UNION OF INDIA V. R GANDHI : HARD CASE, SOFT LAW

*Rishabh Shah and C. Nageshwaran**

BACKGROUND AND THE DECISION

In a modern society the nature of disputes that come before Courts is multifarious. However as a result of specialization of economic relations and increase in litigation, Courts often lack technical expertise in certain matters, and are also unable to cope with the heavy load of cases. It is for the said reason that constitution of tribunals becomes necessary as they offer advantages of speed, cheapness, informality and expertise.[1] Furthermore since tribunals need not follow the tedious codes of procedure and rules of evidence, adjudication is speedy and thus cost effective.[2]

The National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) were established for the abovementioned reasons upon the recommendations of the "Eradi Committee Relating to Insolvency of Companies."[3]

Eradi Committee Relating to Insolvency of Companies

They were to take over the functions which are being performed by CLB, BIFR, AAIFR and High Courts as the committee found that multiplicity of court proceedings was the main reason for the abnormal delay in dissolution of companies. The committee also identified and highlighted several areas which contributed to inordinate delay in finalization of winding-up/dissolution of companies.[4] These were mainly caused due to the existence of tedious procedural rules and regulations which could be done away with if an independent tribunal was established. It was expected that setting up of NCLT will have the beneficial effects of first, reducing the pendency of cases and the period of winding-up process from 20-25 years to about two years, and second, confining the role of the High Court to judicial review within Art. 226/227, thus reducing its burden.

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* Students, B.A., LL.B (Hons.) (III Year) National Academy of Legal Studies and Research (NALSAR) University of Law, Hyderabad. The authors would like to express their gratitude to Mr. Pathik Gandhi whose article has the inspiration for this piece.

1 Phillips & Jackson,, CONSTITUNAL & ADMINSTRATIVE LAW, (8th Edition. 2001), p. 32.

2 *Union of India v. R Gandhi*, 2010 (5) SCALE 514, (¶ 18).

3 Eradi Committee Relating to Insolvency of Companies <http://pib.nic.in/focus/foyr2000/foaug2000/eradi2000.html> (last accessed on 28/2/2011).

4 2010 (5) SCALE 514, (¶ 4).

However, of late, there has been dissatisfaction among the members of the Bar who feel that such a tribunal is not an effective remedy to resolve the structural problem that courts are facing. lawyers fear that the judges of such tribunals are not unbiased adjudicators as most of them have been a part of the administrative machinery prior to appointment. This has also made the NCLT a retirement haven, as officers who were on the verge of retirement could be appointed to such tribunals. This created a sense of distrust, and lawyers felt that important functions of amalgamation, restructuring and winding up that were traditionally discharged by the Courts should not be transferred in their practical entirety to the NCLT and NCLAT. It was in the light of these events that the President of the Madras Bar Association filed a petition challenging the constitutionality of Government and Company (Second Amendment) Act, 2002 that provided for the establishment of National Company Law Tribunals. It must be noted that similar petitions have also been filed by the Madras Bar Association challenging the constitutionality of the National Tax Tribunal.[5] The latter matter *sub-judice* before the Supreme Court.

The main grounds for challenging the Act in the present case were lack of legislative competence and violation of the basic structure of the Constitution of India. The Madras High Court by its order dated 30.3.2004 held that the creation of the tribunals and the vesting of powers hitherto exercised by the High Courts in the tribunals was not unconstitutional.[6] However it pointed out various defects in the provisions of Part IB and IC of The Companies Act, 1956 (inserted by Companies Act 2002) and held them to be violative of the basic constitutional scheme.[7] The Union agreed to correct some of the defects pointed out by the High Court. However the Central Government continued to hold that some provisions of the Parts IB and IC were not defective and hence appealed the decision in the Supreme Court.

5 In *Madras Bar Association v. Union of India*, 2010 6 AWC 6381 SC the following Sections of the National Tax Tribunal Amendments Act, 2002 were challenged:- Section 13 which permitted "any person" duly authorized to appear before the National Tax Tribunal was challenged as it was vague; Section 5(5) of the Act gave the Government to transfer a member of such a tribunal, and Section 7 which provided for a Selection Committee comprising of 2 executive and one judicial members were challenged as being violative of the separation of powers principle. This matter was initially clubbed with *R Gandhi v. Union of India* but the Supreme Court has now put the matter for separate hearing.

6 [2004] 120 CompCas 510 (Mad).

7 *Ibid*, (¶ 123).

It must be noted that the grounds of challenge in both these matters were quite similar, further indicating dissatisfaction by the members of the Bar against the functioning of such tribunals. However since the abovementioned case[8] is *sub-judice* the authors do not wish to comment on the same.

The following Table indicates the impugned parts of the Act and the disputes therein

Issue	**High Court's Recommendations**
Retention of Lien with Parent Cadre	Period of lien in regard to the members of NCLT should be restricted to only one year instead of three years.
Appointment of President	Must confine the choice of persons for President those who have held the position of a Judge of a High Court for a minimum period of five years.
Technical Member to NCLT	NCLT should have two divisions, that is an Adjudication Division and a Rehabilitation Division and Technical members should only be part of the latter.
Qualification for appointment Technical Member	In regard to presiding officers of labour courts and industrial tribunals or the national industrial tribunal, a minimum period of three to five years experience should be prescribed. Clause (h) referring to the category of persons having special knowledge of and experience in matters relating to labour, for not less than 15 years is vague possess.

8 *Madras Bar Association, supra* n. 5.

