualified to be, a Judge of a High Court; or

(b) has been a member of the Indian Legal Service and has held a post in Grade I of that Service for at least three years.

(3-A) a person shall not be qualified for appointment as an Administrative Member unless he—

(a) has, for at least two years, held the post of an Additional Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of an Additional Secretary to the Government of India; or

(b) has, for at least three years, held the post of a Joint Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of a Joint Secretary to the Government of India.

and shall, in either case, have adequate administrative experience."

Sub-sections (4), (5) and (6) of Section 6 provide that all the Members of the Central Administrative Tribunal, the State Administrative Tribunals and the Joint Administrative Tribunals shall be appointed by the President; in the case of the State Administrative Tribunals and the Joint Administrative Tribunals, the President is required to consult the concerned Governor(s). Sub-section (7) stipulates that the Chief Justice of India is also to be consulted in the appointment of the Chairman, Vice-Chairman and Members of all Tribunals under the Act.

Section 8 prescribes the terms of office of the personnel of the Tribunal as being for a duration of five years from the date of entering into office; there is also provision for reappointment for another term of five years. The maximum age limit permissible for the Chairman and the Vice-Chairman is 65 years and for that of any other Member is 62 years. Section 10 stipulates that the salaries, terms and conditions of all Members of the Tribunal are to be determined by the Central Government; such terms are, however, not to be varied to the disadvantage of any Member after his appointment.

Chapter III ("Jurisdiction, powers and authority of Tribunals") consists of Sections 14 to 18. Sections 14, 15 and 16 deal with the jurisdiction, powers and authority of the Central Administrative Tribunal, the State Administrative Tribunals and the Joint Administrative Tribunals respectively. These provisions make it clear that except for the jurisdiction of this Court, the Tribunals under the Act will posses the jurisdiction and powers of every other Court in the country in respect of all service-related matters. Section 17 provides that the Tribunals under the Act will have the same powers in respect of contempt as are enjoyed by the High Courts.

Chapter IV ("Procedure") comprises Sections 19 to 27. Section 21 specifies

strict limitation periods and does not vest the Tribunals under the Act with the power to condone delay.

Chapter V ("Miscellaneous"), the final Chapter of the Act, comprising Sections 28 to 37, vests the Tribunals under the Act with ancillary powers to aid them in the effective adjudication of disputes. Section 28, the "exclusion of jurisdiction" clause reads as follows:

> "28. **Exclusion of jurisdiction of courts.**—On and from the date from which any jurisdiction, powers and authority becomes exercisable under this Act by a Tribunal in relation to recruitment and matters concerning recruitment to any Service or post or service matters concerning members of any Service or persons appointed to any Service or post, no court except—
>
> (a) the Supreme Court; or
>
> (b) any Industrial Tribunal, Labour Court or other authority constituted under the Industrial Disputes Act, 1947 or any other corresponding law for the time being in force,
>
> shall have, or be entitled to exercise any jurisdiction, powers or authority in relation to such recruitment or matters concerning such recruitment or such service matters."

A facet which is of vital relevance to the controversy before us, and consequently needs to be emphasised, is that Section 28, when originally enacted, was in the express terms of clause (2)(d) of Article 323A of the Constitution and the only exception made in it was in respect of the jurisdiction of this Court under Article 136 of the Constitution. However, before the final hearing in *Sampath Kumar's* case the provision was further amended to also save the jurisdiction of this Court under Article 32 of the Constitution; this aspect has been noted in the judgment of Misra, J. in *Sampath Kumar's* case (at para 14). Since the Court in *Sampath Kumar's* case had restricted its focus to the provisions of the Act, it expressed itself to be satisfied with the position that the power of judicial review of the Apex Court had not been tampered with by the provisions of the Act and did not venture to address the larger issue of whether clause (2)(d) of Article 323A of the Constitution also required a similar amendment.

Section 29 provides for the transfer to the Tribunals under the Act, of all service matters pending in every existing fora before their establishment. The only exception carved out is in respect of appeals pending before High Courts. Section 35 vests the Central Government with rule-making powers and Section 36 empowers the appropriate Government to make rules to implement the provisions of the Act and the matters specified in it. By virtue of Section 37, the rules made by the Central Government are required to be laid before Parliament and, in the case of rules made by State Governments, before the concerned State Legislature(s).

The Act and its provisions will be analysed in the course of this judgment. However, a preliminary appraisal of the framework of the Act would indicate that it was intended to provide a self-contained, almost wholly exclusive (the exceptions being specified in Section 28) forum for adjudication of all service-related matters. The Tribunals created under the Act were intended to perform a

substitutional role as opposed to — and this distinction is of crucial significance — a supplemental role with regard to the High Courts.

According to the information provided to us by Mr. K.N. Bhat, the learned Additional Solicitor General, apart from the Central Administrative Tribunal which was established on 1.11.1985, eight States have set up State Administrative Tribunals, all of which are presently functioning. The States, along with the date of establishment of the particular State Administrative Tribunals, are as follows: Andhra Pradesh (1.11.1989), Himachal Pradesh (1.9.1986), Karnataka (6.10.1986), Madhya Pradesh (2.8.1988), Maharashtra (8.7.1989), Orissa (14.7.1986), Tamil Nadu (12.12.1988) and West Bengal (16.1.1995).

We may now analyse the "post-***Sampath Kumar*** cases" which find mention in the order of the referring Bench. In ***J.B. Chopra's*** case, a Division Bench of this Court had occasion to consider one of the specific questions that has now arisen for our consideration, *viz.*, whether the Central Administrative Tribunal constituted under the Act has the authority and the jurisdiction to strike down a rule framed by the President of India under the proviso to Article 309 of the Constitution as being violative of Articles 14 and 16(1) of the Constitution. When the matter came up before the Division Bench, the issue was still being considered by the Constitution Bench in ***Sampath Kumar's*** case. The Division Bench, therefore, deferred its judgment till the final pronouncement of the decision in ***Sampath Kumar's*** case. Thereafter, it analysed the Constitution Bench's decision to arrive at the conclusion that "the Administrative Tribunal being a substitute of the High Court had the necessary jurisdiction, power and authority to adjudicate upon all disputes relating to service matters including the power to deal with all questions pertaining to the constitutional validity or otherwise of such laws as offending Articles 14 and 16(1) of the Constitution."

An aspect which needs to be emphasised is that the Constitution Bench in ***Sampath Kumar's*** case had not specifically addressed the issue whether the Tribunals under the Act would have the power to strike down statutory provisions or rules as being constitutionally invalid. However, the Division Bench in ***J.B. Chopra's*** case felt that this proposition would follow as a direct and logical consequence of the reasoning employed ***Sampath Kumar's*** case.

In ***M.B. Majumdar's*** case, a Division Bench of this Court had to confront the contention, based on the premise that in ***Sampath Kumar's*** case, this Court had equated the Tribunals established under the Act with High Courts, that the Members of the Central Administrative Tribunal must be paid the same salaries as were payable to Judges of the High Court. The Court, after analysing the text of Article 323A of the Constitution, the provisions of the Act, and the decision in ***Sampath Kumar's*** case, rejected the contention that the Tribunals were the equals of the High Courts in respect of their service conditions. The Court clarified that in ***Sampath Kumar's*** case, the Tribunals under the Act had been equated with High Courts only to the extent that the former were to act as substitutes for the latter in adjudicating service matters, the Tribunals could not, therefore, seek parity for all other purposes.

In ***Amulya Chandra's*** case, a Division Bench of this Court had to consider the question whether a dispute before the Central Administrative Tribunal could be decided by a single Administrative Member. The Court took note of sub-

section (2) of Section 5 of the Act which, as we have seen, stipulates that a Bench of a Tribunal under the Act should ordinarily consist of a Judicial Member and an Administrative Member, as also the relevant observations in ***Sampath Kumar's*** case, to conclude that under the scheme of the Act, all cases should be heard by a Bench of two Members. It appears that the attention of the Court was not drawn towards sub-section (6) of Section 5 which, as we have noticed, enables a single Member of a Tribunal under the Act to hear and decide cases.

The same issue arose for consideration before another Bench of this Court in ***Dr. Mahabal Ram's*** case. The Court took note of the decision in ***Amulya Chandra's*** case and, since the *vires* of sub-section (6) of Section 5 of the Act was not under challenge, held that sub-sections (2) and (6) of Section 5 are to be harmoniously construed in the following manner (*supra* at p. 404):

> "....There is no doubt that what has been said in ***Sampath Kumar's*** case would require safeguarding the interest of litigants in the matter of disposal of their disputes in a judicious way. Where complex questions of law would be involved the dispute would require serious consideration and thorough examination. There would, however, be many cases before the Tribunal where very often no constitutional issues or even legal points would be involved.....We are prepared to safeguard the interests of claimants who go before the Tribunal by holding that while allocating work to the single Member — whether judicial or administrative — in terms of sub-section (6), the Chairman should keep in view the nature of the litigation and where questions of law and for interpretation of constitutional provisions are involved they should not be assigned to a Single Member. In fact, the proviso itself indicates Parliament's concern to safeguard the interest of claimants by casting an obligation on the Chairman and Members who hear the cases to refer to a regular bench of two members such cases which in their opinion require to be heard by a bench of two Members. We would like to add that it would be open to either party appearing before a Single Member to suggest to the Member hearing the matter. The Members should ordinarily allow the matter to go to Bench of two Members when so requested. This would sufficiently protect the interests of the claimants and even of the administrative system whose litigation may be before the Single Member for disposal ..... The *vires* of sub-section (6) has not been under challenge and, therefore, both the provisions in Section 5 have to be construed keeping the legislative intention in view. We are of the view that what we have indicated above brings out the true legislative intention and the prescription in sub-section (2) and the exemption in sub-section (6) are rationalised."

