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**(1993) 10 AP CK 0009**

**In the Andhra Pradesh High Court**

**Case No :** Writ Petition No. 518 of 1993 and W.A. No. 302 of 1992

Sakinala Hari Nath and Others

APPELLANT

Vs

State of Andhra Pradesh and Others

RESPONDENT

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**Date of Decision :** 26-10-1993

**Acts Referred:**

Administrative Tribunals Act, 1985 — Section 28, 4(2)  
Constitution of India, 1950 — Article 12, 136, 14, 141, 16

**Citation :** (1993) 3 ALT 471 : (1994) 1 APLJ 1

**Hon'ble Judges :** S. Parvatha Rao, J; M.N. Rao, J; D. Reddeppa Reddi, J

**Bench :** Full Bench

**Advocate :** S. Ramachandra Rao, M.R.K. Choudhary, Raghuram and P. Venkateswarlu, for the Appellant; Altaf Ahmed, Additional Solicitor-General of India, S. Venkata Reddy, General, Y. Suryanarayana, K. Jhansi Rani and P.V. Krishnaiah, for the Respondent

**Final Decision :** Disposed Off

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## Judgement

M.N. Rao, J.—In this batch of cases, the primordial question for consideration concerns the constitutionality of Sub-clause (d) of Clause (2) of Article 323A. Part XIV-A of the Constitution of India consisting of two Articles - 323A and 323B - was inserted by Section 46 of the Constitution (42nd Amendment) Act, 1976 with effect from 3-1-1977. Clause (1) of Article 323A confers power on Parliament to establish, by law administrative tribunals for adjudication of disputes and complaints with regard to persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local authority or of Public Corporation controlled or owned by the Government. Sub-clauses (a) to (g) of Clause (2) speak of what the law made under Clause (1) may provide for. Sub-clause (d) of Clause (2) lays down that the law made under Clause (1) may "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)". Clause (3) incorporating non-obstante clause mandates that the provisions of Article 323A shall have effect notwithstanding

anything in any other provision of the Constitution or in any other law for the time being in force.

2. The Administrative Tribunals" Act, 1985 (Act No. 13 of 1985) was enacted by Parliament in exercise of power under Article 323A. The Act contains provisions for establishment of a Central Administrative Tribunal at the National level with Benches at several places and an Administrative Tribunal for each State or two or more States to exercise jurisdiction, powers and authority conferred under the Act. The tribunals at the State level are established only on receipt of a request in that behalf from any State Government (Section 4).

3. Section 6 of the Act lays down qualifications for appointment of Chairman, Vice-Chairman or other members. Under Sub-section (1), a person who is or has been a Judge of a High Court is eligible to be appointed as the Chairman. The Vice-Chairman could be a Judge of a High Court or Secretary to the Government of India with two years experience in that post or an Additional Secretary with five years experience or a member of the Administrative Tribunal with not less than three years of experience. Sub-sections (3) and (3- A) speak of qualifications for appointment to the post of judicial member and administrative member. The Chief Justice of India is required to be consulted in regard to the appointments of the Chairman, Vice-Chairman and members" of the Tribunal. Sections 14 and 15 deal with jurisdiction, powers and authority of the Central Administrative Tribunal and State Administrative Tribunals respectively. The Tribunals are conferred with power to punish for contempt u/s 17. The procedure and powers of the Tribunals are dealt with in Section 22 and decisions are required to be given by majority as per Section 26. Section 27 forbids challenge to the orders of the tribunals in any High Court. Section 28 which excludes the jurisdiction of all Courts except the Supreme Court and industrial Courts, is in the following terms:

"Exclusion of jurisdiction of Courts except the Supreme Court under Article 136 of the Constitution. On and from the date from which any jurisdiction, power 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, power or authority in relation to such recruitment or matters concerning such recruitment or such service matters."

Section 29 relates to transfer of pending cases at the time of the constitution of the tribunals.

4. The Central Administrative Tribunal was established on 1-7-1985 and on 1-1-1986, State Administrative Tribunals were established in several States.

5. In the State of Andhra Pradesh, under Act No. 13 of 1985, the State Administrative Tribunal was set up only with effect from 1-11-1989 due to certain special reasons. Prior to that, a separate tribunal set up under the A.P. Administrative Tribunal Order, 1975 was functioning in the State of Andhra Pradesh with effect from 6th July, 1976. The coming into force of the State Reorganisation Act had resulted in the extinction of the Part-B State of Hyderabad. The employees of the erstwhile Hyderabad Government working in the territories (Telangana area) which become part of the State of Andhra Pradesh with effect from 1-11-1956 faced certain difficulties in regard to their service conditions: the region itself was backward requiring immediate development. The A.P. Administrative Tribunal Order itself was issued by the President under Article 371D. The events leading to the enactment of Constitution (32nd Amendment) Act, 1973 by which Article 371D was included in the Constitution are:

"In the year 1957, the Public Employment (Requirement as to residence) Act was enacted inter alia to provide for employment opportunities for residents of Telangana area, some of the relevant provisions were held to be unconstitutional by the Supreme Court due to a variety of causes. The working of the safeguards gave rise to dissatisfaction sometimes in the Telangana area and sometimes in the other areas of the State and even led to violent agitations. A consensus was arrived among several leaders of Andhra Pradesh to make a concerted effort to analyse the factors which have been giving rise to the dissatisfaction and they suggested certain measures known as "six point formula" and the same has been endorsed by the State Government. A bill was brought forward to provide for necessary constitutional authority for giving effect to this formula and the same became the Constitution (32nd Amendment) Act under which Article 371D was introduced. See Government of Andhra Pradesh and another Vs. A. Suryanarayana Rao and others, ."

The purpose of enacting Article 371D was to provide "equitable opportunities and facilities for the people belonging to different parts of the State in the matter of public employment and in the matter of education". The President was empowered, by order, to give effect to the provisions of Article 371D. Clause (3) of Article 371D envisages the constitution of an Administrative Tribunal by a Presidential Order to "exercise such jurisdiction, powers and authority (including any jurisdiction, power and authority which immediately before the commencement of the Constitution (32nd Amendment) Act, 1973 was exercisable by any Court (other than the Supreme Court) or by any tribunal or other authority) as may be specified in the order with respect to appointment, promotion, seniority and such other conditions of service specified in Sub-clauses (a) (b) and (c) of Clause (3)& ". Clause (4) contains provisions regarding powers, authority and procedure of the tribunal, and transfer of all cases pending before

any Court other than the Supreme Court to the Tribunal. Clause (5) laid down that the order of the Administrative Tribunal finally disposing of any case shall become effective only upon its confirmation by the State Government or on the expiry of three months from the date on which the order was made, whichever was earlier. The proviso to Clause (5) empowered the State Government, for reasons to be recorded in writing, to modify or annul any order of the tribunal before it became effective.

6. In *Sambamurthy v. State of A.P.* AIR 1987 SC 663, Clause (5) of Article 371-D was struck down by a Constitution Bench of the Supreme Court on the ground that the proviso to Clause (5) renders "much less effective and efficacious institutional mechanism or authority for judicial review than the High Court in respect of specified service matters and if the proviso goes, the main part of Clause (5) must also fail along with it "since it is inextricably interlinked with it". By Clause (7), the power of the High Court to have superintendence over the Administrative Tribunal was excluded. The power of judicial review of the Supreme Court was alone retained. Clause (8) conferred power on the President to abolish, by order, the Administrative Tribunal if he was satisfied that the continued existence of the tribunal was not necessary and he was also empowered to make provisions in the order for transfer and disposal of cases pending before the tribunal before the abolition. By an order issued in GSR 920-E, the President, on 25-10-1989 in exercise of power under Clause (8) of Article 371-D, abolished the A.P. Administrative Tribunal and directed the transfer of all the cases pending before the tribunal to the newly constituted tribunal set up on 1-11-1989 under Act No. 13 of 1985.

7. Three categories of persons have filed these writ petitions - (i) those claiming employment to the post of Village Assistant and Second Grade Teacher, (ii) State Government employees challenging orders of punishment imposed upon them in disciplinary proceedings; and (iii) State Government employees seeking promotion to higher posts or challenging orders of transfer or reversion. Realising that the divestiture of the jurisdiction of this Court in respect of service conditions of Government employees will be a threshold objection for entertaining the writ petitions, they have challenged the constitutionality of Article 323A(2)(d).

8. W.P.No. 2377 of 1992 was dismissed by a learned single Judge of this Court taking the view that since it relates to a service matter, the High Court has no jurisdiction. W.A.No. 302 of 1992 was preferred against that. W.A.No. 303 of 1992 is another such appeal.

9. W.A.No. 711 of 1993 was filed against the judgment of a learned single Judge in W.P.No. 6244 of 1993 in which the legality of an order of transfer of an Assistant Excise Superintendent was challenged.

10. Having regard to the complexity of the constitutional questions raised in these cases, a Division Bench of this Court issued notice on 2-3-1993 requesting

the Attorney-General of India to appear and assist the Court. The learned Attorney-General has deputed Sri Altaf Ahmad, learned Additional Solicitor General, to represent him and assist the Court in the adjudication of these matters. We place on record our grateful appreciation for the able assistance rendered by him.