Section 10FR(3): Appointment of members of the Appellate Tribunal	A member of the Appellate Authority should be a person who is or has been a judge of a High Court or who is or has been an officer not below the rank of a Secretary to the Government who has been a member of the Board for not less than three years.
Section 10FX - Selection Process for Chairperson	Selection of the President/Chair-person should be by a committee headed by the Chief Justice of India in consultation with two senior Judges of the Supreme Court.

The Union contended that the impugned provisions provided sufficient discretion to selection committee headed by the Chief Justice of India to appoint the best talent for members of the NCLT and NCLAT. Furthermore it contended that the observations of the High Court were uncalled for as they amounted to judicial legislation.

The issues before the Court were thus, whether the legislature has the competence to create tribunals in matters other than those provided in Art.323A and Art.323B of the Constitution of India and, whether judicial functions can be transferred to tribunals headed by persons who are unqualified and incompetent to discharge such judicial powers, or whose independence is suspect.[9] The Court ruled that the Parliament was competent to create the NCLT; consequently a wholesale transfer of the Company Court's power to adjudicate insolvency matters was held to be permissible. The Court however declared that the procedure of selection of members of the Board laid down in Parts 1B and IC of the Act, "as presently structured" is unconstitutional. The Court then went on to take a similar view taken by Madras High Court and held that the invalid provisions may be made operational by incorporating the suggestions given by the Court. Thus the Court implicitly said that the laws will be *eclipsed* by constitutional limitations till its defects are removed.

The Judges however did not strike down the impugned legislation on the ground that it was violative of the Basic Structure.

9 2010 (5) SCALE 514, (¶ 8).

The reasons given by the Court for holding the impugned provisions unconstitutional were, first, erosion of the independence of the judiciary, second, violation of the principle of separation of powers, third, violation of the rule of law by way of non-independent tribunals. It also held that the right to have an impartial and independent hearing before Court being a part of Article 14 of the Constitution rendered "the legislative act open to challenge."[10]

CRITIQUE

Ronald Dworkin in his book *Taking Rights Seriously* refers to certain cases before judges as "Hard Cases".[11] The impact of such cases is often beyond the rights of the two parties in question. Some believe that such cases are "open textured" as they allow judges to exercise their discretion, as they feel fit, due to the existence of legal indeterminacy, [12] and thus they advocate that there is no unique answer to such problems.

Dworkin to the contrary limits the extent of such indeterminacy. He argues that when a judge decides a case, he is not limited only to rules. He can also find the answer in other standards. Thus he most controversially contends that judges can find the right to answer to a problem[13] by searching through the moral fabric of the society.

Dworkin further elaborates his arguments by introducing the hypothetical ideal judge, Hercules who has superhuman power that most judges lack[14]. He has the ability to find out the correct answer to a problem by developing his theory of the constitution with references to policy and institutional detail. Thus he builds the 'soundest theory' of law that portrays law as a seamless web of legal rules, principles and other legal standards. Such a theory must be justified on principle, constitutional and statutory provisions.[15] Thus he advocates that the discretion vested in the Judges cannot be exercised to lay down decisions without being bound by any standard.

The authors endeavor to argue that the Courts in *R Gandhi* by giving a carte blanche for tribunalization of commercial matters and

10 2010 (5) SCALE 514, (¶41).
11 Ronald Dworkin, TAKING RIGHTS SERIOUSLY, (4th rep., 2008), p.81. This was a term originally used by legal positivists.
12 HLA Hart, THE CONCEPT OF LAW, (2nd ed., 1997), p. 23.
13 Dworkin, *supra* n. 11.
14 *Ibid*, p. 105.
15 *Ibid*, p. 117.

through application of the "due process" approach have handed down their decision without being bound by a concrete standard. The authors believe that though the judgment may turn out to be fair, the means employed in rendering the same smack of vagueness. Hence the authors through this Article seek to advocate a "more Herculean approach" to arriving at the final decision.

Re : Legislative Competence

Legislative competence refers to the employment of source of power as is envisaged by the document granting such power. Thus in the present the case the question would be whether Article 323-B authorizes the Parliament to create a National Company Law Tribunal. To analyze the ascription of legislative competence to the Parliament it is important to trace the judicial history of Articles 323-A and 323-B, after the 42nd Amendment and the Administrative Tribunals Act, 1985 were passed. The quandary began in *S. P. Sampath Kumar v. UOI*[16] wherein the constitutional validity of the Administrative Tribunals Act, 1985 was challenged on the ground that it was violative of Articles 226 and 227 of the Constitution. The Supreme Court held that Section 28 of the Administrative Tribunals Act, 1985 which excludes the jurisdiction of High Courts is constitutional, as it sets up an alternative institutional mechanism for judicial review.[17] Thus administrative tribunals under the 1985 Act were held to be substitutes to High Courts and, were even held to be competent to decide service matters pertaining to fundamental rights.[18] However the Court said that Chairman of an administrative tribunal should be or should have been a Judge of a High Court, or he should have for at least two years held office as Vice-Chairman. It held that a person who merely held the post of a Secretary to the Government could not be appointed to the post.[19] Hence Section 6(1) of the abovementioned Act was struck down as invalid. As a result, the Act was further amended in 1987. In *M.B. Majumdar's v. Union of India*[20] the Supreme Court clarified that tribunals had been equated with High Courts only to the extent that the former were to act as substitutes for the latter in adjudicating matters. Tribunals could not seek parity for all other purposes. Thus the salary of the Chairman of the tribunal need not be the same as