In *R.K. Jain* v. ***Union of India***, (1993) 4 SCC 119, a Division Bench of this Court consisting of three of us (Ahmadi, CJI, Punchhi and Ramaswamy, JJ.) had occasion to deal with complaints concerning the functioning of the Customs, Excise and Gold (Control) Appellate Tribunal, which was set up by exercising the power conferred by Article 323B. In his leading judgment, Ramaswamy, J. analysed the relevant constitutional provisions, the decisions in ***Sampath Kumar, J.B. Chopra*** and ***M.B. Majumdar*** to hold that the Tribunals created under Articles 323A and 323B could not be held to be substitutes of High Courts for the purpose of exercising jurisdiction under Articles 226 and 227 of the Constitution. Having had the benefit of more than five year's experience of the working of these alternative institutional mechanisms, anguish was expressed over their

ineffectiveness in exercising the high power of judicial review. It was recorded that their performance had left much to be desired. Thereafter, it was noted that the sole remedy provided, that of an appeal to this Court under Article 136 of the Constitution, had proved to be prohibitively costly while also being inconvenient on account of the distances involved. It was suggested that an expert body like the Law Commission of India should study the feasibility of providing an appeal to a Bench of two Judges of the concerned High Court from the orders of such Tribunals and also analyse the working of the Tribunals since their establishment, the possibility of inducting members of the Bar to man such Tribunals etc. It was hoped that the recommendations of such an expert body would be immediately adopted by the Government of India and remedial steps would be initiated to overcome the difficulties faced by the Tribunals, making them capable of dispensing effective, inexpensive and satisfactory justice.

In a separate but concurring judgment, Ahmadi, J. (as he then was) speaking for himself and Punchhi, J., endorsed the recommendations in the following words:

> "....[T]he time is ripe for taking stock of the working of the various Tribunals set up in the country after the insertion of Articles 323A and 323B in the Constitution. A sound justice delivery system is a *sine qua non* for the efficient governance of a country wedded to the rule of law. An independent and impartial justice delivery system in which the litigating public has faith and confidence alone can deliver the goods. After the incorporation of these two articles, Acts have been enacted whereunder tribunals have been constituted for dispensation of justice. Sufficient time has passed and experience gained in these last few years for taking stock of the situation with a view to finding out if they have served the purpose and objectives for which they were constituted. Complaints have been heard in regard to the functioning of other tribunals as well and it is time that a body like the Law Commission of India has a comprehensive look-in with a view to suggesting measures for their improved functioning. That body can also suggest changes in the different statutes and evolve a model on the basis whereof tribunals may be contituted or reconstituted with a view to ensuring greater independence. An intensive and extensive study needs to be undertaken by the Law Commission in regard to the constitution of tribunals under various statutes with a view to ensuring their independence so that the public confidence in such tribunals may increase and the quality of their performance may improve. We strongly recommend to the Law Commission of India to undertake such an exercise on priority basis. A copy of this judgment may be forwarded by the Registrar of this Court to the Member-Secretary of the Commission for immediate action."

During the hearing, we requested the learned Additional Solicitor General of India, Mr. K.N. Bhat, to inform us of the measures undertaken to implement the directions issued by this Court in ***R.K. Jain's*** case. We were told that the Law Commission had in fact initiated a performance-analysis on the lines suggested in the judgment; however, when the Division Bench issued its order indicating that ***Sampath Kumar's*** case might have to be reviewed by a Larger Bench, further progress on the study was halted.

We may now apply ourselves to analysing the decision which has been impugned in one of the matters before us, C.A. No. 169 of 1994. The judgment,

Sakinala Harinath and Ors. v. ***State of A.P.***, rendered by a full Bench of the Andhra Pradesh High Court, has declared Article 323A(2)(d) of the Constitution to be unconstitutional to the extent it empowers Parliament to exclude the jurisdiction of the High Courts under Article 226 of the Constitution; additionally, Section 28 of the Act has also been held to be unconstitutional to the extent it divests the High Courts of jurisdiction under Article 226 in relation to service matters.

The judgment of the Court, delivered by M.N. Rao, J. has, in an elaborate manner, viewed the central issues before us against the backdrop of several landmark decisions delivered by Constitution Benches of this Court as also the leading authorities in comparative constitutional law. The judgment has embarked on a wide-ranging quest, extending to the American, Australian and British jurisdictions, to ascertain the true import of the concepts of 'judicial power', 'judicial review' and other related aspects. The judgment has also analysed a contention based on Article 371D of the Constitution, but, since that aspect is not relevant to the main controversy before us, we shall avoid its discussion.

The judgment of the Andhra Pradesh High Court has, after analysing various provisions of our Constitution, held that under our constitutional scheme the Supreme Court and the High Courts are the sole repositories of the power of judicial review. Such a power, being inclusive of 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" in Article 12 of the Constitution, has only been entrusted to the constitutional courts, *i.e.*, the High Courts and this Court. For this proposition, support has been drawn from the rulings of this Court in ***Kesavananda Bharati*** v. ***State of Kerala***, (1973) 4 SCC 225, ***Special Reference No. 1 of 1964***, [1965] 1 SCR 413, ***Indira Nehru Gandhi*** v. ***Raj Narain***, 1975 (Supp) SCC 1, ***Minerva Mills Ltd.*** v. ***Union of India***, (1980) 3 SCC 625, ***Kihoto Hollohan*** v. ***Zachillu and Ors.***, (1992) Supp. 2 SCC 651 and certain others decisions, all of which have been extensively analysed and profusely quoted from.

Analysing the decision in ***Sampath Kumar's*** case against this backdrop, it is noted that the theory of alternative institutional mechanisms established in ***Sampath Kumar's*** case is in defiance of the proposition laid down in ***Kesavananda Bharati's*** case, ***Special Reference*** case and ***Indira Gandhi's*** case, that the Constitutional Courts alone are competent to exercise the power of judicial review to pronounce upon the constitutional validity of statutory provisions and rules. The High Court, therefore, felt that the decision in ***Sampath Kumar's*** case, being *per incuriam*, was not binding upon it. The High Court also pointed out that, in any event, the issue of constitutionality of Article 323A(2)(d) was neither challenged nor upheld in ***Sampath Kumar's*** case and it could not be said to be an authority on that aspect.

Thereafter, emphasising the importance of service matters which affect the functioning of civil servants, who are an integral part of a sound governmental system, the High Court held that service matters which involve testing the constitutionality of provisions or rules, being matters of grave import, could not be left to be decided by statutorily created adjudicatory bodies, which would be

susceptible to executive influences and pressures. It was emphasised that in respect of Constitutional Courts, the Framers of our Constitution had incorporated special prescriptions to ensure that they would be immune from precisely such pressures. The High Court also cited reasons for holding that the sole remedy provided, that of an appeal under Article 136 to this Court, was not capable of being a real safeguard. It was also pointed out that even the saving of the jurisdiction of this Court under Article 32 of the Constitution would not help improve matters. It was, therefore, concluded that although judicial power can be vested in a Court or Tribunal, the power of judicial review of the High Court under Article 226 could not be excluded even by a constitutional Amendment.

Article 323B:

This provision of the Constitution empowers Parliament or the State Legislatures, as the case may be, to enact laws providing for the adjudication or trial by Tribunlas of disputes, complaints or offences with respect to a wide variety of matters which have been specified in the nine sub-clauses of clause (2) of Article 323B. The matters specified cover a wide canvas including *inter alia* disputes relating to tax cases, foreign exchange matters, industrial and labour cases, ceiling on urban property, election to State Legislatures and Parliament, essential goods and their distribution, criminal offences etc. Clause (3) enables the concerned Legislature to provide for the establishment of a hierarchy of Tribunals and to lay down their jurisdiction, the procedure to be followed by them in their functioning, etc. Sub-clause (d) of clause (3) empowers the concerned Legislature to exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Article 136 of the Constitution, with respect to all or any of the matters falling within the jurisdiction of the Tribunals. The constitutional provision, therefore, invests Parliament or the State Legislatures, as the case may be, with powers to divest the traditional courts of a considerable portion of their judicial work.

According to the information provided to us by Mr. K.N. Bhat, the learned Additional Solicitor General, until the present date, only four Tribunals have been created under Article 323B pursuant to legislations enacted by the Legislatures of three States. The first of these was the West Bengal Taxation Tribunal which was set up in 1989 under the West Bengal Taxation Tribunal Act, 1987. Similarly, the Rajasthan Taxation Tribunal was set up in 1995 under the Rajasthan Taxation Tribunal Act, 1995. The State of Tamil Nadu has set up two Tribunals by utilising the power conferred upon it by Article 323B. The first of these was the Tamil Nadu Land Reforms Special Appellate Tribunal which was established on 1.11.1990 under the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1985 to deal with all matters relating to land reforms arising under the Tamil Nadu Reforms (Fixation of Ceiling on Land) Act, 1961. Later, the Tamil Nadu Taxation Special Tribunal was established on 22.12.1995 under the Tamil Nadu Taxation Special Tribunal Act, 1992 to deal with cases arising under the Tamil Nadu General Sales Tax Act and Additional Sales Tax Act.

Certain problems have arisen in the functioning of these Tribunals especially in respect of the manner in which they exclude the jurisdiction of their respective High Courts. This aspect can be illustrated by briefly adverting to the broad facts

of two of the matters before us. C.A. No. 1532-33 of 1993 arises as a result of conflicting orders issued by the West Bengal Taxation Tribunal and the Calcutta High Court. Certain petitioners had challenged the constitutional validity of some provisions in three legislations enacted by the West Bengal Legislature before the West Bengal Taxation Tribunal. After examining the matter and hearing the arguments advanced in response by the State of West Bengal, the West Bengal Taxation Tribunal, by its order dated 9.10.1991, upheld the constitutional validity of the impugned provisions. Thereafter, the constitutional validity of the same provisions was challenged in a Writ Petition before the Calcutta High Court. During the proceedings, the State of West Bengal raised the preliminary objection that by virtue of Section 14 of the West Bengal Taxation Tribunal Act, 1987, which excluded the jurisdiction of the High Court in all matters within the jurisdiction of the Taxation Tribunal, the Calcutta High Court had no jurisdiction to entertain the writ petition. However, the High Court proceeded with the case and, by its judgment dated 25.11.1992, declared the impugned provisions to be unconstitutional. These developments have resulted in an interesting situation, where the same provisions have alternately been held to be constitutional and unconstitutional by two different fora, each of which considered itself to be empowered to exercise jurisdiction.