11. On a previous occasion, when a similar question arose as to the maintainability of Writ Petitions in the High Court seeking redressal in respect of service matters pertaining to Government employees, a Division Bench of this Court in *R. V. Ranaratna Rao v. State of A.P.* 1992 (1) APLJ 168 ruled that the A.P. Administrative Tribunal constituted u/s 15 of the Administrative Tribunals Act, 1985 alone has jurisdiction and in that view, dismissed the writ petitions. Another Division Bench of this Court, after noticing the above decision, has admitted some of the writ petitions in this batch - W.P.Nos. 518,1373,1423, 2295,3942, 5286,3081 and 2268 of 1993. When the same came up for final hearing before another Division Bench of this Court to which one of us (M.N.Rao, J.,) was a party, in view of the above apparent inconsistency, passed an order on 29-6-1993 expressing the view that the matter requires to be authoritatively decided by a Full Bench of this Court. That is how all these cases came up before us.

12. Sri S. Ramachander Rao, learned Counsel who advanced leading arguments on behalf of the petitioners, has contended that the Andhra Pradesh Administrative Tribunal set up under Act No. 13 of 1985 is unconstitutional as per the dicta of the Supreme Court in *S.P. Sampath Kumar v. Union of India* AIR 1987 SC 386 and certain other decisions. In the state of Andhra Pradesh, no Administrative tribunal can come into being by an executive order; such a tribunal can only be created by parliamentary enactment as envisaged by Article 323A itself and that too, after reconciling Article 371-D by an appropriate amendment to the constitution. Article 323A(2)(d) is unconstitutional since it destroys the basic structure of the Constitution; the Constitution vests judicial power of the State in the Supreme Court and the High Courts under Articles 32, 226 and 227 and any interference with that power would amount to destroying the basic and essential feature of the Constitution.

13. The rule in *Sampath Kumar's* case AIR 1987 SC 386 that the power of judicial review need not always be exercised by regular Courts and that the same can be exercised by an equally efficacious alternative mechanism is contrary to the dicta laid down by the earlier Constitution Benches - *His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala*, , *Minerva Mills Ltd. and Others Vs. Union of India (UOI) and Others*, , *In the matter of: Under Article 143 of the Constitution of India, and Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another*, .

14. Even the directions issued by the Supreme Court in *Sampath Kumar's* case<sup>4</sup> as to the structure and composition of the Administrative tribunals have not been complied with by making appropriate amendments and, therefore, Act No 13 of

1985, as it stands now, is unconstitutional. State Government employees, who constitute a large segment of the population, cannot be deprived of their right to seek redressal of their grievance by approaching the High Court under Article 226.

15. Sri M R. K. Choudhary, learned Counsel appearing for some of the petitioners, has contended that when the Andhra Pradesh Administrative Tribunal established under Article 371-D(3) was abolished by an order of the President on 25-10-1989, the Jurisdiction of the High Court to entertain writ petitions in relation to conditions of service of State Government employees was revived. On similar lines, arguments were advanced by Smt. Tripura Sundari - another learned Counsel.

16. Sri Raghuram, learned Counsel appearing in some of the writ petitions, while approaching the problem from a different angle has urged that the absence of a prescription in the very Constitution itself in regard to the parameters of the alternative institutions and enunciation of immediate safeguards in regard to the structural pattern of the alternative forums would affect very adversely the guaranteed constitutional rights of the State Government employees under Articles 14, 16, 309 and 311. The alternative forums - because of absence of structural safeguards would not be in a position to act as independently as the High Courts and this, without anything more, will have a demoralising effect on the civil servants. A civil servant is required to tender advice to the political executive fearlessly and the existence of constitutional Courts endowed with the power of judicial review creates the necessary confidence in him that in the discharge of his duties he was to be subjected to any injustice he would get justice from the constitutional Courts.

17. Sri P. Venkateswarlu, another learned Counsel, while supplementing the arguments of Sri Ramachander Rao has highlighted the point that the Constitution ensures independence of the judiciary and no tribunal or Court set up by ordinary legislation can interpret or enforce the provisions of the Constitution and its function must be discharged only by the Courts set up by the Constitution itself.

18. Mr. Altaf Ahmed, learned Additional Solicitor-General of India, has stated at the very outset that he is representing the Attorney-General of India to whom notice was issued by this Court requesting his assistance and that he is not representing either the Union Government or the State Government and so the contentions advanced by him, therefore, should not be taken as representing the views of either of the Government. According to him Sampath Kumar's case (4 supra) is a complete answer to all the propositions urged on behalf of the petitioners. The constitutionality of both Article 323-A and Act No. 13 of 1985 having already been upheld in Sampath Kumar's case (4 supra), it is not open to this Court to enquire any further into this aspect. The Administrative Tribunals constituted under Act No. 13 of 1985 are empowered to review the constitutionality of any statute since they are equally efficacious alternative ;

forums for the High Courts. Although judicial review is a basic feature of the Constitution, it is not correct to state that judicial power of the State must always be exercised by the judiciary and the last word on this has already been said by the Supreme Court in Sampath Kumar's case (4 supra).

19. Sri S. Venkat Reddy, the learned Advocate-General appearing for the Union of India and the State Government, has addressed arguments supporting the stand of Mr. Altaf Ahmed. Much to the same effect are the contentions advanced by Sri Y. Suryanarayana, learned Counsel for one of the respondents. In addition, he also urged that any views expressed by the Supreme Court in exercise of its advisory jurisdiction have no binding force and so, the observations in the Privileges case (7 supra) in regard to the nature of judicial power and the exercise of judicial review by the High Courts do not have the effect of unsettling the decision in Sampath Kumar (4 supra).

20. Sri P.V. Krishnaiah a practising advocate who appeared as party-in-person claiming that he was interested in the continuance of the tribunals established under Act No. 13 of 1985 since they are rendering expeditious justice - has vigorously put forth the plea that this Court has no jurisdiction to pronounce upon the constitutionality of a provision in the Constitution since that power is exclusively vested in the Supreme Court.

21. We begin with the basic document. Our Constitution is not merely the mechanism under which laws are made but more importantly a testament of faith fostering the achievement of many goals, transcendent among them is social revolution: it blends idealism with realism.

"....(It is a) document in which provisions expressing general principles and humanitarian sentiments - vows of purpose, if you will - mingle with these embodying level-headed practicality and administrative detail, See: Granville Austin: The Indian Constitution Corner stone of a Nation - pages xiii & xiv (introduction)."

It is not the result of a mere belief in limited government as is the usual case when a country opts for a written Constitution, See: Prof. K.C. Wheare: Modern Constitutions - 2nd Edn. 1984 reprint p.7. The Founding Fathers of our Constitution had succeeded, almost in full measure, in providing to this country a lengthy Constitution as nearly perfect as possible and intended to endure for ages and they did not - very pragmatically - adhere to the view propounded by John Marshall, one of the framers of the American Constitution and the fourth Chief Justice of the Supreme Court of the United States that the Constitution should contain "the very minimum and that minimum to be rules of law". Among other things, we have adopted the Cabinet system of Government prevailing in the United Kingdom, the theory of separation of powers in vogue in the United States and the doctrine of judicial review enabling the higher judiciary to review legislative enactments on the touch-stone of the constitutional provisions. The justification for this, according to Sri B.N. Rau:

"Most modern constitutions do make full use of the experience of other countries, borrow whatever is good for them and reject whatever is unsuitable. To profit from the experience of other countries or from the vast experience of one's own is the path of wisdom. There is another advantage in borrowing not only the substance but even the language of established constitutions; for we obtain in this way, the benefit of the interpretation put upon the borrowed provisions by the Courts of the countries of their origin and we thus avoid ambiguity or doubt, B.N. Rau: India's Constitution in the making - page 361".

In the adjudication of Constitutional questions reference to decisional law of foreign countries, therefore, would become relevant.

22. The theory of separation of powers as propounded by Montesquieu although was not in *stricto sensu* incorporated in our Constitution, nonetheless, our organic document adheres to the concept of separation of powers and it is not necessary to go into the minute details as to in what respects departure from this theory is discernible, Justice O.W. Holmes in his tribute to Montesquieu: "and this was the work of a lonely scholar sitting in the library. Like Descartes or Kaut, he commented the future from his study more than Napoleon from his throne" Max Learner: The Mind and Faith of Justice Holmes 1943 Edn. 382. Montesquieu believed that control of power depends upon its fragmentation.

23. In a federal set up like ours with distribution of legislative powers between the union and the States and enforceable fundamental rights incorporated in Part-III of the Constitution, the Higher judiciary comprising constitutional Courts inevitably has to interpret and enforce the provisions of the Constitution. The successful working of the Constitutional system, therefore, depends upon the effective role played by the constitutional Courts - the Supreme Court and the High Courts - and realising this irrefragable truth, the founding Fathers ensured the independence of judiciary by incorporating the necessary safeguards in that regard. Therefore, in our view, any attempt at jurisdiction-stripping moves- either by legislative measures or by amendments to the Constitution must be subjected to strictest possible judicial scrutiny.