16 AIR 1987 SC 386.
17 *Ibid.* (¶ 4).
18 *J.B. Chopra v. Union of India*, AIR 1987 SC 357.
19 *Supra* n. 16.
20 (1990) 4 SCC 501.

that of a High Court Judge. Subsequently in *Amulya Chandra v. Union of India*[21] the Court held that all benches of tribunals must have at least two members i.e. a judicial member and a technical member. However in subsequent cases it was also held that a single member with the consent of the parties could adjudicate a dispute provided that there was substantial question or law or legal issues involved.[22]

The constitutionality of Article 323A came for the first time before a full bench of the Andhra Pradesh High Court in *Sakinala Harinath v. State of AP.*[23] The High Court held sub-clause 2(d) of Article 323-A to be unconstitutional. It further held that the ruling in *Sampath Kumar* is *per incuriam* as it is contrary to the ruling of the Supreme Court in *Kesavananda Bharati v. State of Kerala*[24] as it took away the power of Judicial Review of the High Court.[25] This matter along with several other similar petitions culminated in a bench of seven judges of the Supreme Court examining the debated issues in a wider perspective, including the constitutionality of article 323A (2) (d) in *L Chandra Kumar v. Union of India.*[26] The Supreme Court, (contrary to the position in Sampath Kumar) held that the role of tribunals is not that of substitution but supplementation of the High Courts.[27] It also held that the power of judicial review is a part of the basic structure of the Constitution.[28] The Court further declared that the decisions of such tribunals shall be appealable before a bench of two judges in the High Court under whose jurisdiction the tribunal falls. Thus clause (2)(d) of Article 323A, clause (3)(d) of Article 323B, section 28 of Administrative Tribunals Act ousting jurisdiction of Supreme Court under Article 32 and of High Courts under Articles 226 and 227 were held to be constitutionally invalid as the offended the basic structure of the constitution.[29] However tribunals were said to have quasi-equal status of High Courts in restricted areas. Thus, the tribunals established under Article 323A could still examine the constitutionality of an enactment however that would not take away the power of the Courts

21 (1991) 1SCC181.
22 *Dr. Mahabal Ram. v. Indian Council of Agricultural Research,* [1994] 2 SCC 401.
23 1993 (3) ALT 471.
24 AIR 1973 SC 1461.
25 *Ibid,* (¶54) and (¶103).
26 AIR 1997 SC 1125.
27 *Ibid,* (¶80).
28 *Fertilizer Corporation Kamgar Union v. Union of India,* (1981) ILLJ 193 SC and *Delhi Judicial Service Association v. State of Gujarat,* AIR 1991 SC 2150. *Indira Gandhi v. Raj Narain,* AIR 1975 SC 2299.
29 AIR 1997 SC 1125, (¶100).

under Article 226. The Court also held similar power will vest in the tribunals created under the authority of Article 323B.

The issue of the affiliation between a Tribunal and a Court creeps up once again in *R Gandhi*. However, the case is unique as it involves setting up a tribunal on grounds (revival/rehabilitation/regulation/ winding up of companies) which are not mentioned in Article 323-B. The Supreme Court quoted several cases to show that the grounds mentioned in Article 323-B are illustrative and not exhaustive.[30] It held that since Article 323-B is only an enabling provision, a tribunal could be created under a ground that was not mentioned in the said Article. It then traced the legislative competence of Parliament to provide for creation of tribunals can be traced to Entries 77, 78, 79 and Entries 43, 44 read with Entry 95 of List I, Item 11A read with Entry 46 of List III of the Seventh Schedule. Furthermore the Court held that the setting up of such a tribunal would inevitably involve a wholesale transfer of powers but that could in no way invalidate the setting up of a particular tribunal[31] However, it is submitted, with due respect, that the Court has failed to observe the larger question in the present case, which is, the elasticity of the contours of tribunalization. This is because the mushrooming of tribunals across India has often fed upon the original jurisdiction of the Courts. Due to the existence of arbitration Tribunals, National Tax Tribunals and the NCLT and NCLAT, the domain of the High Courts in matters of commerce stands highly limited. Such erosion may eventually make High Courts mere courts of correction. According to the Apex Court's Judgment in *JB Chopra v. Union of India*[32] even issues regarding violation of fundamental rights can be adjudicated upon by Administrative Tribunals. To vest such immense responsibility of exercising *rights in rem* into the hands of members who are neither as experienced nor paid as much as a High Court may prejudice the consumer of justice. Such a possibility could not have been envisaged by the seven Judge Bench in *L Chandra Kumar* wherein the Court held that Tribunals could not substitute the High Courts.

A contrary view has been taken by Dr. A K Lakshmanan in the 215th Law Commission Report[33] wherein he opines that the position

30 *Union of India v. Delhi High Court Bar Association*, 2002 (4) SCC 275 and *State of Karnataka v. Vishwabharathi House Building Cooperative Society* and Ors, 2003 (2) SCC 412

31 *R Gandhi*, 2010 (5) SCALE 514, (¶ 32). The Supreme Court held, *"If jurisdiction of High Courts can be created by providing for appeals, revisions and references to be heard by the High Courts, jurisdiction can also be taken away by deleting the provisions for appeals, revisions or references."*

32 AIR 1987 SC 357.

33 <http://lawcommissionofindia.nic.in/reports/report215.pdf> (last accessed on 1/3/2012).

in *L Chandra Kumar* must be revisited to wrest away the jurisdiction of High Courts as Courts of second appeal, thus leaving the aggrieved party with the sole remedy of a petition under Article 136. He says that as a result of the Apex Court judgment, the status of a tribunal is lowered and there is an inordinate delay caused due to multiple appeals. However the authors feel that fairness must not be traded off for efficiency as the latter would be meaningless without the former[34]. Furthermore neither a constitutional nor a practical approach supports this argument for the abovementioned reasons.