S.L.P. No. 17768 of 1991 seeks to challenge a judgment of the Madras High Court which has held that the establishment of the Tamil Nadu Land Reforms Special Appellate Tribunal will not affect the powers of the Madras High Court to issue writs. This decision is based on the reasoning that the Legislature of the State had no power "to infringe upon the High Courts' power to issue writs under Article 226 of the Constitution and to exercise its power of superintendence under Article 227 of the Constitution."

It is against these circumstances that we must now test the propositions put forth for our consideration.

Submissions of Counsel:

We have heard the submissions of several learned senior counsels who appeared for the various parties before us. Mr. Rama Jois and Mr. Shanti Bhushan, through their respective arguments, urged us to review the decision in ***Sampath Kumar's*** case and to hold Article 323A(2)(d) and Article 323B(3)(d) of the Constitution to be unconstitutional to the extent they allow Tribunals created under the Act to exclusively exercise the jurisdiction vested in the High Courts under Articles 226 and 227 of the Constitution. On the other hand, Mr. Bhat, the learned Additional Solicitor General, Mr. P.P. Rao, and Mr. K.K. Venugopal urged us to uphold the validity of the impugned constitutional provisions and to allow such Tribunals to exercise the jurisdiction under Article 226 of the Constitution. We have also heard arguments advanced on behalf of the Registrar of the Principal Bench of the Central Administrative Tribunal, who was represented before us by Mr. Kapil Sibal, Mr. V.R. Reddy, the learned Additional Solicitor General, urged us to set aside the judgment of the Madras High Court which affects the jurisdiction of the Tamil Nadu Land Reforms Special Appellate Tribunal. Certain other counsels have also addressed us in support of the main arguments advanced.

Mr. Rama Jois, learned counsel for the petitioner in W.P. No. 918 of 1992,

contended as follows: (i) Section 5(6) of the Act, insofar as it allows a single Member Bench of a Tribunal to test the constitutional validity of a statutory provision, is unconstitutional. This proposition flows from the decisions in ***Sampath Kumar's*** case, ***Amulya Chandra's*** case and ***Dr. Mahabal Ram's*** case. In ***Sampath Kumar's*** case, this Court had required a Bench of a Tribunal to ordinarily consist of a Judicial Member and an Administrative Member. Consequently, Section 5(2) of the Act was accordingly amended; however, since Section 5(6) was not amended simultaneously, the import of the observations in ***Sampath Kumar's*** case can still be frustrated. Even if the theory of alternative institutional mechanisms adopted in ***Sampath Kumar's*** case, is presumed to be correct, Section 5(6) of the Act will have to be struck down as a single Member Bench of a Tribunal cannot be considered to be a substitute for the exercise of the power of a High Court under Article 226 of the Constitution, (ii) The impugned provisions of the Constitution, insofar as they exclude the jurisdiction of the Supreme Court and the High Courts under Articles 32 and 226 of the Constitution, are unconstitutional. This is for the reason that: (a) Parliament cannot, in exercise of its constituent power, confer power on Parliament and the State Legislatures to exclude the constitutional jurisdiction conferred on the High Courts as the power to amend the Constitution cannot be conferred on the Legislatures; and (b) These provisions violate the basic structure of the Constitution insofar as they take away the power of judicial review vested in the Supreme Court under Article 32 of the Constitution and the High Courts under Articles 226 and 227 of the Constitution. While the Tribunals constituted under Articles 323A and 323B can be vested with the power of judicial review over administrative action, the power of judicial review of legislative action cannot be conferred upon them. This proposition flows from ***Kesavananda Bharati's*** case where it was held that under our constitutional scheme, only the constitutional courts have been vested with the power of judicial review of legislative action; (iii) While the provisions of the Act do not purport to affect the sacrosanct jurisdiction of the Supreme Court under Article 32 of the Constitution, Articles 323A and 323B allow Parliament to pursue such a course in future and are therefore liable to be struck down; (iv) The decision in ***Sampath Kumar's*** case was founded on the hope that the Tribunals would be effective substitutes for the High Courts. This position is neither factually nor legally correct on account of the following differences between High Courts and these Tribunals: (a) High Courts enjoy vast powers as a consequence of their being Courts of Record under Article 215 of the Constitution and also possess the power to issue Certificates of Appeal under Articles 132 and 133 of the Constitution in cases where they feel that a decision of this Court is required. This is not so for Tribunals; (b) The qualifications for appointment of a High Court Judge and the constitutional safeguards provided ensure the independence of and efficiency of the Judges who man the High Courts. The conditions prescribed for Members of Tribunals are not comparable; (c) While the jurisdiction of the High Courts is constitutionally protected, a Tribunal can be abolished by simply repealing its parent statute; (d) While the expenditure of the High Courts is charged to the Consolidated Fund of the States, the Tribunals are dependent upon the appropriate Government for the grant of funds for meeting their expenses. These and other differences give rise to a situation whereby the Tribunals, being deprived of constitutional safeguards for ensuring their independence, are

incapable of being effective substitutes for the High Courts; (v) Under our constitutional scheme, every High Court has, by virtue of Articles 226 and 227 of the Constitution, the power to issue prerogative writs or orders to all authorities and instrumentalities of the State which function within its territorial jurisdiction. In such a situation, no authority or Tribunal located within the territorial jurisdiction of a High Court can disregard the law declared by it. The impugned constitutional provisions, insofar as they seek to divest the High Courts of their power of superintendence over all Tribunals and Courts situated within their territorial jurisdiction, violate the basic structure of the Constitution; (vi) In view of the aforestated propositions, the decision in ***Sampath Kumar's*** case requires a comprehensive reconsideration.

Mr. Shanti Bhushan, appearing for the respondent in C.A. No. 1532-33/96, advanced the following submissions: (i) The 42nd Amendment to the Constitution, which introduced the impugned constitutional provisions, must be viewed in its historical context. The 42nd Amendment, being motivated by a feeling of distrust towards the established judicial institutions, sought, in letter and spirit, to divest constitutional courts of their jurisdiction. The aim was to vest such constitutional jurisdiction in creatures whose establishment and functioning could be controlled by the executive. Such an intent is manifest in the plain words of Articles 323A and 323B which oust the jurisdiction vested in this Court and the High Courts under Articles 32, 226 and 227 of the Constitution; (i) The validity of the impugned provisions has to be determined irrespective of the manner in which the power conferred by them has been exercised. In ***Sampath Kumar's*** case, this Court restricted its enquiry to the Act, which did not oust the jurisdiction under Article 32, and did not explore the larger issue of the constitutionality of Article 323A(2)(d), which in express terms permits Parliament to oust the jurisdiction of the Supreme Court. This was not the correct approach as the constitutionality of a provision ought not to be judged only against the manner in which power is sought to be exercised under it. The correct test is to square the provision against the constitutional scheme and then pronounce upon its compatibility. The vice in Article 323A(2)(d) is that it permits Parliament to enact, at a future date, a law to exclude the jurisdiction of this Court under Article 32. Being possessed of such potential for unleashing constitutional mischief in the future, its *vires* cannot be sustained; (iii) The power of judicial review vested in this Court under Article 32 and the High Court under Article 226 is part of the basic structure of Constitution. The relevant portions of the decisions in ***Kesavananda Bharati's*** case, ***Fertiliser Corporation Kamgar Union*** v. ***Union of India***, (1981) 1 SCC 568 and ***Delhi Judicial Service Association*** v. ***State of Gujarat***, (1991) 4 SCC 406 highlight the importance accorded to Article 32 of the Constitution; (iv) The theory of alternative institutional mechanisms advocated in ***Sampath Kumar's*** case ignores the fact that judicial review vested in the High Courts consists not only of the power conferred upon the High Courts but also of the High Courts themselves as institutions endowed with glorious judicial traditions. The High Courts had been in existence since the 19th century and were possessed of a hoary past enabling them to win the confidence of the people. It is this which prompted the Framers of our Constitution to vest such constitutional jurisdiction in them. A Tribunal, being a new creation of the executive, would not be able to recreate a

similar tradition and environment overnight. Consequently, the alternative mechanisms would not, in the absence of an atmosphere conducive to the building of traditions, be able to act as effective alternatives to High Courts for the exercise of constitutional jurisdiction. In ***Pratibha Bonnerjea*** v. ***Union of India***, (1995) 6 SCC 765, this Court has analysed the special constitutional status of Judges of High Courts and explained how they are distinct from other tiers of the judiciary.

Mr. A.R. Ganguli, appearing for the second and third respondents in C.A. 1532-33/93, adopted the arguments of Mr. Rama Jois and Mr. Bhushan. In addition, he cited certain authorities in support of his contention that the power to interpret the provisions of the Constitution is one which has been solely vested in the constitutional courts and cannot be bestowed on newly created quasi-judicial bodies which are susceptible to executive influences.

Mr. K.N. Bhat, the learned Additional Solicitor General of India represented the Union of India which is a party in C.A. No. 169 of 1994 and C.A. No. 481 of 1989. His contentions are as follows: (i) Clause 2(d) of Article 323A and clause 3(d) of Article 323B ought not to be struck down on the ground that they exclude the jurisdiction of this Court under Article 32 of the Constitution. On account of several decisions of this Court, it is a well-established proposition in law that the jurisdiction of this Court under Article 32 of the Constitution is sacrosanct and is indisputably a part of the basic structure of the Constitution. This position had been clearly enunciated well before the 42nd Amendment to the Constitution was conceived. Therefore, Parliament must be deemed to have been aware of such a position and it must be conclude that the jurisdiction under Article 32 was not intended to be affected. However the jurisdiction of the High Courts under Article 226 was sought to be removed by creating alternative institutional mechanisms. The theory enunciated in ***Sampath Kumar's*** case is based on sound considerations and does not require any reconsideration; (ii) Alternatively, Articles 323A and 323B do not seek to exclude the supervisory jurisdiction of the High Courts over all Tribunals situated within their territorial jurisdiction. Viewed from this perspective, the High Courts would still be vested with constitutional powers to exercise corrective or supervisory jurisdiction; (iii) Since the decisions of this Court in ***Amulya Chandra's*** case and ***Dr. Mahabal Ram's*** case had clearly held that matters relating to the *vires* of a provision are to be dealt with by a Bench consisting of a judicial member and these guidelines will be followed in future, there is no vice of unconstitutionality in Section 5(6).