24. Some times, a Constitution may be silent as to where the judicial power vests as was the case with regard to the erstwhile Ceylon Constitution which was contained in several enactments passed by the British Parliament incorporating broadly the theory of separation of powers. The constitutionality of the Criminal Law (Special Provisions) Act Nos. 1 and 31 of 1962 which enacted ex-post facto legislation altering the rules of evidence and criminal procedure obtaining under the general law at the time when certain offences were committed and for legalising the imprisonment of the accused while they were awaiting trial, came up for consideration before the Privy Council in *Don John Francis Douglas Liyanage and Ors. v. The Queen* 1967 (1) A.C. 259 . One of the contentions advanced before the Privy Council was that although there was no express provision in the Ceylon Constitution with regard to vesting of judicial power in the Courts, but the Judges, having regard to the judicial oath taken by them and

the protection in regard to the service conditions afforded to them under the Constitution, were under a duty, in exercising judicial functions, to dispense even handed justice to all persons according to the laws of the country and as a necessary corollary to that, the Parliament, in the guise of exercising its legislative power, cannot usurp the judicial functions of the judges or interfere with them and this fundamental distinction flows from the constitutional position which ensures either expressly or by necessary implication, a complete separation of judicial functions. This contention found favour with the Privy Council. After examining the nature of judicial appointments the protection afforded to Judges and the duties enjoined upon them, Lord Pearce speaking for the Judicial Committee of the Privy Council said in his speech.

"These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by the executive or the legislature". (pp. 287-288)

Pronouncing upon the constitutionality of the impugned legislation, Lord Pearce further held that in impugned enactments interfered with the functions of the judiciary - that was the intended effect of the impugned enactments. "

The true nature and purpose of those enactments are revealed by their conjoint impact on the specific proceedings in respect of which they were designed, and they take their colour, in particular, from the alterations they purported to make as to their ultimate objective, the punishment of those convicted. These alterations constituted a grave and deliberate incursion into the judicial sphere. Quite bluntly, their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences". (p. 290)

What is significant is that before the Privy Council, a very strong plea was made on behalf of the Government of Ceylon that the legislature had no general intention to divest judicial power from the Judges and that because of a grave situation prevailing in the country, grave measures had to be taken. Declining judicial assent to the plea, the learned Law Lord administered a note of caution:

"But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution. In their Lordships view the Acts were ultra vires and invalid". (pp 291-292).

25. In some of the Constitutions like the United States and Australia, judicial

power is specifically vested in Courts. In Australia, by Section 71 of the Commonwealth of Australia (Constitution) Act, 1900, judicial power is vested in the High Court of Australia (highest Federal Supreme Court) and in such other Federal Courts as Parliament may create. The definition of "judicial power" by Griffith, C.J., in *Huddart, Parker & Co. v. Moorehead* 8 C.L.R. 330 was accepted by the Privy Council in *Shell Co. of Australia v. Federal Commissioner of Taxation* 1931 A.C. 275 which was in the following terms:

"I am of the opinion that the words "judicial power" as used in Section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action". (pp 295-296)

The Privy Council, in principle, recognised:

"The authorities are clear to show that there are tribunals with many of the trappings of a Court which, nevertheless, are not Courts in the strict sense of exercising judicial power", (p. 296)

and further focussed on certain other characteristic features: a tribunal would not become a Court merely because it gives a final decision, hears witnesses on oath, contending parties appear before it, decisions affecting the rights of subjects are rendered by it, a provision for appeal to a Court is provided and the requirement to refer the matter to another body. Even while acting judicially, a tribunal may retain its characteristics as an administrative tribunal as distinguished from a Court, strictly so called.

26. Applying the aforesaid tests, the Privy Council ruled that the Board of Review established under the Income Tax Assessment Act, 1922-25 of Australia is not a Court but only an administrative tribunal, empowered by law, to review the decisions of the Commissioner of Income Tax who is not a judicial authority, but an executive.

27. In the United States due to the existence of dual judiciary - the federal judiciary enforcing and interpreting the Constitution and the laws made by the Congress and the State judiciary discharging similar functions with respect to the Constitution of each State and the laws enacted by its legislature - the States being the repositories of the residuary powers - powers not granted by the Constitution to the Union - safeguard their judicial power jealously unwilling to concede the same in any measure to the federal judiciary.

28. Section (1) of Article III of the United States Constitution vests judicial power "in one Supreme Court and in such inferior Courts as the Congress may, from time to time, ordain and establish". The section also enjoins that judges of the Supreme Court and the inferior Courts shall hold their offices during good

behaviour and shall receive for their services "a compensation which shall not be diminished during their continuance in office". The Courts established by the U.S. Congress under Article III are called "Article III Courts" exercising Federal judicial power extending to matters enumerated therein. What are the matters encompassed by the judicial power are specified in Sections 2 and 3 of Article III. The United States Supreme Court in *Muskrat v. United States* 219 U.S. 346 held:

"Judicial power implies the right to determine actual controversies arising between adverse litigants duly instituted in Courts of proper jurisdiction".

29. Jurisdiction is the authority of a Court to exercise judicial power and is, therefore, a necessary pre-condition for the exercise of judicial power when a Court hears and decides a dispute. Courts established by the Congress under Article III are Constitutional Courts which are vested with the judicial power and such Courts are different from "legislative Courts" created in virtue of the general right of sovereignty which exists in the Government.....The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third Article of the Constitution but is conferred by Congress in the execution of those general powers which that body possesses over the territories of the United States, Edward S. Corwin: *The Constitution of the United States of America* - p.533". Clause (2) of Article VI ensures the supremacy of the Constitution by declaring that the Constitution and the laws of the United States shall be the Supreme Law of the Land. This supremacy clause recognized judicial review of legislative enactments not only in relation to the U.S. Constitution but also in relation to the acts of Congress which are enacted in pursuance of the Constitution.

30. Judicial review was firmly evolved for the first time by Chief Justice Marshall in 1803 in *Marbury v. Madison*, Justice Holmes in his tribute to Marshall: ".....when I consider his might, his justice and his wisdom, I do fully believe that if American Law were to be represented by a single figure sceptic and worshipper alike, would agree without dispute that the figure could be one alone and that one, John Marshall" - Max Learner - *Op. cit.* p.385." Emphasising that a Constitution is paramount law, Marshall said:

"It is emphatically the province and duty of the judicial department to say what the law is.....If two laws conflict with each other, the Courts must decide on the operation of each.....If, then, the Courts are to regard the Constitution and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply".

Any declaration otherwise, the Chief Justice concluded:

".....would be subversive of the very foundation of all written Constitutions, would force the judges to close their eyes to the Constitution, and would make the judicial oath "a solemn mockery, See Edward S. Corwin *Op. cit.* p.559".

Exercise of the power of judicial review by a Constitutional Court sometimes may

result in decisions against the wishes of a legislative majority: such situations are inevitable when the acts of a law making body are reviewed with reference to the limited powers conferred upon it by the organic document. Any criticism that anti-majoritarian decisions are anti-democratic is but ill-founded. "After all, every right protected by the Constitution is a right protected against majority legislation, See: Lawrence H. Tribe and Michael C. Dorf: On reading the Constitution, 1991 Edn. p.29". Judicial Review not only results in Courts striking down a legislative action as unconstitutional but sometimes a statute may also get validated on the ground that the law making body has passed it within the constitutionally granted powers and has not transgressed the constitutional limitations. Both legitimating function and checking function are implicit in the exercise of the power of judicial review. As observed by Prof. Alexander M. Bickel:

"legitimizing function is inescapable - even if unintended - by product of the checking power, See: Alexander M. Bickel The Least Dangerous Branch - The Supreme Court at the Bar of Politics p.29".

39. Constitutional Courts are the proper guardians to ensure and safeguard the enduring values, the Constitution seeks to preserve. The advantage, Courts have, is that "questions of principle never carry the same aspect for them as they did for the legislature or the executive, See Alexander M. Bickel - op. cit. p.26. Statutes, after all, deal typically with abstract or dimly foreseen problems. The Courts are concerned with the flesh and blood of an actual case. This tends to modify, perhaps to lengthen, everyone's view. It also provides an extremely salutary proving ground for all abstractions; it is conducive in a phrase of Holmes, to thinking things not words, and thus to the evolution of principle by a process that tests as it creates. Why should Courts alone be entrusted with the task of interpreting and enforcing the Constitution and not other non-judicial branches like the legislature and the executive even though they too are sworn to uphold the Constitution? Prof. Laurence H. Tribe of the Harvard University gives a very convincing answer:

".....the independent judiciary has a unique capacity and commitment to engage in constitutional discourse - to explain and justify its conclusions about governmental authority in a dialogue with those who read the same Constitution even if they reach a different view. This is a commitment that only a dialogue-engaging institution insulated from day-to-day political accountability but correspondingly burdened with oversight by professional peers and vigilant lay critics, can be expected to maintain...The price we pay for allowing judges to discharge this commitment is that, for various periods of time, an enlightened consensus may be blocked by blind judicial adherence to constitutional views we will later come to regret. But the price of the alternative course is that, for other periods, the enlightened consensus that judges might help to catalyze in the name of the Constitution may be blocked by more self-interested or short-sighted majorities, See Lawrence H. Tribe American Constitutional Law - 2nd Edn. p.15".