***Re*: Need to Apply the Basic Structure Doctrine**

The Court in *R Gandhi*, while refusing to apply the basic structure doctrine to invalidate legislation[35] advocates an indirect application of the doctrine relying on general broad constitutional principles like rule of law, independence of the judiciary and the doctrine of separation of Powers to invalidate a statute. Thus the Court uses the "due process approach" to invalidate parts of the Act. The closest the Court comes towards the application of a constitutional principle is when it makes a passing reference to Article 50 and when it reads the right to an independent and impartial judiciary within Article 14.[36] However it does not make any effort to proceed on those lines.

In this part of the chapter the authors submit that the best way to skin the proverbial cat of Part 1B and 1C is through the application of the basic structure doctrine by showing that it is the best possible alternative available.

In the context of the case at hand, it is reasonable to presume that the NCLT and NCLAT may become retirement havens of biased officials. The authors opine that such a colourable tribunalization amounts to substituting administrative adjudication in judicial matters. This is impermissible irrespective of however loosely the doctrine of separation of powers is followed in the Indian context.[37] To challenge this proposition it would be safe to assume as can be inferred from Justice Raveenderan's judgment that Article 14 would be the touchstone of evaluation. Thus the question to be asked is does an overhaul of the existing system and its replacement with a "lesser tribunal" compromise the right of an individual to seek adjudication

34 Upendra Baxi, INTRODUCTION TO IP MASSEY' ADMINISTRATIVE LAW, 7th ed., 2005.
35 2010 (5) SCALE 514, (¶ 40).
36 *Ibid*, (¶ 41).
37 M. P. Singh, SECURING INDEPENDENCE OF JUDICIARY, 10 Ind. Int'l & Comp. L. Rev. 245 (1999-2000).

from an impartial and independent tribunal?

This question of change of procedure leading to a violation of Article 14 was answered in *Maganlal Chhaganlal v. Municipal Corporation of Greater Bombay.*[38] The main and relevant principle enunciated in this case was that a possibility for abuse of power cannot be the sole ground for striking down a statute.[39] The Court in *Maganlal* then held that only when a procedure drastically different from the ordinary procedure, i.e. when an entire field covered in ordinary procedure is overhauled without any guidelines of application will the Statute be hit by Article 14. The question for decision in *Maganlal* was whether the provision of Chapter V-A of the Bombay Municipal Corporation Act, as also of the Bombay Government Premises Eviction Act, 1955, which provided a special procedure for evicting an unauthorized occupant from Municipal premises and for evicting a person from Government premises violated Article 14 because it was open to the prescribed authorities either to resort to the special procedure for eviction or to file a suit.[40] Justice Aligarswami then classified similar matters relating to change in procedure into three heads -:

a. *A statute providing for a more drastic procedure different from the ordinary law but covering the whole field covered by the ordinary procedure without any guidelines as to the class of cases in which either procedure is to be resorted to.*

b. *In such cases as mentioned above if from the preamble and surrounding circumstances as well as the provisions of the statute, explained and amplified by affidavits, necessary guidelines could be inferred.*

c. *Where the statute itself covers only a class of cases.*[41]

The Court then held that unless case falls in the first category, there will be no violation of Article 14. The mere availability of two procedures will not by itself vitiate the other or violate Article 14, as long as the executive is guided in its action under the statutes (that is categories (b) and (c)). In other words, the proposition in *Maganlal* relies on hope that any individual instance of bias or impropriety by the executive can be separately held as invalid.[42]

38 AIR 1975 SC 648.

39 *Magganlal Chagganlal v. Greater Bomabay Municipality,* (1974) 2 SCC 402.

40 H. M. Seervai, CONSTITUTIONAL LAW OF INDIA, 4th ed., vol. 1, p.529.

41 *Magganlal Chagganlal v. Greater Bomabay Municipality,* (1974) 2 SCC 402, ¶ 15.

42 *Vasantkumar Radhakisan Vora and Ors. v. Board of Trustees of the Port of Bombay,* AIR 1984 Bom 96.

In the case under comment, the policy of the legislation with regard to parts 1B and 1C which were under challenge, is that the legislature intended that both the NCLT and the NCLAT would result in speedy and efficient adjudication of disputes by providing for both judicial and technical members.[43] Further it also provides for a minimum qualification for appointment of technical and judicial members to the tribunal along with those of the President. Thus with respect to appointments to the Appellate Tribunal, the selection committee has been given wide discretionary powers to decide on its composition. Parts IB and 1C also provide a sufficient policy to satisfy the test as in *Maganlal*. The directions to the executive can be inferred from the purpose for which the NCLT was to be constituted and also reflects the policy of the Union.[44] Thus the argument that the executive or the selection committee may appoint a person who is not qualified enough, is a possibility for abuse of power and it cannot be the sole ground for striking down a statute.[45]

At the same time, the existence of a policy with regard to appointments and the conferral of discretion on the concerned appointing authorities, fettered with guidelines from the provisions as well as the object of NCLT also satisfy the reasonable classification test for Article 14. Thus the application of the 'reasonable legislative classification test' may actually produce results contrary to which the Court has reached.

Alternatively the Court could investigate Part IB and IC for their constitutionality by applying the principle of arbitrariness as done in *Mardia Chemicals*[46] on the ground that the remedy available in case of bad appointments will become illusory. However that approach has its own criticisms[47] that fall outside the scope of this comment.