Mr. P.P. Rao, learned counsel for the State of Andhra Pradesh in C.A. No. 196 of 1994 and the connected special leave petitions, put forth the following submissions: (i) The matter before us involves a very serious, live problem which needs to be decided by adopting a pragmatic, co-operative approach instead of by a dogmatic, adversarial process. It is a fact that the Administrative Tribunals which were conceived as substitutes for the High Courts have not lived upto expectations and have instead, proved to be inadequate and ineffective in several ways. However, the striking down of the impugned constitutional provisions would, instead of remedying the problem, contribute to its worsening. The problem of pendency in High Courts which has been a cause for concern for several decades, has been focussed upon by several expert

committees and commissions. The problem of enormous increase in the volume of fresh institution coupled with massive arrears has necessitated the seeking of realistic solutions in order to prevent High Courts from becoming incapable of discharging their functions. The consistent view of these expert committees has been that the only manner in which the situation can be saved is by transferring some of the jurisdiction of the High Courts, in relatively less important areas, to specially constituted Tribunals which would act as substitutes for the High Courts. In *Sampath Kumar's* case, this Court was required to test the constitutional validity of providing for such a substitute to the High Courts in the shape of Administrative Tribunals. While deciding the case, this Court had actually monitored the amendments to the Act by a series of orders and directions given from time to time as the learned Attorney General had offered to effect the necessary amendments to the Act to remove its defects. After the necessary amendments were made to the Act, this Court was satisfied that there was no need to strike it down as it was of the view that the Act would provide an effective alternative forum to the High Courts for the resolution of service disputes. However, the actual functioning of the Tribunals during the last decade has brought forth several deficiencies which need to be removed. The remedy, however, lies not in striking down the constitutional provisions involved but in allowing the Union of India to further amend the Act so as to ensure that the Tribunals become effective alternative fora; (ii) Articles 323A(2)(d) does not violate the basic structure of the Constitution. The relevant observations in *Kesavananda Bharati's* case show that there is an inherent distinction between the individual provisions of the Constitution and the basic features of the Constitution. While the basic features of the Constitution cannot be changes even by amending the Constitution, each and every provision of the Constitution can be amended under Article 368. The majority judgments in *Kesavananda Bharati's* case emphatically state that the concept of separation of powers is a basic feature of the Constitution. It, therefore, follows that the power of judicial review, which is a necessary concomitant of the independence of the judiciary, is also a basic feature of our Constitution. However, it does not follow that specific provisions such as Article 32 or Article 226 are by themselves part of the basic structure of the Constitution. In this regard, the history of Article 31, which contained a Fundamental Right to Property and was shifted from Part III to Chapter IV of Part XII can be cited by way of an example; (iii) The essence of the power of judicial review is that it must always remain with the judiciary and must not be surrendered to the executive or the legislature. Since the impugned provisions save the jurisdiction of this Court under Article 136, thereby allowing the judiciary to have the final say in every form of adjudication, it cannot be said that the basic feature of judicial review had been violated. The constitutional bar is against the conferment of judicial power on agencies outside the judiciary. However, if within the judicial set-up, arrangements are made in the interests of better administration of justice to limit the jurisdiction under Articles 32 and 226 of the Constitution, there can be no grievance. In fact, it is in the interest of better administration of justice that this Court has developed a practice, even in the case of violation of Fundamental Rights, of requiring parties to approach the concerned High Court under Article 226 instead of directly approaching this Court under Article 32 of the Constitution. This, undoubtedly, has the effect of limiting the jurisdiction of this Court under Article 32 but, being necessary for

proper administration of justice, cannot be challenged as unconstitutional. Service matters, which are essentially in the nature of in-house disputes, being of lesser significance than those involving Fundamental Rights, can also be transferred to Tribunals on the same reasoning; (vi) By virtue of Order XXVII-A, Rule 1A, ordinary civil courts are empowered to adjudicate upon questions of *vires* of statutory rules and instruments. In view of this situation, there is no constitutional difficulty in empowering Tribunals to have similar powers; (v) Alternatively, in case we are inclined to take the view that the power of judicial review of legislative enactments cannot in any event be conferred on any other Court or Tribunal, we may use the doctrine of reading down to save the impugned constitutional provisions. So construed, the High Courts would continue to have jurisdiction to decide the *vires* of an Act even in the area of service disputes and would, therefore, perform a supervisory role over Tribunals in respect of matters involving constitutional questions.

Mr. K.K. Venugopal, representing the State of West Bengal in S.L.P. No. 1063 of 1996 and C.A. No. 1532-33 of 1993, began by reiterating the contention that the impugned provisions do not seek to oust the jurisdiction of this Court under Article 32 which is a basic feature of the Constitution. His alternative contention was that since the provisions do not exclude the jurisdiction under Article 136 and since Article 32(3) itself conceives of the delegation of that jurisdiction, the ouster of the jurisdiction under Article 32 was not unconstitutional. This submission was based on the reasoning that, in the absence of any specific constitutional prohibition, both Parliament and the State legislatures were vested with sufficient legislative powers to effect changes in the original jurisdiction of this Court as well as the High Courts. He then stated that in the event that we are not inclined to hold in accordance with either of the earlier contentions, the doctrine of severability should be applied to excise the words "under Article 136" from the provisions and thus save them from the vice of unconstitutionality. Thereafter, he endeavoured to impress upon us the jurisprudential soundness of the theory of alternative institutional mechanisms propounded in ***Sampath Kumar's*** case. He then contended that the shortfalls in the constitution of the Tribunals, the selection of their personnel, the methods of their appointment etc. are a consequence of legislative and executive errors of judgment; these shortfalls cannot affect the constitutionality of the parent constitutional provisions. He concluded by declaring that these constitutional amendments were lawfully incorporated by the representatives of the people in exercise of the constituent power of Parliament to remedy the existing problem of inefficacious delivery of justice in the High Courts. He counselled us not to substitute our decision for that of the policy evolved by Parliament in exercise of its constituent power and urged us to suggest suitable amendments, as was done in ***Sampath Kumar's*** case, to make up for the shortfalls in the existing system.

Mr. Kiran K. Shah, the petitioner in W.P. No. 789 of 1990, who is a lawyer practising before the Ahmedabad Bench of the Central Administrative Tribunal, sought to apprise us of the practical problems faced by Advocates in presenting their cases before the Central Administrative Tribunal and of several complaints regarding the discharge of their official duties.

The Registrar of the Principal Bench of the Central Administrative Tribunal,

who is the second respondent in C.A. No. 481 of 1989, was represented before us by Mr. Kapil Sibal. The case of the Registrar is that the Tribunals, as they are functioning at present, are not effective substitutes for the High Courts. However, the creation of alternative institutional mechanisms is not violative of the basic structure so long as it is as efficacious as the constitutional courts. He urged us to discontinue the appointment of Administrative Members to the Tribunals and to ensure that the Members of the Tribunals have security of tenure, which is a necessary pre-requisite for securing their independence.

Mr. V.R. Reddy, the learned Additional Solicitor General of India, drew our attention towards the judgment of the Madras High Court which is the subject of challenge in S.L.P. No. 17768 of 1991. Mr. Reddy endeavoured to convince us that the amendments incorporated in the legislation which created the Tamil Nadu Land Reforms Special Appellate Tribunal after the decision in ***Sampath Kumar's*** case have the effect of making it a proper and effective substitute for the High Courts. He also submitted that the functioning of the Land Reforms Tribunal was essential for the effective resolution of disputes in that branch of law.

We may now address the main issues which have been identified at the beginning of this judgment as being central to the adjudication of this batch of matters. This would involve an appreciation of the power of judicial review and an understanding of the manner and the instrumentalities through which it is to be exercised.

The underlying theme of the impugned judgment of the A.P. High Court rendered by M.N. Rao, J. is that the power of judicial review is one of the basic features our Constitution and that aspect of the power which enables courts to test the constitutional validity of statutory provisions is vested exclusively in the constitutional courts, *i.e.*, the High Courts and the Supreme Court. In this regard, the position in American Constitutional Law in respect of Courts created under Article III of the Constitution of the United States has been analysed to state that the functions of Article III Courts (constitutional courts) cannot be performed by other legislative courts established by the Congress in exercise of its legislative power. The following decisions of the U.S. Supreme Court have been cited for support : ***National Mugal Insurance Company of the District of Columbia*** v. ***Tidewater Transfer Company,*** 93 L.Ed. 1156 = 337 US 582, ***Thomas S. William*** v. ***United States,*** 77 L. Ed. 1372 = 289 US 553, ***Cooper*** v. ***Aaron*** 3 L. Ed. 2d 5 = 358 US 1, ***Northern Pipeline Construction Company*** v. ***Marathon Pipeline Company and United States,*** 73 L. Ed. 2d 59 = 458 US 50.

We may briefly advert to the position in American Constitutional Law to the extent that it is relevant for our purpose. As pointed out by Henry J. Abraham, an acclaimed American Constitutional Law scholar, Judicial review in the United States comprises the power of any court to hold unconstitutional and hence unenforceable any law, any official action based upon a law or any other action by a public official that it deems to be in conflict with the Basic Law, in the United States, its Constitution.(*) It is further stated that in the United States, the highly significant power of Judicial review is possessed, theoretically, by every

(*)Henry J. Abraham, The Judicial Process, 4th Edn., Oxford University Press (1980) p. 296.

court of record, no matter how high or low on the judicial ladder. Though it occurs only infrequently, it is quite possible for a Judge in a low-level court of one of the 50 States to declare a Federal Law unconstitutional.