Officials entrusted with the duty of enforcing laws sometimes also interpret them but their interpretations are qualitatively different if the judges were to interpret the same. Judge R. A. Posner was not articulating his views alone when he observed:

"The distinctive things about the judges are that their incentives are a bit "purer" than those of most other officials, that their experiences are those of a lawyer, that their reading is dominated by legal materials largely unknown and incomprehensible to the lay public, and that convention requires of them (as it does not of most other government officials) a written justification of their important rulings. This last requirement imparts a certain thoughtfulness to what they do, as do the other procedural constraints of judicial decision making as well as the conditions of judicial employment, See: Richard A". Posner: The Problems of Jurisprudence -1990 Edn. p.233".

40. From the very nature of the consequences that flow from judicial review, judges should be disinterested and must stand aside from the controversies of the day and free from the "deflecting pressures of the ego" and the values the Court vindicates "must have a content grater than any single concern of the moment....The function of judicial review arises in the limiting context of cases, to be sure, but while the Court should not surmount the limitation, it must rise above the case, See: Alexander M. Bickel - op. cit. p.50". Larger considerations transcending the immediate situation presented by the case should come into play. As observed by Justice Cordozo, "judges should hold fast to kant's categorical imperative, "Act on a maxim which thou canst will to be law Universal". Judges should refuse to sacrifice the larger and more inclusive (universal?) good to the narrower and smaller and they should "look beyond the particular to the universal and shape our judgment in obedience to the fundamental interest of society.....,See: B.N. Cordozo: The Nature of the Judicial Process - pp.139-140".

41. In the United States, so far, the controversy as to whether an amendment to the Constitution was unconstitutional has not arisen, but it is a settled principle of American Constitutional Law 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. In regard to matters not covered by Article III, the Congress has no power under Article I to establish legislatively any Court for the purpose of exercising judicial power falling within the ambit of Article III. The legislative jurisdiction under Article I cannot be conferred by by the Congress on Courts established under Article III. The distinction was brought out clearly in *National Mugal Insurance Company of the District of Columbia v. Tidewater Transfer Company* 93 LEd. 1556 : 337 U.S. 582:

"Whether a Court is of one category or the other depends upon what power of Congress was utilized in its creation. If it was the power to create inferior constitutional Courts, the Court may exercise only the judicial power outlined in

Article III. If Congress creates a judicial body to implement another of its constitutional powers, that body is a legislative Court may exercise none of the judicial power of Article III".

42. In *Thomas S. Williams v. United States* 77 L.Ed. 1372 : 289 U.S. 553 one of the questions for consideration before the United States Supreme Court was: whether the judicial power under Article III would apply to the Court of Claims and whether the compensation of a judge of the Court of Claims could lawfully be diminished during his continuance in office. The plaintiff in that case was a judge of the Court of Claims of the United States and his salary was diminished during his continuance in office from \$ 12,500 per annum to \$ 10,000, by the Comptroller General under the Legislative Appropriation Act taking the view that the Court of Claims was a legislative Court, but not a Constitutional Court. Holding that the Court of Claims was not a constitutional Court and that the reduction in salary was justified, Sutherland, J., delivering the opinion of the Court observed:

"Since all matters made cognizable by the Court of Claims are equally susceptible of legislative or executive determination, there are, of course, matters in respect of which there is no constitutional right to a judicial remedy.....and the authority to inquire into and decide them may constitutionally be conferred on a non-judicial officer or body.....a power definitely assigned by the Constitution to one department can neither be surrendered nor delegated by that department, nor vested by statute in another department or agency:....a power which may be devolved at the will of Congress upon any of the three departments plainly is not within the doctrine of the separation and independent exercise of governmental powers contemplated by the tripartite distribution of such powers. ....As the Court of Claims has derived its power and the Judges their rights from the Acts of Congress, unrelated to Article III, the Court was not a constitutional Court and the Judge had no right to claim under Article III that his salary could not be reduced." (p. 1384).

43. In *Cooper v. Aaron* 3 L.Ed. 2d. 5 : 358 U.S. 1, the Court citing the historical pronouncement of Chief Justice Marshall in *Marbury v. Madison* 2 L.Ed. 2d. 60, observed:

".....This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the country as a permanent and indispensable feature of our constitutional system.....Any interpretation of the Constitution by the Supreme Court would become the "supreme law of the land".

44. The question was again exhaustively considered by the Supreme Court of the United States in one of the recent decisions - *Northern Pipeline Construction Co. v. Marathon Pipe Line Company* and *United States* 73 L.Ed. 598 : 458 U.S. 50. At issue was whether the Bankruptcy Courts established under Bankruptcy Act, 1978 and exercising jurisdiction over State law actions could be considered

"Article III Courts" exercising judicial power of the United States? The Judges of the Bankruptcy Courts did not have life-tenure and protection against salary diminution - the two important contributing factors for the independence of Judges. Speaking for the majority, Brennan, recalled the famous statement of A. Hamilton, one of the Founding Fathers of the United States Constitution:

"Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support.....In the general course of human nature, a power over a man's subsistence amounts to the power over his will".

45. On an analysis of the provisions of the Bankruptcy Act and the powers conferred on the Bankruptcy Courts, the learned Judge found that the Bankruptcy Courts exercise all ordinary powers of Article III Courts. He, therefore, concluded:

"The Bankruptcy Act of 1978, has impermissibly removed most, if not all, of the essential attributes of the judicial power from the Article III district Court, and has vested those attributes in a non-Article III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress power to create adjuncts to Article III Courts".

46. We shall now advert to the position obtaining in our country.

47. In *Harinagar Sugar Mills Ltd. Vs. Shyam Sundar Jhunjhunwala and Others*, the concept of "judicial power" came up for consideration before our Supreme Court. The question was: whether the Central Government in exercise of appellate power u/s 11(3) of the Companies Act, 1956, before its amendment by Act No. 65 of 1960, was acting as a Court or tribunal. Against an order of the Board of Directors refusing to register the transfer of shares, the Act provided two remedies - (1) an application to Court u/s 155 for rectification of the Register of shares; and (2) an appeal to the Central Government. Speaking for the majority, Shah, J., (as he then was) held that, in principle, there was no difference between the exercise of power by the Court u/s 155 and the appellate power conferred on the Central Government u/s 111. The Central Government was required to decide the dispute "according to law i.e., it has to consider and decide the proposal and the objections in the light of the evidence and not on grounds of policy or expediency". Further examining the nature of the power:

"The power in appeal to order registration of transfers has to be exercised subject to the limitations similar to those imposed upon the exercise of the power of the Court in a petition for that relief u/s 155: the restrictions which inhere the exercise of the power of the Court also apply to the exercise of the appellate power by the Central Government.....The authority cannot proceed to decide the question posed for its determination on grounds of expediency: the statute empowers the Central Government to decide the disputes arising out of the claims made by the transferor or transferee which claim is opposed by the company and by rendering a decision upon the respective contentions, the rights

of the contesting parties are directly affected. Prima facie, the exercise of such authority would be judicial", (p. 1675).

The opinion expressed by Mahajan, J., in *The Bharat Bank Ltd., Delhi Vs. Employees of the Bharat Bank Ltd., Delhi and The Bharat Bank Employees' Union, Delhi*, that "the condition precedent for bringing a tribunal within the ambit of Article 136 is that it should be constituted by the State; again a tribunal would be outside the ambit of Article 136 if it is not invested with any part of the judicial functions of the State but discharges purely administrative or executive duties & "was also relied upon by the majority. Shah, J., also held that the appellate power of the Central Government u/s 111(3) "being an alternative remedy to an aggrieved party to a petition u/s 155, the investiture of authority is in the exercise of the judicial power of the State". Hidayatullah, J., (as he then was) in his minority opinion, examined the distinction between a "Court" and "tribunal":

"All tribunals are not Courts, though all Courts are tribunals. The word "Courts" is used to designate those tribunals which are set up in an organised State for the administration of justice. By administration of justice is meant the exercise of judicial power of the State to maintain and uphold rights and punish "wrongs", whenever there is an infringement of a right or an injury, the courts are there to restore the *vinculum juris*, which is disturbed", (p. 1680).

He also referred to the judgment of Griffith, C.J., in *Huddart* (14 supra). Ordinary Civil Courts, observed the learned Judge, are "invested with the judicial power of the State and their authority is derived from the Constitution or some Act of legislature constituting them" and applying this test, held that the Central Government did not come within the class of "Courts of Civil judicature". Adverting to Administrative Tribunals, which have come into existence because of the multitudinous functions of the State, the learned Judge held:

"These tribunals have the authority of law to pronounce upon valuable rights; they act in a judicial manner and even on evidence on oath, but they are not part of the ordinary Courts of Civil judicature. They share the exercise of the judicial power of the State but they are brought into existence to implement some administrative policy or to determine controversies arising out of some administrative law. They are very similar to Courts, but are not Courts. When the Constitution speaks of "Courts" in Articles 136, 227 or 228 or in Articles 233 - 237 or in the lists, it contemplates Courts of civil judicature but not tribunals other than such Courts. This is the reason for using both the expressions in Articles 136 and 227.