Thus existing/defined tests of Article 14 thus create a void when it comes to cases like these and hence a challenge to the law under

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43 See *R Gandhi*, 2010 (5) SCALE 514 (¶18): *The Judicial Member will act as a bulwark against apprehensions of bias and will ensure compliance with basic principles of natural justice such as fair hearing and reasoned orders. The Judicial Member would also ensure impartiality, fairness and reasonableness in consideration. The presence of Technical Member ensures the availability of expertise and experience related to the field of adjudication for which the special Tribunal is created, thereby improving the quality of adjudication and decision-making.*

44 Eradi Committee Report, *supra* n. 3.

45 *Magganlal Chagganlal v. Greater Bomabay Municipality*, (1974) 2 SCC 402.

46 (2004) 4 SCC 311.

47 See Abhinav Chandrachud, *How legitimate is Non-arbitrariness? Constitutional Invalidation in the Light of Mardia Chemicals v. Union of India*. INDIAN J. CONST. L.179.

Article 13 also fails. The result of using such an argument would result in the examination of individual cases of bias and conflict of interest with meagre evidence or relying upon a diamond bright, diamond hard approach. Such a consequence cannot be admitted in the public interest as the mere idea of disparaging the quality of justice is abhorrent to the idea of democracy.

Re: Understanding the "basic structure":

THE TRANSITION FROM VIEWING IT AS 'PREDOMINANCE OF LEGAL SPIRIT' TO VIEWING IT AS THE '*GRUNDNORM*'

The authors opine that it only when other approaches fail does the 'basic structure doctrine', come to the aid of the courts. Since an administrative substitution of the judiciary strikes at the very roots of an established principal of fair and independent adjudication, the authors feel that it would be fit to look at the case through the lens of the this doctrine.

To determine whether such an approach is justified or not we have to look at the evolution of the doctrine and the possibility of applying it to legislations in the current context.[48]

The basic structure theory's origins can be traced back to *Kesavananda Bharti v. State of Kerala*[49] wherein the prevailing opinion was that even though amendments under Article 368 are not law under Article 13(4), the basic features of the constitution are un-amendable and form the identity of the constitution. The Court, rejecting the theory of implied limitations[50] held that certain principles were in existence even before the constitution came into force and that, the makers of the constitution framed it with certain objectives and principles in mind which found face in the various constitutional provisions.[51]

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48 To show the evolution of the principles of Basic Structure in this context the author relies on the analysis by Pathik Gandhi, *Basic Structure And Ordinary Laws (Analysis Of The Indira Gandhi & The Coelho Case)*, Indian Journal of Constitutional Law. However the author differs with the article when it comes to the application of the Grundnorm in the Indian Context.

49 AIR 1973 SC 1461.

50 *Ibid.*

51 *Ibid,* Sikri CJ: *It seems also to have been a common understanding that the fundamental features of the Constitution, namely, secularism, democracy and the freedom of the individual would always subsist in the welfare state* (¶ 307). Hegde and Mukherji JJ: *Now that we have set out the objectives intended to be achieved by our founding fathers, the question arises whether those very persons could have intended to empower the Parliament, a body constituted under the*

The judgement is but a product of its time. The manner in which the Parliament was using its power under Article 368 necessitated the argument that the basic structure was something that existed independently of the constitution. An inference to such a proposition could be in retrospect considered a diceyean reiteration of the principle of "predominance of legal spirit."[52]

The principle is further illustrated by Justice Khanna's dissent in *ADM Jabalpur v. Shivakant Shukla*[53] where he held that Article 21 was not the sole repository of the right to life and personal liberty.[54] Thus even if Article 21 had not been drafted and inserted in Part III, the state could not deprive a person of his life and liberty without the authority of law.[55] These two cases indicate an initial line of judicial reasoning that advocates that basic structure doctrine as an extra-constitutional tool imported into Indian constitutional jurisprudence.

A year before this case was decided, the Supreme Court in *Indira Gandhi v. Raj Narain*[56] rejected the argument that a democratic way of life through parliamentary institutions based on free and fair elections as a part of the basic structure can be used to invalidate a legislative measure. The majority gave the following reasons for doing so[57]:

1. The amending power unlike the power to legislate, is a constituent power of the Parliament which follows a different

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Constitution to destroy the ideals that they dearly cherished and for which they fought and sacrificed. (¶ 688); *We find it difficult to accept the contention that our Constitution-makers after making immense sacrifices for achieving certain ideals made provision in the Constitution itself for the destruction of those ideals.* (¶690).

52 A.V Dicey, *INTRODUCTION TO THE* STUDY OF THE LAW OF THE CONSTITUTION, (Indianapolis: Liberty Fund 1982) p.195. Dicey describes the predominance of legal spirit as general principles of the constitution that determine the rights of parties. He also says that such rights existed even before the Constitution came into being through Judicial Decisions.

53 AIR 1976 SC 1207.

54 While holding that even in the absence of Article 21 of the Constitution, the state cannot deprive a person of his life and personal liberty, Justice Khanna observed : *The principle that no one shall be deprived of his life or liberty without the authority of law is rooted in, the consideration that life, and liberty are priceless possessions which cannot be made the plaything of individual whim and caprice and that any act which has the effect of tampering with life and liberty must receive sustenance from and sanction of the laws of the land. Ibid.* ¶168.