The position can be better appreciated by analysing the text of Section 1 of Article III of the U.S. Constitution:

> "**Article III, Section 1** — The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." (Emphasis added)

The judgment of the A.P. High Court is, therefore, correct in asserting that the judicial power vested in Article III of the U.S. Constitution can only be exercised by courts created under Section 1 of Article III. However, what must be emphasised is the fact that Article III itself contemplates the conferment of such judicial power by the U.S. Congress upon inferior courts so long as the independence of the Judges is ensured in terms of Section 1 of Article III. The proposition which emerges from this analysis is that in the United States, though the concept of judicial power has been accorded great constitutional protection, there is no blanket prohibition on the conferment of judicial power upon courts other than the U.S. Supreme Court.

Henry J. Abraham's definition of judicial review in the American context is, subject to a few modifications, equally applicable to the concept as it is understood in Indian Constitutional Law. Broadly speaking, judicial review in India comprises three aspects: judicial review of legislative action, judicial review of judicial decisions and judicial review of administrative action. We are, for the present, concerned only with understanding the first two aspects.

In the modern era, the origin of the power of judicial review of legislative action may well be traced to the classic enunciation of the principle by Chief Justice John Marshall of the U.S. Supreme Court in *Marbury* v. *Madison*, 1 Cranch 137 (1803):

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule... A law repugnant to the Constitution is void;... Courts as well as other departments are bound by that instrument." (Emphasis added)

The assumption of such a power unto itself by the U.S. Supreme Court was never seriously challenged and, over the years, it has exercised this power in numerous cases despite the persisting criticism that such an exercise was undemocratic. Indeed, when the Framers of our Constitution set about their monumental task, they were well aware that the principle that courts possess the power to invalidate duly enacted legislations had already acquired a history of nearly a century and a half.

At a very early stage of the history of this Court, when it was doubted whether it was justified in exercising such a power, Patanjali Sastri, C.J., while

emphatically laying down the foundation of the principle held as follows (***State of Madras*** v. ***V.G. Row***, [1952] S.C.R. 597 at 606):

> "....[O]ur Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike as in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted "due process" clause in the Fifth and Fourteenth Amendments. if, then, the Courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the "fundamental rights", as to which this Court has been assigned the role of a sentinel on the *qui vive*. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute." (Emphasis added)

Over the years, this Court has had many an opportunity to express its views on the power of judicial review of legislative action. What follows is an analysis of the leading pronouncements on the issue.

While delivering a separate but concurring judgment in the five-Judge Constitution Bench decision in ***Bidi Supply Co.*** v. ***The Union of India & Ors.***, [1956] S.C.R. 267 at 284, Bose, J. made the following observations which are apposite to the present context:

> "The heart and core of a democracy lies in the judicial process, and that means independent and fearless judges free from executive control brought up in judicial traditions and training to judicial ways of working and thinking. The main bulwarks of liberty and freedom lie there and it is clear to me that uncontrolled powers of discrimination in matters that seriously affect the lives and properties of people cannot be left to executive or quasi-executive bodies even if they exercise quasi-judicial functions because they are then invested with an authority that even Parliament does not possess. Under the Constitution, Acts of Parliament are subject to judicial review particularly when they are said to infringe fundamental rights, therefore, if under the Constitution Parliament itself has not uncontrolled freedom of action, it is evident that it cannot invest lesser authorities with that power."

Special Reference No. 1 of 1964, was a case where a seven-Judge Constitution Bench of this Court had to express itself on the thorny issue of Parliamentary Privileges. While doing so, the Court was required to consider the manner in which our Constitution has envisaged a balance of power between the three wings of Government and it was in this context that Gajendragadkar, C.J. made the following observations:

> "... [W]hether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the Constitution has entrusted to the Judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens. When a statute is challenged on the ground that it has been passed by a Legislature without authority, or has otherwise unconstitutionally trespassed on fundamental rights, it is for the courts to determine the dispute and decide

> whether the law passed by the legislature is valid or not. Just as the legislatures are conferred legislative functions, and the functions and authority of the executive lie within the domain of executive authority, so the jurisdiction and authority of the Judicature in this country lie within the domain of adjudication. If the validity of any law is challenged before the courts, it is never suggested that the material question as to whether legislative authority has been exceeded or fundamental rights have been contravened, can be decided by the legislatures themselves. Adjudication of such a dispute is entrusted solely and exclusively to the Judicature of this country." (Emphasis added)

It is interesting to note that the origins of the power of judicial review of legislative action have not been attributed to one source alone. While Sastri, C.J. found the power mentioned expressly in the text of the Constitution, Gajendragadkar, C.J. preferred to trace it to the manner in which the Constitution has separated powers between the three wings of Government.

In ***Kesavananda Bharati's*** case, a 13-Judge Constitution Bench, by a majority of 7:6, held that though, by virtue of Article 368, Parliament is empowered to amend the Constitution, that power cannot be exercised so as to damage the basic features of the Constitution or to destroy its basic structure. The identification of the features which constitute the basic structure of our Constitution has been the subject-matter of great debate in Indian Constitutional Law. The difficulty is compounded by the fact that even the judgments for the majority are not unanimously agreed on this aspect. [There were five judgments for the majority, delivered by Sikri, C.J., Shelat & Grover, JJ., Hegde & Mukherjee, JJ., Jaganmohan Reddy, J. and Khanna, J. While Khanna, J. did not attempt to catalogue the basic features, the identification of the basic features by the other Judges are specified in the following paragraphs of the Court's judgments : Sikri, C.J. (para 292), Shelat and Grover, JJ. (para 582), Hegde and Mukherjee, JJ. (paras 632, 661) and Jaganmohan Reddy, J. (paras 1159, 1161)]. The aspect of judicial review does not find elaborate mention in all the majority judgments. Khanna, J. did, however, squarely address the issue (at para 1529):

> "... The power of judicial review is, however, confined not merely to deciding whether in making the impugned laws the Central or State Legislatures have acted within the four corners of the legislative lists earmarked for them; the courts also deal with the question as to whether the laws are made in conformity with and not in violation of the other provisions of the Constitution.. As long as some fundamental rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by those rights are not contravened.... Judicial review has thus become an integral part of our constitutional system and a power has been vested in the High Courts and the Supreme Court to decide about the constitutional validity of provisions of statutes. If the provisions of the statute are found to be violative of any article of the Constitution, which is the touchstone for the validity of all laws, the Supreme Court and the High Courts are empowered to strike down the said provisions." (Emphasis added)

Shelat & Grover, JJ., while reaching the same conclusion in respect of

Articles 32 & 226, however, adopted a different approach to the issue (at para 577):

> "There is ample evidence in the constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so predominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the Constitution does not lay down the principle of separation of powers in all its rigidity as is the case in the United States Constitution but it envisages such a separation to a degree as was found in ***Ranasinghe's*** case (*supra*). The judicial review provided expressly in our Constitution by means of Articles 226 and 32 is one of the features upon which hinges the system of checks and balances." (Emphasis added)

In *Indira Nehru Gandhi* v. *Raj Narain*, a five-Judge Constitution Bench had to, *inter alia*, test the Constitutional validity of provisions which ousted the jurisdiction of all Courts including the Supreme Court, in election matters. Consequently, the Court was required to express its opinion on the concept of judicial review. Though all five Judges delivered concurring judgments to strike down the offending provisions, their views on the issue of judicial review are replete with variations. Ray, C.J., was of the view that the concept of judicial review, while a distinctive feature of American Constitutional Law, is not founded on any specific Article in our Constitution. He observed that judicial review can and has been excluded in several matters; in election matters, judicial review is not a compulsion. He, however, held that our Constitution recognises a division of the three main functions of Government and that judicial power, which is vested in the judiciary cannot be passed to or shared by the Executive or the Legislature. (Paras 32, 43, 46, 52). Khanna, J. took the view that it is not necessary, within a democratic set up, that disputes relating to the validity of elections be settled by Courts of Law; he, however, felt that even so the legislature could not be permitted to declare that the validity of a particular election would not be challenged before any forum and would be valid despite the existence of disputes. (Para 207). Mathew, J. held that whereas in the United States of America and in Australia, the judicial power is vested exclusively in Courts, there is no such exclusive vesting of judicial power in the Supreme Court of India and the Courts subordinate to it. Therefore, the Parliament could, by passing a law within its competence, vest judicial power in any authority for deciding a dispute. (Paras 322 and 323). Beg, J. held that the power of Courts to test the legality of ordinary laws and Constitutional amendments against the norms laid down in the Constitution flows from the 'supremacy of the Constitution' which is a basic feature of the Constitution. (para 622). Chandrachud, J. felt that the contention that judicial review is a part of the basic structure and that any attempt to exclude the jurisdiction of courts in respect of election matters was unconstitutional, was too broadly stated. He pointed out that the Constitution, as originally enacted, expressly excluded judicial review in a large number of important matters. The examples of Articles 136(2) and 226(4) [exclusion of review in laws relating to armed forces], Article 262(2) [exclusion of review in river disputes], Article 103(1) [exclusion of review in disqualification of Members of Parliament], Article 329(a) [exclusion of review in laws relating to delimitation of constituencies and related matters], were cited for support. Based

on this analysis, Chandrachud, J. came to the conclusion that since the Constitution, as originally enacted, did not consider that judicial power must intervene in the interests of purity of elections, judicial review cannot be considered to be a part of the basic structure in so far as legislative elections are concerned.

The foregoing analysis reveals that the Judges in *Indira Gandhi's* case, all of whom had been party to *Kesavananda Bharati's* case, did not adopt similar approaches to the concept of judicial review. While Beg, J. clearly expressed his view that judicial review was a part of the basic structure of the Constitution, Ray, CJ and Mathew, J. pointed out that unlike in the American context, judicial power had not been expressly vested in the judiciary by the Constitution of India. Khanna, J. did not express himself on this aspect, but in view of his emphatic observations in *Kesavananda Bharati's* case his views on the subject can be understood to have been made clear. Chandrachud, J. pointed out that the Constitution itself excludes judicial review in a number of matters and felt that in election matters, judicial review is not a necessary requirement.