By "Courts is meant Courts of civil judicature and by tribunals, those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decided such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State. In the exercise of this power, a clear

division is thus noticeable. Broadly speaking, certain special matters go before the tribunals and the residue goes before the ordinary Courts of civil judicature. Their procedures may differ, but the functions are not essentially different. What distinguishes them has never been successfully established. Lord Stamp said that the real distinction is that Courts have "an air of detachment". But this is more a matter of age and tradition and is not of the essence: Many tribunals, in recent years, have acquitted themselves so well and with such detachment as to make this test insufficient". (p. 1680).

48. Speaking for the majority, the concept of judicial power was defined by his Lordship M.N. Venkatachallaiah, C.J., in *Kihoto Hollohan v. Zachillu and Ors.* 1991 Supp. (2) SCC 651:

"When there is a lis -an affirmation by one party and denial by another -and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is an exercise of judicial power. That authority is called a Tribunal, (even) if it does not have all the trappings of a Court".

49. In the Indian context, the judicial power of the State encompasses entrustment of power of adjudication not only to regular Courts but also to non-judicial bodies commonly called "tribunals" established under special laws. The distribution of powers between the Union and the States and the various entries in the three lists of Schedule VII constitute the legal foundation on which this power rests.

50. Unlike the position in the United States, the Founding Fathers of our Constitution did not opt for a dual judiciary. They took great care to incorporate necessary safeguards for ensuring the independence of the judiciary and insulate it from interference by the other two State-Wings - Legislature and Executive, See: Chapter IV of Part V and Chapter V of Part VI of the Constitution. We have a single judiciary and the Courts in our judicial hierarchy interpret and administer the laws enacted both by Parliament and State Legislatures. The scheme of distribution of legislative powers as contained in Articles 245, 246 and 247 does not affect the power of Parliament to enact legislation for the establishment of any additional Courts for the better administration of laws made by Parliament or of any existing laws with respect to a matter enumerated in the Union List (Vide Article 247).

51. The residuary power to legislate exclusively in respect of any matter not covered by the State List or Concurrent List is conferred on Union Parliament by Clause (1) of Article 248. Entry 78 of List I speaks of constitution and organization of High Courts with certain exceptions mentioned therein. Entry 79 speaks of extension and exclusion of the jurisdiction of High Courts in relation to any Union Territory. Entry 65 of List II relates to the jurisdiction and power of all Courts except the Supreme Court, with respect to any of the matters covered by that List. Part III of the Constitution incorporates justiciable Fundamental Rights.

52. Under Article 32 the right to move the Supreme Court for enforcement of the Fundamental Rights is itself a guaranteed Fundamental Right. For enforcement of the constitutional remedies, Clause (2) of Article 32 confers power on the Supreme Court to issue directions or orders or writs including the five well-known writs mentioned therein. Clause (3) empowers Parliament by law to confer jurisdiction on "any other Court" to exercise within the limits of its jurisdiction, all or any of the powers exercisable by the Supreme Court under Clause (2). Article 214 enjoins that there shall be a High Court for each State and by Article 215 every High Court is made a Court of Record and invested with all powers of such a Court including the power to punish for contempt of itself. Article 226 confers on every High Court "notwithstanding anything in Article 32, power to issue directions, orders or writs" for the enforcement of any of the rights conferred by Part III and for any other purpose. Clause (4) makes it explicit that the power conferred on a High Court by Article 226 "shall not be in derogation of the power conferred on the Supreme Court by Clause (2) of Article 32". Article 227 confers on every High Court the power of superintendence over all Courts and tribunals throughout the territories, in relation to which it exercises its jurisdiction. Before a Court subordinate to the High Court if a substantial question of law as to the interpretation of the Constitution, falls for determination, the High Court by Article 228 is empowered to withdraw the case and either dispose of the case by itself, or determine the question of law and return the case to the subordinate Court for disposal in conformity with its judgment. By Article 230, Parliament is empowered by law to extend the jurisdiction of a High Court to or exclude its jurisdiction from any Union Territory. Under Article 231, Parliament has power to enact legislation to establish a common High Court for two or more States or, for two or more States and for a Union Territory. For amendment of any of the provisions relating to the Union judiciary (Supreme Court), the High Court and the distribution of legislative powers, ratification by the Legislatures of not less than one half of the States is a necessary pre-condition under Article 368 of the Constitution.

53. From the nature of the powers conferred by the Constitution on the Supreme Court and the High Courts, it is axiomatic that they are the sole repositories of the power of judicial review. Power of judicial review implies the power to interpret and enforce the Constitution and this power includes the power to pronounce upon the validity of statutes, actions taken and orders passed by individuals and bodies falling within the ambit of the expression "State" occurring in Article 12. In a democratic set up governed by a written Constitution, judicial review is the most effective instrument to ensure that the Legislature and the Executive do not transgress the limitations imposed by the Constitution. Constitutional Courts - Supreme Court and High Courts - are enjoined to exercise this power of judicial review. Any doubts in this regard will be dispelled by an examination of Article 13 found in Part III comprising the Fundamental Rights. Clause (1) of Article 13, in unequivocal terms, declares that all laws in force immediately before the commencement of the Constitution in so far as they are

inconsistent with the provisions of Part III shall be void, to the extent of such inconsistency. Clause (2) injuncts the State from making any law taking away or abridging the rights conferred by Part III, and any law made in contravention of that clause, shall be void to the extent of the contravention. Article 13 is, therefore, in the nature of a "supremacy clause" comparable to Clause (2) of Article VI of the United States Constitution.

54. Although it is now well-settled that judicial review is a basic feature of our Constitution, there was divergence of judicial opinion in the past on the question whether the Indian Constitution contains express provisions for judicial review. According to Chief Justice Ray, in *Smt. Indira Nehru Gandhi* (8 supra):

"Judicial review is one of the distinctive features of American Constitutional law. In America, equal protection of laws is based on the concept of "due process of law". These features are not in our Constitution." (p. 2318)

55. A diametrically opposite view was taken by Chief Justice Patanjali Sastry in *State of Madras Vs. V.G. Row*, :

"Before proceeding to consider this question, we think it right to point out what is sometimes overlooked, that our Constitution contained 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".

It would appear to us that there is no provision in our Constitution empowering Parliament or the Legislature of a State to divest the Supreme Court or the High Court of the power of judicial review. Clause (3) of Article 32, Clause (4) of Article 226, Article 230 and Article 231 do not either directly or remotely authorise curtailment of the power of judicial review: they operate in a different sphere as already noticed supra. To the extent of legislative competency granted by the Constitution, under Articles 245, 246 and the three Lists in Schedule VII, Courts forming part of the judicial hierarchy can be set up by Union and the States by passing appropriate enactments and likewise Tribunals also maybe established to deal with special matters excluded from the jurisdiction of the regular civil Courts. When a right is created or liability imposed by a statute or statutory instrument and a forum - either a regular Court or tribunal - is set up with power to render a binding and authoritative decision - whether subject to appeal or not - in either case, it is the sovereign power of the State to decide controversies between its subjects or between itself and its subjects, and so the power confided in the forum is judicial power, Vide: *Harinagar Sugar Mills* (18 supra); and *Kihota Hollahan* (32 supra). Being creatures of statutory enactments, such Courts or tribunals cannot exercise the power of judicial review which is confided only in the Constitutional Courts by the constitutive provisions of the organic document. Stated differently the power to interpret and enforce the Constitution does not belong to legislative Courts and tribunals. Article 228 is

a clear pointer in this regard. It would therefore, appear to be plain that every organ in which judicial power is vested, cannot exercise the power of judicial review. A law enacted by Parliament by virtue of its legislative competence (Articles 245 to 248 and Entries 77, 78 of List I and Entries 45 and 46 of List III) can confer original, appellate or revisional jurisdictions on the Supreme Court or the High Court. But a statute enacted by a State Legislature cannot confer jurisdiction on the Supreme Court since Parliament alone can exercise such power under Article 246(1) read with Entry 77 of List I (vide *In Re Special Courts Bill, 1978*), *In Re: The Special Courts Bill, 1978*, . This Legislative competence does not amount to and cannot be equated with the power to create Courts endowed with the power of judicial review. Such enactments also fall within the ambit of the power of judicial review which inheres in our Constitutional Courts - the Supreme Court and the High Courts.

56. The Supreme Courts ruling in *Keshavananda Bharathi* (5 supra) in which a thirteen Judge Bench has considered the constitutionality of the 24th, 25th and 29th amendments to the Constitution - marks a watershed in the constitutional jurisprudence of our Country. By a majority of seven against six, the Court ruled that Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution. On the question of implied limitations on the power of amendment under Article 368, seven Judges held that there is no such implied limitation under Article 368 while five Judges held otherwise. Jaganmohan Reddy, J., (as he then was) expressed the view that it was not necessary to consider the existence or otherwise of implied or inherent limitations. Khanna, J., though expressed the opinion that there were no implied limitations, agreed with the majority on the question of the existence of "basic features". Although the majority held that there are no implied limitations, on the other aspect of the existence of "basic features" of the Constitution which are beyond the mandatory power of Parliament, the majority answered in the affirmative. Perhaps, to some extent, there is justification in saying that the majority of the Judges indirectly have recognised the implied limitations on the power of Parliament. The basic features of the Constitution were illustratively pointed out by the majority of the Judges.