55 *Ibid.*

56 AIR 1975 SC 2299.

57 For a detailed analysis of this issue see Pathik Gandhi, *Basic Structure and Ordinary Laws,* Indian Journal of Constitutional Law, Vol. 4, 2010, p. 56. The authors rely on the analysis of Mr. Pathik Gandhi with respect to the majority position enunciated in *Indira Gandhi v. Raj Narain*.

procedure.[58] Hence the two cannot be equated.

2. The basic structure cannot be defined whereas plenary power can defined using the Articles incorporated in the constitution.[59]

3. Application of basic structure to ordinary laws will result in rewriting the constitutional limitations to legislation.[60]

Subsequently cases like *State of Karnataka v. Union of India*[61] Justice Beg speaking on behalf of the majority held that the basic feature in question was required to be located in one of the provisions of the constitution.[62] The Court thus shunned the approach of looking at basic features as transcendental to the constitution or being merely abstract principles with no specific link or location in the constitution.[63] In *Waman Rao v. Union of India*[64] and *I.R. Coelho v. State of Tamil Nadu,*[65] the Court held that Ninth Schedule was violative of basic structure doctrine as it took away the Courts power of judicial review. The Court thus made an effort to locate certain basic features within

58 Justice Chandrachud's opinion in *Indira Gandhi v. Raj Narain,* (¶692).

59 Justice Matthews opinion in *Indira Gandhi* (¶346).

60 See Justice Ray's opinion in the *Indira Gandhi* (¶38): *To accept the basic features or basic structures theory with regard to ordinary legislation would mean that there would be two kinds of limitations for legislative measures. One will pertain to legislative power under Articles 245 and 246 and the legislative entries and the provision in Article 13. The other would be that no legislation can be made as to damage or destroy basic features or basic structures. This will mean rewriting the Constitution and robbing the legislature of acting within the framework of the Constitution.*

61 AIR 1978 SC 68. It must be noted that Justice Beg who dissented in *Indira Gandhi v. Raj Narain* by citing Kelsen's theory followed the majority opinion laid down in Indira Gandhi in *State of Karnataka v. Union of India.*

62 See *State of Karnataka v. Union of India,* AIR 1978 SC 68 (¶ 128): *I do not think that what those learned Judges who, in Kesavananda Bharti's case (Supra), found a narrower orbit for the legislative power of amendment of the Constitution itself to move in cant to lay down some theory of a vague basic structure floating, like a cloud in the skies, above the surface of the Constitution and outside it or one that lies buried beneath the surface for which we have to dig in order to discover it. I prefer to think that the doctrine of "a basic structure" was nothing more than a set of obvious inferences relating to the intents of the Constitution makers arrived at by applying the established canons of construction rather broadly, as they should be so far as an organic Constitutional document, meant to govern the fate of a nation, is concerned.*

63 *Ibid* (¶121): *But, in every case where reliance is placed upon it, in the course of an attack upon legislation, whether ordinary or constituent (in the sense that it is an amendment of the Constitution), what is put forward as part of "a basic structure" must be justified by references to the express provisions of the Constitution. That structure does not exist in vacuo. Inferences from it must be shown to be embedded in and to flow logically and naturally from the bases of that structure. In other words, it must be related to the provisions of the Constitution and to the manner in which they could indubitably be presumed to naturally and reasonably function.*

64 (1981) 2 SCC 362.

65 (2007) 2 SCC 1.

the fundamental rights themselves and using them as a ground for constitutional validity.[66]

Usually the basic structure doctrine has been applied to legislations only when they have emanated from unconstitutional amendments.[67] An exception to this case was that of *SR Bommai v. Union of India*[68] wherein the doctrine was applied to test the executive action of Governor under Article 356. Thus as a general rule it is only applied to constitutional amendments.

However, what can be surmised from the above cases is that the basic structure doctrine is usually discussed when other means to engender justice fail and a more holistic approach is required to curtail the actions of the State.

Here it would be relevant to refer to Hans Kelsen's jurisprudence of the *grundnorm* to understand the concept better. Kelsen propounded *"a hierarchy of norms and a procedural relationship between them where the validity of a particular legal norm determined by a higher order norm, with the latter norm representing the validity of the former one".*[69] In Kelsen's analysis the process of determination of a positive legal norm results in this sort of regression leading to the constitution as the source of validity of all the positive norms and the *grundnorm* as the source of validity of the constitution itself.[70] This is the highest norm in the hierarchical legal system which derives its own validity from a direct

66 This aspect in *IR Coehlo* was succinctly explained in the *Glanrock Estate (P) Ltd. vs The State Of Tamil Nadu*, (2010) 10 SCC 96 (¶8). The Court held that General overarching principles are not required in a case in which an unreasonable classification violates the principle of equality before law. In cases like those involving preservation of forests we refer to inter-generational equity and sustainable development and not formal equality or equality enshrined in Article 14 but on a much wider platform of an egalitarian equality which includes the concept of "inclusive growth". However the Court also held that this illustration applies and is for purposes with reference to Constitutional Amendments. We differ from the Court here as the abovementioned statement extends the illustration to cases where formal equality and the reasonable classification test are not enough.

67 Also see *Chandra Kumar v. Union of India*; Section 28 of Administrative Tribunals Act along with clause (2)(d) of Article 323A, Clause (3)(d) of Article 323B were struck down for ousting Jurisdiction of the High Court Power under Articles 226 and 227 which was considered to a part of the basic structure.

68 [1994] 2 SCR 644.