In *Minerva Mills* v. *Union of India,* a five-Judge Constitution Bench of this Court had to consider the validity of certain provisions of the Constitution (42nd Amendment) Act, 1976 which, *inter alia,* excluded judicial review. The judgment for the majority, delivered by Chandrachud, CJ for four Judges, contained the following observations (at p. 644, para 21):

> "... Our Constitution is founded on a nice balance of power among the three wings of the State, namely, the Executive, the Legislature and the Judiciary. It is the function of the Judges, nay their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled." (Emphasis supplied)

The majority judgment held the impugned provisions to be unconstitutional. While giving reasons in support, Chandrachud, CJ stated as follows:

> "... It is for the courts to decide whether restrictions are reasonable and whether they are in the interest of the particular subject. Apart from other basic dissimilarities, Article 31-C takes away the power of judicial review to an extent which destroys even the semblance of a comparison between its provisions and those of clauses (2) to (6) of Article 19. Human ingenuity, limitless though it may be, has yet not devised a system by which the liberty of the people can be protected except through the intervention of courts of law."

It may, however, be noted that the majority in *Minerva Mills* did not hold that the concept of judicial review was, by itself, part of the basic structure of the Constitution. The judgment of Chandrachud, CJ in the *Minerva Mill's* case must be viewed in the context of his judgment in *Indira Gandhi's* case where he had stated that the Constitution, as originally enacted, excluded judicial review in several important matters.

In his minority judgment in *Minerva Mill's* case, Bhagwati, J. held as follows:

"..... The Constitution has, therefore, created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. It is the solemn duty of the Judiciary under the Constitution to keep the different organs of the State such as the executive and the legislature within the limits of the power conferred upon them by the Constitution. This power of judicial review is conferred on the judiciary by Articles 32 and 226 of the Constitution.... The judiciary is the interpreter of the Constitution and to the judiciary is assigned the delicate task to determine what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law, which *inter alia* requires that "the exercise of powers by the government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law". The power of judicial review is an integral part of our constitutional system..... the power of judicial review.... is unquestionably ..... part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that effective alternative institutional mechanisms or arrangements for judicial review cannot be made by Parliament." (Emphasis added)

The A.P. High Court has, through the judgment of M.N. Rao, J. pointed out that the theory of alternative institutional mechanisms enunciated by Bhagwati, J. in his minority judgment in *Minerva Mill's* case was not supported by or even mentioned in the majority judgment. In fact, such a theory finds no prior mention in the earlier decisions of this Court and, in the opinion of the A.P. High Court, did not represent the correct legal position. It is to be noted that in *Sampath Kumar's* case, both Bhagwati, CJ and Misra, J. in their separate judgment have relied on the observations in the minority judgment of Bhagwati, J. in *Minerva Mill's* case to lay the foundation of the theory of alternative institutional mechanisms.

We may, at this stage, take not of the decision in *Fertiliser Corporation Kamgar Union* v. *Union of India*, (1981) 1 SCC 568, where Chandrachud, CJ appears to have somewhat revised the view adopted by him in *Indira Gandhi's* case. In that case, speaking for the majority, Chandrachud, CJ held that "the jurisdiction conferred on the Supreme Court by Article 32 is an important and integral part of the basic structure of the Constitution." (at para 11).

In *Kihoto Hollohan* v. *Zachillu & Ors.*, a five-Judge Constitution Bench had to, *inter alia*, consider the validity of Paragraph 7 of the Tenth Schedule to the Constitution which excluded judicial review. The judgment for the minority, delivered by Verma, J. struck down the provision on the ground that it violated the rule of law which is a basic feature of the Constitution requiring that decisions be subject to judicial review by an independent outside authority. (Paras 181-182). Though the majority judgment delivered by Venkatachaliah, J. also struck down the offending provisions, the reasoning employed was different. The judgment for the majority contains an observation to the effect

that, in the opinion of the judges in the majority, it was not necessary for them to express themselves on the question whether judicial review is part of the basic structure of the Constitution. (Para 120).

We may now analyse certain other authorities for the proposition that the jurisdiction conferred upon the High Courts and the Supreme Court under Article 226 and 32 of the Constitution respectively, is part of the basic structure of the Constitution. While expressing his views on the significance of draft Articles 25, which corresponds to the present Article 32 of the Constitution, Dr. B.R. Ambedkar, the Chairman of the Drafting Committee of the Constituent Assembly stated as follows (CAD, Vol. VII, p. 953):

> "If I was asked to name any particular Article in this Constitution as the most important—an Article without which this Constitution would be a nullity—I could not refer to any other Article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance." (Emphasis added)

This statement of Dr. Ambedkar has been specifically reiterated in several judgments of this Court to emphasise the unique significance attributed to Article 32 in our constitutional scheme. [See for instance, Khanna, J, in ***Kesavananda Bharati's*** case (p. 818), Bhagwati, J. in ***Minerva Mills*** (p. 678), Chandrachud, CJ in ***Fertiliser Kamgar*** (para 11), R. Misra, J. in ***Sampath Kumar*** (p. 137)].

In the ***Special Reference*** case, while addressing this issue, Gajendragadhkar, CJ stated as follows (*supra* at pp. 493-494):

> "If the power of the High Courts under Art. 226 and the authority of this Court under Art. 32 are not subject to any exceptions, then it would be futile to contend that a citizen cannot move the High Courts or this Court to invoke their jurisdiction even in cases where his fundamental rights have been violated. The existence of judicial power in that behalf must necessarily and inevitably postulate the existence of a right in the citizen to move the Court in the behalf; otherwise the power conferred on the High Courts and this Court would be rendered virtually meaningless. Let it not be forgotten that the judicial power conferred on the High Courts and this Court is meant for the protection of the citizens' fundamental rights, and so, in the existence of the said judicial power itself is necessarily involved the right of the citizen to appeal to the said power in a proper case." (Emphasis added)

To express our opioin on the issue whether the power of judicial review vested in the High Courts and in the Supreme Court under Articles 226/227 and 32 is part of the basic structure of the Constitution, we must first attempt to understand what constitutes the basic structure of the Constitution. The Doctrine of basic structure was evolved in ***Kesavananda Bharati's*** *case. However, as already mentioned, that case did not lay down that the specific and particular features mentioned in that judgment alone would constitute the basic structure of our Constitution. Indeed, in the judgments of Shelat & Grover, JJ., Hegde & Mukherjee, JJ. and Jaganmohan Reddy, J., there are specific observations to the effect that their list of essential features comprising the basic structure of the Constitution are illustrative and are not intended to be exhaustive. In* ***Indira Gandhi's*** *case, Chandrachud, J. held that the proper approach for a Judge who is*

confronted with the question whether a particular facet of the Constitution is part of the basic structure, is to examine, in each individual case, the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of our Constitution as a fundamental instrument for the governance of the country. (supra at pp. 751-752). This approach was specifically adopted by Bhagwati, J. in ***Minerva Mill's*** *case (supra at pp. 651-672) and is not regarded as the definitive test in this field of Constitutional Law.*

We find that the various factors mentioned in the test evolved by Chandrachud, J. have already been considered by decisions of various Benches of this Court that have been referred to in the course of our analysis. From their conclusions, many of which have been extracted by us in toto, *it appears that this Court has always considered the power of judicial review vested in the High Courts and in this Court under Articles 226 and 32 respectively, enabling legislative action to be subjected to the scrutiny of superior courts to be integral to our constitutional scheme.* While several judgments have made specific references to this aspect [Gajendragadhkar, CJ in ***Special Reference*** case, Beg, J. and Khanna, J. in ***Kesavananda Bharati's*** case, Chandrachud, CJ and Bhagwati, J. in ***Minerva Mills***, Chandrachud, CJ in ***Fertiliser Kamgar***, K. N. Singh, J. in ***Delhi Judicial Service Association***, etc.] the rest have made general observations highlighting the significance of this feature.

The legitimacy of the power of Courts within constitutional democracies to review legislative action has been questioned since the time it was first conceived. The Constitution of India, being alive to such criticism, has, while conferring such power upon the higher judiciary, incorporated important safeguards. An analysis of the manner in which the Framers of our Constitution incorporated provisions relating to the judiciary would indicate that they were very greatly concerned with securing the independence of the judiciary. [See Chapter VII, "The Judiciary and the Social Revolution" in Granville Austen, The Indian Constitution: Cornerstone of a Nation Oxford University Press, 1972; the chapter includes exhaustive references to the relevant preparatory works and debates in the Constituent Assembly]. These attempts were directed at ensuring that the judiciary would be capable of effectively discharging its wide powers of judicial review. While the Constitution confers the power to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed by such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions. *The Judges of the superior Courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate courts and Tribunals do not fall foul of strict standards of legal correctness and judicial independence. The constitutional safeguards which ensure the independence of the Judges of the superior judiciary are not available to the Judges of the subordinate judiciary or to those who man Tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered*

full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded.

We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all Courts and Tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided.

However, it is important to emphasise that though the subordinate judiciary or Tribunals created under ordinary legislations cannot exercise the power of judicial review of legislative action to the exclusion of the High Courts and the Supreme Court, there is no constitutional prohibition against their performing a supplemental — as opposed to a substitutional — role in this respect. That such a situation is contemplated within the constitutional scheme becomes evident when one analyses clause (3) of Article 32 of the Constitution which reads as under:

> "32. **Remedies for enforcement of rights conferred by this Part.** — (1) .....(2) .....(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)."
>
> (Emphasis supplied)

If the power under Article 32 of the Constitution, which has been described as the "heart" and "soul" of the Constitution, can additionally conferred upon "any other court", there is no reason why the same situation cannot subsist in respect of the jurisdiction conferred upon the High Courts under Article 226 of the Constitution. So long as the jurisdiction of the High Courts under Articles 226/227 and that of this Court under Article 32 is retained, there is no reason why the power to test the validity of legislations against the provisions of the Constitution cannot be conferred upon Administrative Tribunals created under the Act or upon Tribunals created under Article 323B of the Constitution. It is to be remembered that, apart from the authorisation that flows from Articles 323A and 323B, both Parliament and the State Legislatures possess legislative competence to effect changes in the original jurisdiction of the Supreme Court and the High Courts. This power is available to Parliament under Entries 77, 78, 79 and 95 of List I and to the State Legislatures under Entry 65 of List II; Entry 46 of List III can also be availed of both by Parliament and the State Legislatures for this purpose.