57. The basic structure of the Constitution according to Sikri, C.J., consists of the following features: (p. 1535)

- (1) Supremacy of the Constitution.
- (2) Republican and Democratic form of Government.
- (3) Secular character of the Constitution.
- (4) Separation of powers between the Legislature, the Executive and the \* Judiciary; and
- (5) Federal character of the Constitution.

58. Shelat and Grover, JJ., illustratively catalogued the following as the basic

features of the Constitution: (p. 1603)

- (1) Supremacy of the Constitution.
- (2) Republican and Democratic form of Government and sovereignty of the Country.
- (3) Secular and federal character of the Constitution.
- (4) Demarcation of power between the Legislature, the Executive and the Judiciary.
- (5) Dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part-IV.
- (6) The unity and integrity of the Nation.

In the opinion of Hegde and Mukherjea, JJ., the following constituted the basic features of the Constitution, (p. 1628)

- (1) Sovereignty of India.
- (2) Democratic character of the Indian polity.
- (3) Unity of the Country.
- (4) Essential freedoms secured to the citizens, and the mandate given to the Parliament to build a welfare State.

59. Stating that what are the essential features or basic elements comprising the structure of our Constitution need not be considered in detail since they will arise for consideration in any concrete case where they were alleged to have been abrogated, Jaganmohan Reddy, J., held:

"A sovereign democratic republic, Parliamentary democracy and the three organs of the State certainly, in my view, constitute the basic structure". (p. 1753)

According to Khanna, J., the power of amendment under Article 368 does not include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution.

60. The Judges who constituted the minority, expressed the view that there are no limitations on the power of Parliament to amend the Constitution. From the judgments of the majority, it is clearly discernible that judicial review is a basic feature of our Constitution. When separation of powers was held to be one of the basic features, as a corollary to that, it follows that the power of judicial review is also a basic feature. On this, Shelat and Grover, JJ., held:

"The function of interpretation of a Constitution being thus assigned to the judicial power of the State, the question whether the subject of a law is within the ambit of one or more powers of the legislature conferred by the Constitution would always be a question of interpretation of the Constitution" (p. 1602)

They also observed that the power of judicial review is of "paramount importance in federal Constitution. Now it has been said that the heart and core of democracy lies in judicial-process". They also quoted with approval, the opinion of Patanjali Sastri, J., in *State of Madras v. V. G. Rao* (34 supra):

"Judicial review is undertaken by the Courts 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".

How the Constitution ensures independence of the judiciary in the opinion of two learned judges:

"The rule of law has been ensured by providing for judicial review....and the appointment of Judges of both the Supreme Court of India and of the High Courts of the States is kept free from political controversies. Their independence has been assured."

They have also said that judicial review has been made an "integral part of our Constitution."

In more emphatic terms, Khanna, J., held:

"Judicial review has thus become an integral part of our constitutional system and the power has been vested in the High Courts and the Supreme Court to decide about the constitutionality of the provisions of statutes".

We may also notice some relevant aspects in the opinions expressed by some of the Judges who constituted the minority. Mathew, J., after quoting Kelsen in support of the view that the validity of a Constitution is inherent and lies within itself and that it is valid because it is pre-supposed to be valid, has explained the distinction between the Constitution and a law flowing from it and concluded:

"....an amendment to the Constitution has the same validity as the Constitution itself, although the question whether the amendment has been made in the manner and form and within the power conferred by the Constitution is always justiciable."

From this, it would appear that according to the learned judge, except in regard to procedural aspects, the validity of an amendment to the Constitution cannot be tested by any other yard-stick. However, the two sentences immediately following the above - "Just as an ordinary law derives its validity from its conformity with the Constitution, so also, an amendment of the Constitution derives its validity from the Constitution and an amendment of the Constitution can be ultra vires just as an ordinary law can be" - suggestively indicate that the validity of an amendment to the Constitution can be decided on more substantive grounds. But there is no warrant for such a conclusion having regard to the views expressed by the learned judge in the rest of the judgment. Beg, J., in his minority judgment has clearly expressed that the role of judiciary in examining the validity of an amendment to the Constitution is "limited to seeing that the

form and the manner of the amendment is properly observed". Chandrachud, J., completely agreed with the other judges who constituted the minority that the power of amendment under Article 368 is wide and unfettered reaching every part and provision of the Constitution.

61. A study of the separate but concurring judgments of the majority in Keshavananda (5 supra) shows that there is no inconsistency or incongruity in their ratiocination. The underlying theme in the reasoning is the same, although we discern different shades in the articulation. Even in case where for different reasons several judges come to the same conclusion, the decision becomes a precedent and each of the judgments contains a ratio and all the rationes can, cumulatively or separately, be treated as precedents. R.W.M. Dias, in his Treatise on Jurisprudence, explains the legal consequence of plurality of judgments:

"It may happen that all the judges agree in the result for different reasons. Suppose that each of five judges gives a different reason for arriving at the same result and without disagreeing with the reasons given by the other four. Such a case may be said to have five competing rationes and a subsequent tribunal may adopt any of them for the purpose of deciding the case before itself, See: R.W.M. Dias: Jurisprudence - 4th Edn.p.190 ".

62. One of us, (M.N. Rao, J.,) speaking for a Division Bench comprising two of us (M.N. Rao and D. Reddeppa Reddi, JJ.,) in *The State of Andhra Pradesh and Others Vs. V. Raghunadha Rao*, , after considering the question with reference to the British practice and the Indian precedent, expressed the opinion:

"When multiple opinions are expressed by several judges in their separate but concurring judgments in a case, the judgment rendered by each of the judges is read by the other judges. This has been and is the practice except in cases where it is specifically established that prior to writing separate judgments, the judges had a judicial conference in which it was decided that in view of the discussion and the separate views held by each of them there is no necessity to circulate the judgments to each other. But this exception was not the case in regard to the judgment of the Constitution Bench in *Delhi Transport Corporation case*. Even more than a century ago, the British practice was that the judgments prepared by one judge were read by the others. We get this from Lord Esher, M.R. in *Guardians of Poor of West Derby Union v. Guardians of Poor of Atcham Union* 1890 (24) Q.B.D. 177..

"The House of Lords heard the cases and did not give judgment at once, but considered the matter carefully, and four of the learned judges in the House of Lords gave judgment. Now we know that each of them considers the matter separately, and they then consider the matter jointly, interchanging their judgments, so that every one of them has seen the judgments of the others. If they mean to differ in their view, they say so openly when they come to deliver their judgments, and if they do not do this, it must be taken that each of them agrees with the judgments of the others".

Non-Expression of views by the other learned judges who constituted majority in regard to the judgment under appeal in the Delhi Transport Corporation case must, therefore, be construed as an expression of opinion rendered by the majority with the legal consequence that it being the law declared by the Supreme Court, we are bound by it under Article 141 of the Constitution".

63. From a close examination of the views expressed by the majority in Keshavananda (5 supra) we get a clear picture that the power of Parliament under Article 368 to amend the Constitution does not extend to abrogating the basic features of the Constitution. What are integral to the Constitution cannot be destroyed by Parliament in exercise of its constituent power under Article 368. Even though the language employed in Article 368 is wide, the nature of the constituent power confided in Parliament is subject to the aforesaid limitations. It, therefore, follows that not being a sovereign body with unlimited powers, whatever powers are confided in it must be exercised within the specified limitations. What it can do in exercise of its constituent power, it cannot do in exercise of its legislative power. The power of judicial review is a basic feature of the Constitution and an integral part of our Constitutional system. The independence of the constitutional Courts - the Supreme Court and the High Courts is assured by the Constitution and the power of judicial review is vested in them.

64. What we have discerned in the majority judgment in Keshavanandha (5 supra) in regard to the power of judicial review and the nature of the functions performed by the constitutional courts, finds support in the majority judgment delivered by Chief Justice Gajendra Gadkar in In Re Article 143 (7 supra) - commonly known as "the Privileges case". In a different context, on the aspect of federalism and the limits imposed by the Constitution on law making bodies, this case was cited by Shelat and Grover, JJ., in para 503 (page 1568) and by P. Jaganmohan Reddy,, in para 1119 (Page 1735) in Keshavananda (5 supra). Speaking for the majority (6 against 1) in that case (In re Article 143) Chief Justice Gajendra Gadkar expressed the view:

".....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".

Emphasising the cardinal principle that when a question arises whether in passing an enactment, the legislature had lacked competency or the provisions of the statute are in violation of any of the guaranteed fundamental rights, the dispute must be determined by the Courts, the learned Chief Justice said:

"adjudication of such a dispute is entrusted solely and exclusively to the judicature of this country".

The existence of a fearless and independent judiciary, according to the learned Chief Justice:

"....can be said to be the very basic foundation of the Constitutional structure in India.....".

This decision also lays down that there cannot be any restrictions on the power of the constitutional Courts to exercise (the jurisdiction vested in them by the Constitution. The existence of such jurisdiction is inter-linked with the existence of the right in the citizen. Highlighting this concept, the learned Chief Justice observed:

"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 that 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".