69 Hans Kelsen (translated by Bonnie Litschewski Paulson, Stanley L. Paulson), INTRODUCTION TO PROBLEMS OF LEGAL THEORY, 1997, p. 64. This hierarchy was observed and accepted by Ray CJ in *Indira Gandhi* and Beg CJ in *State of Karnataka v. Union of India*.

70 Andreas Kalyvas, *The Basic Norm and Democracy in Hans Kelsen's Political Theory*, Philosophy and Social Criticism, Vol. 32, No. 5, http://www.constitutionalism.gr/ast/cov/AL/ALYVASBasicNormKelsen2372010.pdf, accessed on 27/2/2012, p. 577.

appeal to the constitution. Thus the validity of the constitution can only be derived from a non-positive or non legal norm which is the *grundnorm*.[71].

In *Kesavananda Bharti* when the basic features of the constitution were categorised as unamendable, the Court referred to a higher norm that limited the power under Article 368 of the Constitution. This norm thus validates the constitution and provides it with an identity, in the sense that if it is violated (i.e. basic structure is violated) the constitution would lose its identity and the change would be invalid.

If a rule is framed under a parent act, the Court not only sees whether the rule is consistent with the policy in the enabling act but also determines whether it withstands the tests of fundamental rights of the constitution. Similarly when a legislation is made under the aegis of a right or value enshrined in the constitution it must also be tested against the basic rules which have actually led to the creation of the right or value, and have shaped its interpretation.[72] This must be done irrespective of whether it is a constituent or legislative exercise of power to ensure that the hierarchy of norms is maintained.[73] Neither exercise can violate the *grundnorm*. Hence when the constitutional limitations for an ordinary law fail, there is no reason why the basic structure doctrine cannot be extended to such statutes.

Secondly, the practice post *Kesavananda Bharti* has been to locate the basic structure in the provisions of the constitution. This approach is inherent to the concept of a *grundnorm* as once a positive constitution is in place, the search for the *grundnorm* begins from the bare text of the Constitution itself as per the accepted norms of statutory interpretation.[74] Thus while both the power to amend and the power

71 See Kelsen, *supra* n. 68: This *grundnorm* is: 1) Not a human made positive norm 2) Nor is it created by any legal authority and 3) its validity is presupposed.

72 An argument to the contrary could be that it will eventually advocate viewing original provisions of the Constitution with the Basic Structure. To this we have two submissions- 1. Since the original provisions were made keeping in mind the Grundnorm there cannot be a possibility of inconsistency with it. 2. On the positive side by locating general principles of the Constitution within its Articles will give them a more purposeful interpretation.

73 See H. M. Seervai, CONSTITUTIONAL LAW OF INDIA, 4th ed., Vol. 3, p. 3119: *In a rigid Constitution, law making power is the genus of which legislative and constituent power are the species, the differentia being found in the different procedure prescribed for making ordinary laws. Whereas the power to frame a Constitution is a primary power the, power to amend the Constitution is a derivative power, derived from the Consitution.*

74 It is in this sense that the approach taken by Ray CJ in *Indira Gandhi v. Raj Narain*, is correct when he says that the *"the Constitution generates its own validity."*

to legislate come from the constitution itself, the limitation on both these powers comes from the constitution as well. In other words, the anvil on which the validity of a higher level norm (amendment) is tested would be applicable to a lower level norm (legislation) especially when both the power and the limitations come from the same source. The authors opine that three main reasons given in *Indira Gandhi v. Raj Narain* for non-application of the basic structure doctrine to ordinary legislation seem rebuttable on the basis of the above analysis -

1. Even though there is a difference between constituent and plenary powers both powers are derived from a higher norm and can be challenged on a higher principle. As per Kelsen's theory the mode of creation of a higher or a lower norm may differ from each other although they derive their validity from the same source.
2. Cases post-Kesavananda Bharti have expressly required the basic structure to be based in the explicit provisions of the constitution thus making the doctrine discernable and unambigious.[75]
3. It is not re-writing of constitutional limitation to ordinary laws, but a logical extension of the principle of hierarchy that Ray CJ himself enunciates in his judgement in *Indira Gandhi v. Raj Narain.*

RE: DUE PROCESS *VERSUS* BASIC STRUCTURE

The Court in *R Gandhi* instead of applying the basic structure doctrine to legislation opts to apply general constitutional principles to invalidate legislation. The Court does not expressly say why a law creating the scope for abuse of power has been struck down. Also, whether the guidelines should have been given to the executive with discretionary power remains a moot question. The problem with this approach is that such application of general principles is akin to the "predominance of law"[76] approach. It suffers from the problems pointed out in *Indira Gandhi v. Raj Narain*, as it is indefinable and could subject ordinary laws to a third criteria of "due process of law".

The Court while adjudicating in the instant case has implicitly applied the old yet inchoate due process doctrine.[77] "Due process"

75 *State of Karnataka* v. *Union of India*, AIR 1978 SC 68, (¶121).

76 Dicey, *supra* no. 51.

77 In *Selvi v. State of Karnataka* the Supreme Court expressly recognized the right to substantive due process in the India Constitution. Though this proposition was rejected in *AK Gopalan v. State of Madras*, AIR 1950 SC 27, it has been read into Article 21 post *Maneka Gandhi v Union of India*, AIR 1978 SC 597.

refers to an exertion of the powers of government as the settled maxims of law sanction, and such safeguards for the protection of individual rights those maxims prescribe.[78] Thus the due process doctrine advocates the application of general concepts which are existent in the judicial process and also in the statute under consideration. Seeing the reasoning of the court in the light of the understanding of due process as given above it is evident that silently the court treads the same path.