There are pressing reasons why we are anxious to preserve the conferment of such a power on these Tribunals. When the Framers of our Constitution bestowed the powers of judicial review of legislative action upon the High Courts and the Supreme Court, they ensured that other constitutional safeguards were created to assist them in effectively discharging this onerous burden. The expectation was that this power would be required to be used only occasionally. However, in the five decades that have ensued since Independence, the quantity

of litigation before the High Courts has exploded in an unprecedented manner. The decision in ***Sampath Kumar's*** case was rendered against such a backdrop. We are conscious of the fact that when a Constitution Bench of this Court in ***Sampath Kumar's*** case adopted the theory of alternative institutional mechanisms, it was attempting to remedy an alarming practical situation and the approach selected by it appeared to be most appropriate to meet the exigencies of the time. Nearly a decade later, we are now in a position to review the theoretical and practical results that have arisen as a consequence of the adoption of such an approach.

We must, at this stage, focus upon the factual position which occasioned the adoption of the theory of alternative institutional mechanisms in ***Sampath Kumar's*** case. In his leading judgment, R. Misra, J. refers to the fact that since independence, the population explosion and the increase in litigation had greatly increased the burden of pendency in the High Courts. Reference was made to studies conducted towards relieving the High Courts of their increased load. In this regard, the recommendations of the Shah Committee for setting up independent Tribunals as also the suggestion of the Administrative Reforms Commission that Civil Service Tribunals be set up, were noted. Reference was also made to the decision in *K.K. Dutta* v. *Union of India*, (1980) 4 SCC 38, where this Court had, while emphasising the need for speedy resolution of service disputes, proposed the establishment of Service Tribunals.

The problem of clearing the backlogs of High Courts, which has reached colossal proportions in our times is, nevertheless, one that has been the focus of study for close to a half century. Over the time, several Expert Committees and Commissions have analysed the intricacies involved and have made suggestions, not all of which have been consistent. Of the several studies that have been conducted in this regard, as many as twelve have been undertaken by the Law Commission of India (hereinafter referred to as "the LCI") or similar high level Committees appointed by the Central Government, and are particularly noteworthy. [Report of the High Court Arrears Committee 1949; LCI, 14th Report on Reform of Judicial Administration (1958); LCI, 27th Report on Code of Civil Procedure, 1908 (1964); LCI, 41st Report on Code of Criminal Procedure, 1898 (1969); LCI, 54th Report of Code of Civil Procedure, 1908 (1973); LCI, 57th Report on Structure and Jurisdiction of the Higher Judiciary (1974); Report of High Court Arrears Committee, 1972; LCI, 79th Report on Delay and Arrears in High Courts and other Appellate Courts (1979); LCI, 99th Report on Oral Arguments and Written Arguments in the Higher Courts (1984); Satish Chandra's Committee Report 1986; LCI, 124th Report on the High Court Arrears — A Fresh Look (1988); Report of the Arrears Committee (1989-90)]

An appraisal of the daunting task which confronts the High Courts can be made by referring to the assessment undertaken by the LCI in its 124th Report which was released sometime after the judgment in ***Sampath Kumar's*** case. The Report was delivered in 1988, nine years ago, and some changes have occured since, but the broad perspective which emerges is still, by and large, true:

> "....The High Courts enjoy civil as well as criminal, ordinary as well as extraordinary, and general as well as special jurisdiction. The source of the jurisdiction is the Constitution and the various statutes as well as letters patent and other instruments constituting the High Courts. The High Courts in the country enjoy an original jurisdiction in respect of testamentary,

matrimonial and guardianship matters. Original jurisdiction is conferred on the High Courts under the Representation of the People Act, 1951, Companies Act, 1956, and several other special statutes. The High Courts, being courts of record, have the power to punish for its contempt as well as contempt of its subordinate courts. The High Courts enjoy extraordinary jurisdiction under Articles 226 and 227 of the Constitution enabling it to issue prerogative writs, such as, the one in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*. Over and above this, the High Courts of Bombay, Calcutta, Delhi, Himachal Pradesh, Jammu and Kashmir and Madras also exercise ordinary original civil jurisdiction. The High Courts also enjoy advisory jurisdiction, as evidenced by section 256 of the Indian Companies Act, 1956, Section 27 of the Wealth Tax Act, 1957, Section 26 of Gift Tax Act, 1958, and Section 18 of Companies (Profits) Surtax Act, 1964. Similarly, there are parallel provisions conferring advisory jurisdiction on the High Courts, such as, Section 130 of Customs Act, 1962, and Section 354 of Central Excises and Salt Act, 1944. The High Courts have also enjoyed jurisdiction under the Indian Divorce Act, 1869, and the Parsi Marriage and Divorce Act, 1936. Different types of litigation coming before the High Court in exercise of its wide jurisdiction bear different names. *viz.*, and Divorce Act, 1936. Different types of litigation coming before the High Court in exercise of its wide jurisdiction bear different names. The vast area of jurisdiction can be appreciated by reference to those names, *viz.*, (a) first appeals; (b) appeals under the letters patent; (c) second appeals; (d) revision petitions; (e) criminal appeals; (f) criminal revisions; (g) civil and criminal references; (h) writ petitions; (i) writ appeals; (j) references under direct and indirect tax laws; (k) matters arising under the Sales Tax Act, (l) election petitions under the Representation of the People Act; (m) petitions under the Companies Act, Banking Companies Act and other special Acts; and (n) wherever the High Court has original jurisdiction, suits and other proceedings in exercise of that jurisdiction. This varied jurisdiction has to some extent been responsible for a very heavy institution of matters in the High Courts."

After analysing the situation existing in the High Courts at length, the LCI made specific recommendations towards the establishment of specialist Tribunals thereby lending force to the approach adopted in *Sampath Kumar's* case. The LCI noted the erstwhile international judicial trend which pointed toward generalist courts yielding their place to specialist Tribunals. Describing the pendency in the High Courts as "catastrophic, crisis ridden, almost unmanageable, imposing ..... an immeasurable burden on the system", the LCI stated that the prevailing view in Indian Jurisprudence that the jurisdiction enjoyed by the High Court is a holy cow required a review. It, therefore, recommended the trimming of the jurisdiction of the High Courts by setting up specialist Courts/Tribunals while simultaneously eliminating the jurisdiction of the High Courts.

It is important to realise that though the theory of alternative institutional mechanism was propounded in *Sampath Kumar's* case in respect of the Administrative Tribunals, the concept itself — that of creating alternative modes of dispute resolution which would relieve High Courts of their burden while simultaneously providing specialised justice — is not new. In fact, the issue of

having a specialised Tax Court has been discussed for several decades; though the Report of the High Court Arrears Committee (1972) dismissed it as "ill-conceived", the LCI, in its 115th Report (1986) revived the recommendation of setting up separate Central Tax Courts. Similarly, other Reports of the LCI have suggested the setting up of 'Gram Nyayalayas' [LCI, 114th Report (1986)], Industrial/Labour Tribunals [LCI, 112nd Report (1987)] and Education Tribunals [LCI, 123rd Report (1987)].

In R.K. *Jain's* case, this Court had, in order to understand how the theory of alternative institutional mechanisms had functioned in practice, recommended that the LCI or a similar expert body should conduct a survey of the functioning of these Tribunals. It was hoped that such a study, conducted after gauging the working of the Tribunals over a sizeable period of more than five years would provide an answer to the questions posed by the critics of the theory. Unfortunately, we do not have the benefit of such a study. We may, however, advert to the Report of the Arrears Committee (1989-90), popularly known as the Malimath Committee Report, which has elaborately dealt with the aspect. The observations contained in the Report, to this extent they contain a review of the functioning of the Tribunals over a period of three years or so after their institution, will be useful for our purpose. Chapter VIII of the second volume of the Report, "Alternative Modes and Forums for Dispute Resolution", deals with the issue at length. After forwarding its specific recommendations on the feasibility of setting up 'Gram Nyayalayas', Industrial Tribunals and Educational Tribunals, the Committee has dealt with the issue of Tribunals set up under Articles 323A and 323B of the Constitution. The relevant observations in this regard, being of considerable significance to our analysis, are extracted in full as under:

> **"Functioning of Tribunals:**
>
> 8.63. Several Tribunals are functioning in the country. Not all of them, however, have inspired confidence in the public mind. The reasons are not far to seek. The foremost is the lack of competence, objectivity and judicial approach. The next is their constitution, the power and method of appointment of personnel thereto, the inferior status and the casual method of working. The last is their actual composition; men of calibre are not willing to be appointed as presiding officers in view of the uncertainty of tenure, unsatisfactory conditions of service, executive subordination in matters of administration and political interference in judicial functioning. For these and other reasons, the quality of justice is stated to have suffered and the cause of expedition is not found to have been served by the establishment of such Tribunals.
>
> 8.64. Even the experiment of setting up of the Administrative Tribunals under the Administrative Tribunals Act, 1985, has not been widely welcomed. Its members have been selected from all kinds of services including the Indian Police Service. The decision of the State Administrative Tribunals are not appealable except under Article 136 of the Constitution. On

account of the heavy cost and remoteness of the forum, there is virtual negation of the right of appeal. This has led to denial of justice in many cases and consequential dissatisfaction. There appears to be a move in some of the States where they have been established for their abolition.