The binding nature of the views expressed in the Privileges case was contested by Sri Y. Suryanarayana, learned counsel appearing for one of the respondents on the ground that the opinion expressed by the Supreme Court in exercise of its advisory jurisdiction does not fall within the ambit of Article 141 and so, this Court is not bound by that dicta. We do not agree. It is open to the Supreme Court to overrule the view expressed by it in exercise of its advisory jurisdiction. But so long as that was not done, the same would be binding on all the Courts in India by virtue of Article 141. This legal position was laid down by a seven Judge Bench of the Supreme Court in *In Re Special Courts Bill, 1978* (36 supra), a decision rendered by the Court in exercise of its advisory jurisdiction:

"We are inclined to the view that though it is always open to this Court to re-examine the question already decided by it and to overrule, if necessary, the view earlier taken by it, in so far as all other Courts in the territory of India are concerned, they ought to be bound by the view expressed by this Court even in the exercise of its advisory jurisdiction under Article 143(1) of the Constitution.", (p. 519)

65. Questions relating to "judicial power" and "judicial review" fell for consideration - among other things - before a Constitution Bench of the Supreme Court in *Smt. Indira Gandhi* (8 supra). All the five Judges who decided this case were parties to *Keshavananda* (5 supra). Except H.R. Khanna, J., the rest of the four Judges who decided this case were in the minority in *Keshavananda* (5 supra). Clause (4) of Article 329A inserted by the Constitution (39th Amendment) Act, 1975 was struck down by all the Judges on the ground that it was not open to Parliament to exercise what is purely and indisputably a judicial function. In the opinion of Chief Justice Ray, even though there is no express mention as to vesting of judicial power in the judiciary:

"But a division of the three main functions of the Government is recognised in

our Constitution. Judicial power in the sense of the judicial power of the State is vested in the judiciary. Similarly, the Executive and the Legislature are vested with powers in their spheres. Judicial power has lain in the hands of the Judiciary prior to the Constitution and also since the Constitution" (p. 418 e & f).

Mathew, J., following the decision of the majority in *Keshavananda* (5 supra), held that the power of the amending body exercising the constituent power of the legal sovereign is limited, (p. 508). Beg, J., (as he then was), in his separate judgment, said:

"The assumption underlying the theory of judicial review.....is that Courts act as the real interpreters of the "Real Will" of the people.....and that they perform an essentially judicial function." (p. 538-539).

As to where the judicial power of the State resides, the learned judge had no doubts. In emphatic terms he declared:

"The Constitution undoubtedly specifically vests such power, that is to say, power which can properly be described as "judicial power" only in the Supreme Court and in the High Courts and not in any other bodies or authorities whether executive or legislative, functioning under the Constitution."

66. Another learned Judge, Chandrachud, J., (as he then was) viewed judicial review as a basic feature except in respect of matters which are specifically excluded by the Constitution, as originally enacted [Articles 31 (4), 31(6), 136(2), 227(4), 262(2) and 329(a)].

67. That the Constitutional Courts alone are competent to enforce and interpret the Constitution was again reiterated in *Minerva Mills* (6 supra) in which the validity of Sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976 were challenged. All the five Judges of the Constitution Bench were unanimous that Section 55 which inserted Clauses (4) and (5) in Article 368, is void and unconstitutional since it is violative of the basic structure of the Constitution and beyond the amending power of Parliament. So far as Section 4 was concerned - by which Article 31(c) was amended excluding the challenge to any legislation giving effect to the policy of the State for securing all or any of the principles laid down in Part-IV - the majority struck down Section 4 taking the view that Section 4 totally abrogates Articles 14 and 19 in their application to the category of laws described in Article 31(c) even if such laws are in total defiance of the mandate of Article 13. Bhagawathi, J., (as he then was) in his dissenting opinion upheld its constitutionality on the ground that if any challenge is made to a statute falling within the ambit of Article 31(c), it will be open to the Court to examine whether there is connection between the impugned law and a Directive Principle and if the answer is that the connection is substantial, the law must be sustained.

68. Speaking for the majority, Chief Justice Chandrachud reiterating the ratio laid down in *Keshavananda* (5 supra) that limited amending power of Parliament is one of the basic features of the Constitution and that limited power cannot be

enlarged into an absolute power, very pertinently observed:

"the power to destroy is not a power to amend", (p. 1798)

That it is the duty of the judges to pronounce upon the validity of laws under our Constitutional set up was highlighted by the majority:

"Our Constitution is founded on a nice balance of power among the three wings of the State viz., the Executive, the Legislature and the Judiciary. It is the function of the Judges, may 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", (p. 1799)

The dissenting opinion of Bhagavathi, J., (as he then was) also emphasises the point that the interpretation of the Constitution and the laws:

"would pre-eminently be a matter fit to be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this field.....and the judiciary is vested with the power of judicial review to determine the legality of the executive action and the validity of the legislation passed by the legislature.....this power of judicial review is conferred on the judiciary by Articles 32 and 226 of the Constitution". (p. 1825)

While stating that:

"The power of judicial review is an integral part of our constitutional system and without it, there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality". (p. 1825-1826)

The learned Judge added a limitation:

"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", (p. 1826)

The learned Judge again observed in the next sentence:

"But what I wish to emphasise is that judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution." (p. 1826)

As judicial review is an integral part of our Constitutional system, its abrogation would affect the basic structure and the Supreme Court and the High Courts being the exclusive repositories of that power, the view that: the power of judicial review "could be vested in effective alternative institutional mechanisms or arrangements", we think, with the greatest respect to the learned judge, does not represent the correct legal position; it is contrary to the law laid down in Keshavananda (5 supra), Privileges case(7 supra) and Indira Gandhi (8 supra), the binding precedents. In the majority judgment, there is no reference to the-

effective alternative institutional mechanisms or arrangements, and all the learned counsel agreed on this.

69. In *S.P. Sampath Kumar* (4supra), the constitutionality of the Administrative Tribunals Act (Act No. 13 of 1985) fell for consideration before the Supreme Court. Bhagavathi, C.J., and Ranganatha Misra, J., (as he then was) delivered two separate but concurring judgments. Chief Justice Bhagavathi reiterated the earlier view expressed by him in *Minerva Mills* (6 supra) about the power of Parliament to set up effective alternative institutional mechanisms or arrangements for judicial review by amending the Constitution. If, by such a constitutional amendment, the power of judicial review of the High Court is taken away and vested "in any other institutional mechanism or authority, it would not be violative of the basic structure doctrine, so long as the essential condition is fulfilled viz., that the alternative institutional mechanism or authority set up by Parliamentary amendment is no less effective than the High Court". The learned Chief Justice said that as questions involving interpretation of Articles 14, 15, 16 and 311 arise for decision, it is necessary that "those who adjudicate upon these questions should have some modicum of legal training and judicial experience". In that view, he agreed with Ranganatha Misra, J., about the invalidity of Clause (c) of Section 6(1) of the Act which prescribed qualifications for the office of Chairman of the Tribunal - at least two years experience as Secretary to the Government of India or any other post under the Central or State Government carrying the scale of pay which is not less than that of the Secretary to Government of India. The appointment of the Chairman, the Vice-Chairman and administrative members should be made, in the opinion of the learned Chief Justice, only after consultation with the Chief Justice of India and the recommendations of the Chief Justice of India, ordinarily, be accepted unless there are cogent reasons for not accepting the same. Another suggestion was made that District Judge or an advocate who is qualified to be a Judge of the High Court should be regarded as eligible for being the Vice-Chairman of the Administrative Tribunal and if, to such an effect amendment was not carried out, the impugned Act would have to be declared to be invalid" since it cannot be severed from the other provisions.

70. Ranganatha Misra, J., (as he then was) observed that the five year term for the Chairman, Vice-Chairman and members "may occasionally operate as a disincentive for well qualified people to accept the offer" and by way of comparison referred to the pattern of Income Tax Appellate Tribunals and Customs Tribunals and concluded that when amendments are undertaken, "this aspect of the matter deserves to be considered.....". It was also suggested that in every Bench there should be at least one judicial member.

71. The main challenge in the Writ Petitions was against Section 28 of the Administrative Tribunals Act by which jurisdiction of the Supreme Court under Article 32 was taken away in respect of specified service disputes. The learned Attorney -General assured the Court that the law would be amended to save the

jurisdiction of the Supreme Court under Article 32 and other minor anomalies also would be set right. It was represented before the Supreme Court that the necessary amendments were brought about by an ordinance which was subsequently replaced by an Act of Parliament. The contention that judicial review is a fundamental aspect of the basic structure and the divestiture of the jurisdiction of the High Courts under Articles 226 and 227 was illegal was examined by the Supreme Court with reference to the existing provisions of the Act. In view of the suggestions made and the striking down of Section 6(1)(c) of the Act and the further directions given regarding consultation with the Chief Justice of India in the matter of appointments, the Court felt that the Administrative Tribunal would be an efficacious alternative for the High Court and, therefore, the ouster of jurisdiction of the High Court u/s 28 of the Act did not suffer from any invalidity.