It is necessary to note that the due process approach was rejected by the Constituent Assembly.[79] Its adoption by the Supreme Court is contrary to an originalist reading of the Constitution *which advocates that the* constitution be interpreted according to the intent of those who drafted and adopted it.[80] Thus a statute or a constitution has to be construed as on the day after it was enacted. This rule is qualified by an exception known as 'generic interpretation'.[81]

However as stated in *Eastman Photographic Materials Co.* v. *Comptroller of General Patents, Designs and Trademarks*[82], in all cases, the object is to see what is the intention expressed by the words used. But from the imperfections of language, it is impossible to know what that intention is without seeing what the circumstances were with reference to which the words were used and what was the object appearing from those circumstances, which the person using them had in view.[83]

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78 Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS, p. 356.

79 Sir B. N. Rau, the constitutional advisor, on being advised by United States Supreme Court Justice Felix Frankfurter against due process, successfully removed the due process clause from the draft and replaced it with 'procedure established by law'. Frankfurter's position was that that that the power of judicial review implied in the due process clause was both undemocratic and burdensome to the judiciary, because it empowered judges to invalidate legislation enacted by democratic majorities: See Manoj Mate, *The Origins of Due Process in India*, <http://www.boalt.org/bjil/docs/BJIL28.1_Mate.pdf>, (last accessed on 1.3.2012),.

80 A. Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849.

81 H. M. Seervai, CONSTITUTIONAL LAW OF INDIA, 4th Ed., Vol. 1, p. 176. As per this interpretation, suppositions as to what the framers might have done if their minds had been directed to future developments are irrelevant and the question whether a novel development is or is not included in the terms of the Constitution finds its solution in the ordinary principles of interpretation namely, what is the meaning of the terms in which the intention has been expressed. [Waynes, LEGISLATIVE, EXECUTIVE AND JUDICIAL POWERS IN AUSTRALIA, 5th Ed., p. 26; as quoted in H. M. Seervai, CONSTITUTIONAL LAW OF INDIA, 4th Ed., Vol. 1, p. 176].

82 (1898) 15 RPC 476.

83 *Ibid.*

Going by the principles of originalism, hedged with those of generic interpretation, it is evident that the basic structure doctrine was first laid down and later on evolved as an expression of the intention of the makers. Although this was sourced not from the bare words of the provisions factors including the prevailing conditions at the time of drafting, the nature of the provisions and their intended immutability sculpted the doctrine.

As against this the due process test is an insolent judicial concept that has evolved by expressly disregarding the intention of our framers. Thus it is submitted that the application of the basic structure doctrine in cases like the instant one is far more viable, constitutionally valid and rooted over abstract principles in the due process clause. This difference has become more pronounced especially after the development of the tradition of locating the basic features in specific provisions of the constitution. The authors thus favor the basic structure doctrine to be closer to the "soundest theory of law" developed by Hercules. The basic structure doctrine as explained above is actually an application of the intention of the makers and is thus closer to the theory of originalism or original intent rather than due process which actually represents situations that do not creatively redress *silences* in the constitutional text but performances that retrospectively deny the constitution maker's *speech.*[84] *The authors are aware the mere dispersion of the traditional objections to the application of basic structure does not negate the practical considerations in question. The authors by no means intend to argue that all legislations must satisfy this threshold. The frequency of its application is solely a function of the discretion of the Judges and must be exercised most sparingly. Yet* in cases like the instant one, where the regular tests of legislative competence and fundamental right violation fail, the application of basic structure doctrine clearly becomes a viable option.

Conclusion

We must not make a scarecrow of the law,
Setting it up to fear the birds of prey,
And let it keep one shape, till custom make it
Their perch and not their terror. (Measure for Measure 2:1)

These phrases from Shakespeare's play best sum up the approach to be taken by the Courts in *R Gandhi versus Union of India.* A palpable

84 Upendra Baxi, *"A known but an indifferent judge": situating Ronald Dworkin in contemporary Indian jurisprudence"*, International Journal of Constitutional Law, 2003, p. 575.

"attempt at encroachment" whether it be at rights or at jurisdiction of the High Court is looked at most lightly by our *sentinel de qui've*. The Supreme Court does well to move away from the position in *Maganlal* but what comes out of *R Gandhi* is only a correctional dictum that checks only the penumbral evils of tribunalization. The true ambit of such encroaching tribunalization yet remains unknown. The authors submit that it would be dangerous to assume that a sympathetic stand towards tribunals, as such a stand will mere lead to.

More adjudicatory outsourcing rather than actual structural reform. Hence the scope of Article 323-B and the ambit of tribunalization therein is something that must most certainly be earmarked especially since the independence and quality of such tribunal have come into question. Furthermore the authors believe that the reasoning of the judgment prays to extra constitutional forces to come to its aid for the purpose of adjudication thus rendering itself subject to the criticisms in *Indira Gandhi v. Raj Narain*. If the courts had employed the basic structure doctrine to introduce concepts like 'independence of the judiciary' and 'separation of powers' by locating them in specific provisions of the constitution and read them together to create a right to have a fair and proficient adjudication (under the *grundnorm* that there exists limitations to power), the courts would have been on *terra firma.* Such an approach would have been the "more Herculean one to take." One fails to comprehend why amendments that are out of abundant caution are subject to the basic structure doctrine while legislations are not. Such a concretization of the basic structure doctrine will only lead to attrition of law, as it will become customary to pass Acts that are tentatively violate our basic rights. It is imperative that such encroachment be curbed through sound judicial principles.