Tribunals — Tests for Including High Court's Jurisdiction:

8.65. A Tribunal which substitutes the High Court as an alternative institutional mechanism for judicial review must be no less efficacious than the High Court. Such a Tribunal must inspire confidence and public esteem that it is a highly competent and expert mechanism with judicial approach and objectivity. What is needed in a Tribunal, which is intended to supplant the High Court, is legal training and experience, and judicial acumen, equipment and approach. When such a Tribunal is composed of personnel drawn from the judiciary as well as from services or from amongst experts in the field, any weightage in favour of the service members or expert members and value — discounting the judicial members would render the Tribunal less effective and efficacious than the High Court. The Act setting up such a Tribunal would itself have to be declared as void under such circumstances. The same would not at all be conducive to judicial independence and may even tend, directly or indirectly, to influence their decision-making process, especially when the Government is a litigant in most of the cases coming before such Tribunal. (See ***S.P. Sampath Kumar*** v. ***Union of India,*** reported in 1987 I SCR 435). The protagonists of specialist Tribunals, who simultaneously with their establishment want exclusion of the Writ jurisdiction of the High Courts in regard to matters entrusted for adjudicating to such Tribunals ought not to overlook these vital and important aspects. It must not be forgotten that what is permissible to be supplant by another equally effective and efficacious institutional mechanism is the High Courts and not the judicial review itself. Tribunals are not an end in themselves but a means to an end; even if the laudable objectives of speedy justice, uniformity of approach, predictability of decisions and specialist justice are to be achieved, the framework of the Tribunal intended to be set up to attain them must still retain its basic judicial character and inspire public confidence. Any scheme of decentralisation of administration of justice providing for an alternative institutional mechanism in substitution of the High Courts must pass the aforesaid test in order to be constitutionally valid.

8.66. The overall picture regarding the Tribunalisation of justice in our country is not satisfactory and encouraging. There is a need for a fresh look and review and a serious consideration before the experiment is extended to new areas of fields, especially if the constitutional jurisdiction of the High Courts is to be simultaneously ousted. Not many Tribunals satisfying the aforesaid tests can possibly be established." (Emphasis added)

Having expressed itself in this manner, the Malimath Committee specifically recommended that the theory of alternative institutional mechanisms be abandoned. Instead, it recommended that institutional changes be carried out within the High Courts, dividing them into separate divisions for different branches of law, as is being done in England. It stated that appointing more Judges to man the separate divisions while using the existing infrastructure

would be a better way of remedying the problem of pendency in the High Courts.

In the years that have passed since the Report of the Malimath Committee was delivered, the pendency in the High Courts has substantially increased and we are of the view that its recommendation is not suited to our present context. *That the various Tribunals have not performed upto expectations is a self-evident and widely acknowledged truth. However, to draw an inference that their unsatisfactory performance points to their being founded on a fundamentally unsound principle would not be correct. The reasons for which the Tribunals were constituted still persist; indeed, those reasons have become even more pronounced in our times. We have already indicated that our constitutional scheme permits the setting up of such Tribunals. However, drastic measures may have to be resorted to in order to elevate their standards to ensure that they stand up to constitutional scrutiny in the discharge of the power of judicial review conferred upon them.*

We may first address the issue of exclusion of the power of judicial review of the High Courts. We have already held that in respect of the power of judicial review, the jurisdiction of the High Courts under Article 226/227 cannot wholly be excluded. It has been contended before us that the Tribunals should not be allowed to adjudicate upon matters where the *vires* of legislation is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be quite frivolous, to directly approach the High Courts and thus subvert the jurisdiction of the Tribunals. Moreover, even in these special branches of law, some areas do involve the consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the Constitution. *To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Article 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter.*

It has also been contended before us that even in dealing with cases which are properly before the Tribunals, the manner in which justice is dispensed by them leaves much to be desired. Moreover, the remedy provided in the parent statutes, by way of an appeal by special leave under Article 136 of the Constitution, is too costly and inaccessible for it to be real and effective. Furthermore, the result of providing such a remedy is that the docket of the Supreme Court is crowded with decisions of Tribunals that are challenged on

relatively trivial grounds and it is forced to perform the role of a First Appellate Court. We have already emphasised the necessity for ensuring that the High Courts are able to exercise judicial superintendence over the decisions of Tribunals under Article 227 of the Constitution. In *R.K. Jain's* case after taking note of these facts, it was suggested that the possibility of an appeal from the Tribunals on questions of law to a Division Bench of a High Court within whose territorial jurisdiction the Tribunal falls, be pursued. It appears that no follow-up action has been taken pursuant to the suggestion. Such a measure would have improved matters considerably. Having regard to both the afore-stated contentions, *we hold that all decisions of Tribunals, whether created pursuant to Article 323A or Article 323B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls.*

We may add here that under the existing system, direct appeals have been provided from the decisions of all Tribunals to the Supreme Court under Article 136 of the Constitution. In view of our above-mentioned observations, this situation will also stand modified. In the view that we have taken, no appeal from the decision of a Tribunal will directly lie before the Supreme Court under Article 136 of the Constitution; but instead, the aggrieved party will be entitled to move the High Court under Articles 226/227 of the Constitution and from the decision of the Division Bench of the High Court the aggrieved party could move this Court under Article 136 of the Constitution.

Before moving on to other aspects, *we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the* vires *of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the* vires *of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the* vires *of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the concerned High Court may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the* vires *of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal.*

The directions issued by us in respect of making the decisions of Tribunals amenable to scrutiny before a Division Bench of the respective High Courts will, however, come into effect prospectively i.e. will apply to decisions rendered hereafter. To maintain the sanctity of judicial proceedings, we have invoked the doctrine of prospective over-ruling so as not to disturb the procedure in relation to decisions already rendered.

We are also required to address the issue of the competence of those who man the Tribunals and the question of who is to exercise administrative supervision over them. It has been urged that only those who have had judicial experience should be appointed to such Tribunals. *In the case of Administrative Tribunals, it has been pointed out that the administrative members who have been appointed have little or no experience in adjudicating such disputes;* the Malimath Committee has noted that at times, IPS Officers have been appointed to these Tribunals. *It is stated that in the short tenures that these Administrative Members are on the Tribunal, they are unable to attain enough experience in adjudication and in cases where they do acquire the ability, it is invariably on the eve of the expiry of their tenures. For these reasons, it has been urged that the appointment of Administrative Members to Administrative Tribunals be stopped. We find it difficult to accept such a contention. It must be remembered that the setting up of these Tribunals is founded on the premise that specialist bodies comprising both trained administrators and those with judicial experience would, by virtue of their specialised knowledge, be better equipped to dispense speedy and efficient justice. It was expected that a judicious mix of judicial members and those with grass-roots experience would best serve this purpose. To hold that the Tribunal should consist only of judicial members would attack the primary basis of the theory pursuant to which they have been constituted. Since the Selection Committee is now headed by a Judge of the Supreme Court, nominated by the Chief Justice of India, we have reason to believe that the Committee would take care to ensure that administrative members are chosen from amongst those who have some background to deal with such cases.*

It has been brought to our notice that one reason why these Tribunals have been functioning inefficiently is because there is no authority charged with supervising and fulfilling their administrative requirements. To this end, it is suggested that the Tribunals be made subject to the supervisory jurisdiction of the High Courts within whose territorial jurisdiction they fall. We are, however, of the view that this may not be the best way of solving the problem. We do not think that our constitutional scheme requires that all adjudicatory bodies which fall within the territorial jurisdiction of the High Courts should be subject to their supervisory jurisdiction. If the idea is to divest the High Courts of their onerous burdens, then adding to their supervisory functions cannot, in any manner, be of assistance to them. The situation at present is that different Tribunals constituted under different enactments are administered by different administrative departments of the Central and the State Governments. The problem is compounded by the fact that some Tribunals have been created pursuant to Central Legislations and some others have been created by State Legislations. However, even in the case of Tribunals created by Parliamentary legislations, there is no uniformity in administration. *We are of the view that, until a wholly independent agency for the administration of all such Tribunals can be set-up, it is desirable that all such Tribunals should be, as far as possible, under a single nodal Ministry which will be in a position to oversee the working of these Tribunals. For a number of reasons that Ministry should appropriately be the Ministry of Law. It would be open for the Ministry, in its turn, to appoint an independent supervisory body to oversee the working of the Tribunals. This will ensure that if the President or Chairperson of the Tribunal is for some reason unable to take sufficient interest in the working of the Tribunal, the entire system will not languish and the ultimate consumer*

of justice will not suffer. The creation of a single umbrella organisation will, in our view, remove many of the ills of the present system. If the need arises, there can be separate umbrella organisations at the Central and the State levels. Such a supervisory authority must try to ensure that the independence of the members of all such Tribunals is maintained. To that extent, the procedure for the selection of the members of the Tribunals, the manner in which funds are allocated for the functioning of the Tribunals and all other consequential details will have to be clearly spelt out.

The suggestions that we have made in respect of appointments to Tribunals and the supervision of their administrative function need to be considered in detail by those entrusted with the duty of formulating the policy in this respect. That body will also have to take into consideration the comments of expert bodies like the LCI and the Malimath Committee in this regard. We, therefore, recommend that the Union of India initiate action in this behalf and after consulting all concerned, place all these Tribunals under one single nodal department, preferably the Legal Department.

Since we have analysed the issue of the constitutional validity of Section 5(6) of the Act at length, we may now pronounce our opinion on this aspect. Though the *vires* of the provision was not in question in *Dr. Mahabal Ram's* case, we believe that the approach adopted in that case, the relevant portion of which has been extracted in the first part of this judgment, is correct since it harmoniously resolves the manner in which Sections 5(2) and 5(6) can operate together. *We wish to make it clear that where a question involving the interpretation of a statutory provision or rule in relation to the Constitution arises for the consideration of a single Member Bench of the Administrative Tribunal, the proviso to Section 5(6) will automatically apply and the Chairman or the Member concerned shall refer the matter to a Bench consisting of at least two Members, one of whom must be a Judicial Member. This will ensure that question involving the vires of a statutory provision or rule will never arise for adjudication before a single Member Bench or a Bench which does not consist of a Judicial Member. So construed, Section 5 (6) will no longer be susceptible to charges of unconstitutionality.*

In view of the reasoning adopted by us, we hold that clause 2 (d) of Article 323A and clause 3(d) of Article 323B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323A and 323B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other Courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323A and Article 323B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the concerned Tribunal falls. The Tribunals will, nevertheless, continue to act like Courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of

statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated.

All these matters may now be listed before a Division Bench to enable them to be decided upon their individual facts in the light of the observations contained in this judgment.