72. In *Sambamurthy* (2 *supra*), in which the proviso to Clause (5) of Article 371-D of the Constitution was challenged, Chief Justice Bhagavathi speaking for the Constitution Bench has restated the competence of Parliament to amend the Constitution so as to substitute in the place of the High Court any other alternative institutional mechanism provided it is no less efficacious than the High Court. The proviso to Clause (5) of Article 371-D subjected the decisions of the Administrative Tribunal functioning in the State of Andhra Pradesh to the veto power of the State Government. The proviso was struck down on the ground that it rendered the Tribunal not at all effective or efficacious. Clause (5) was also struck down since it was interlinked with the proviso. It may be of interest to notice that Clause (6), which is a consequential provision, was left untouched. When Clause (5) was struck down, Clause (6) had no independent existence; it only cast an obligation on the State Government to place before both the houses of the State Legislature every order of the State Government passed under Clause (5) annulling the decision of the tribunal. The American Supreme Court's decision in *INS v. Chadha* 7 L.Ed 317 : 462 U.S. 919 striking down the resolution passed by the House of Representatives vetoing the Court of Appeals Order of suspension of deportation of an alien appears to be a parallel analogy.

73. In view of the unanimous judgment in *Sambamurthy* (2 *supra*) - as to Parliament's power to establish alternative institutional mechanisms to exercise the power of judicial review - we think it quite unnecessary to go into the questions as to what is the effect of the majority judgment in *Minerva Mills* (6 *supra*) in not referring to this aspect and whether it was necessary for Bhagavathi, J., (as he then was), on the contentions advanced in *Minerva Mills* (6 *supra*) to express any views about alternative mechanisms for judicial review, although lengthy arguments were advanced on this by the counsel appearing for the petitioners. But the theory of alternative mechanism is contrary to the *rationes decidendi* of the earlier larger Benches - *Keshavananda* (5 *supra*) *Privileges* case (7 *supra*) and the Constitution Bench in *Indira Gandhi* (8 *supra*) - as already indicated *supra*. All the three decisions laid down the principle that the Constitutional Courts - The Supreme Court and the High Courts - alone have the

power of judicial review and they alone can pronounce upon the validity of laws made by Parliament and legislatures of the States. What is note-worthy is that no reference was made to any of these three binding precedents either in Sambamurty (2 supra) or in Sampath Kumar (4 supra). Had the Supreme Court laid down the principle in these two cases with regard to alternative institutional mechanisms after noticing the above three precedents, the same would have been binding on us under Article 141 of the Constitution of India and in such a situation, no further question would arise as to whether the binding precedents have been correctly construed. When a smaller Bench of the Supreme Court lays down a proposition contrary to and without noticing the ratio decidendi of the earlier larger Benches, we are not inclined to think that such a decision will become the law declared by the Supreme Court so as to have a binding effect under Article 141 of the Constitution on all the Courts within the country. When we say this, we are conscious of the general legal position that in the hierarchical set up of our Courts, the High Court is bound by the decisions of the Supreme Court. Even so, a situation of the present type, in our considered view, constitutes an exception. On this, we are fortified by a recent decision of the Supreme Court - Union of India (UOI) and Another Vs. Raghubir Singh (Dead) by Lrs. Etc., in which a Constitution Bench has exhaustively reviewed the case law on the question of precedent, its jurisprudential nature and effect with reference to Article 141 of the Constitution. Speaking for the Constitution Bench, Chief Justice Pathak said:

"Taking note of the hierarchical character of the judicial system in India, it is of paramount importance that the law declared by this Court should be certain, clear and consistent. It is commonly known that most decisions of the Courts are of significance not merely because they constitute an adjudication on the rights of the parties and resolve the dispute between them, but also because in doing so, they embody a declaration of law operating as a binding principle in future cases." (p. 1939)

After observing that the highest Court should not depart from an interpretation given in an earlier judgment of the Court, "unless there was a fair amount of unanimity that the earlier decision was manifestly wrong", the learned Chief Justice considered the question whether a Division Bench of Judges is obliged to follow the law laid down by a Division Bench of a larger number of Judges and answered the same:

"It is in order to guard against the possibility of inconsistent decisions on points of law by different Division Benches that the rule has been evolved in order to promote consistency and certainty in the development of the law and its contemporary status, that the statement of the law by a Division Bench is considered binding on a Division Bench of the same or lesser number of Judges." (p. 1945)

The statement of law in *Mattulal Vs. Radhe Lal*, that if the view expressed by two different Division Benches could not be reconciled, the pronouncement of a

Division Bench of a larger number of Judges had to be preferred over the decision of a Division Bench of a smaller number of Judges was cited with approval, (p. 1946).

74. On the authority of Union of India (UOI) and Another Vs. Raghubir Singh (Dead) by Lrs. Etc., , as to what constitutes a precedent, we conclude that- the opinion of the Supreme Court in Sambamurthy and Sanpath Kumar (2 and 4 supra) as regards alternative mechanisms for judicial review cannot be construed as binding precedents under Article 141 of the Constitution. For the same reason, the view expressed by a two-judge Bench in J.B. Chopra and Others Vs. Union of India (UOI) and Others, that the tribunals constituted under the Administrative Tribunals Act, 1985 are invested with power to "deal with questions pertaining to the constitutionality or otherwise of such laws as offending Articles 14 and 16(1) of the Constitution" does not become a binding precedent.

75. We, therefore, cannot accept the submission of Sri Altaf Ahmed, learned Additional Solicitor-General of India, that the ruling in Sampath Kumar (4 supra) precludes this Court from considering the questions raised by the petitioners.

76. One important aspect that deserves serious consideration is: whether in Sampath Kumar (4 supra) the constitutionality of Article 323A(2)(d) was upheld? It was so according to both the learned Additional Solicitor-General of India and the learned Advocate-General. But the same was contested very seriously by the learned Counsel for the petitioners. We have carefully examined the opinions of Chief Justice Bhagavathi and Rangantha Misra, J., (as he then was) in Sampath Kumar (4 supra); neither of them had gone into the question of the constitutionality of any provision in Article 323A nor such a plea was raised by the petitioners in that case. Both the learned Judges assumed the validity of Article 323A for the self evident reason that the challenge was confined only to the vires of the Administrative Tribunals Act, 1985 but not the validity of Article 323-A. The scope and ambit of the constituent power of Parliament under Article 368 did not come up for consideration either directly or even remotely. The opinion of Ranganatha Misra, J., was based on the premise:

"Indisputably, the Act has been framed within the ambit of Article 323-A ....." (P.393).

and that of the learned Chief Justice:

"the exclusion of the jurisdiction of the High Court under Articles 226 and 227 by any law made by Parliament under clause (1) of Article 323-A is, therefore, specifically authorised by the constitutional amendment enacted in Caluse (2)(d) of that Article." (P.389).

As the validity of the Administrative Tribunals Act, 1985 alone was at issue, it is not possible for us, by any interpretative process, to hold mat after first examining the validity of the exercise of the constituent power by Parliament when it enacted Article 323-A, although the same was not challenged and no

plea was raised, the Court had taken up the vires of the impugned enactment. Such assumptions are plainly forbidden. While deciding a case, the constitutional Courts will not try either to discover or discuss a constitutional question if it is not raised. The position in the American constitutional law is that unless the constitutionality of a statute was directly at issue, the Court would not go into that question. Citing an American case in this regard, Prof. Cooley says:

"While the Courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both more proper and more respectful to a co-ordinate department to discuss constitutional questions only when that is the very *lis mota*. Thus presented and determined, the decision carries a weight with it to which no extra judicial disquisition is entitled, See: Prof Cooley: Constitutional limitations, p.163."

77. Our view gains support from the ruling in *Chief Justice of Andhra Pradesh and Others Vs. L.V.A. Dixitulu and Others*, in which one of the questions that fell for consideration before the Constitution Bench was: whether the officers and servants of the High Court and the members of the judicial service are outside the scope of Article 371-D of the Constitution? Article 371-D was enacted by the Constitution (32nd Amendment) Act, 1973. By Clause (3), the President is empowered to provide for the constitution of an Administrative Tribunal for the State of Andhra Pradesh to adjudicate matters relating to the service conditions of any class or classes of civil posts in any civil service of the State as may be specified in the Presidential Order. The Administrative Tribunal, as constituted by the Presidential Order, was conferred with jurisdiction, powers and authority which immediately before the commencement of that order were exercised by all Courts except the Supreme Court. It was held by the Supreme Court that a wider interpretation of the phrase "civil services of the State" in Article 371P(3) would result in the divestiture of the control vested in the Chief Justice over the staff of the High Court, and in the High Court over the subordinate judiciary, and the same would pass into the hands of the executive Government, which under Clause (5), was the supreme authority vested with the power to annul or modify the decision of the Administrative Tribunal. The silence of Clause (3) of Article 371-D about the members of the judicial service of the State and officers and servants of the High Court was a clear indication, according to the Supreme Court, that the above classes were excluded from the purview of Clause (3) and that such exclusion could also be inferred from the constitutional position accorded to the High Court and the Chief Justice by Articles 235 and 229. No discerning observer, in our view, could fail to notice one important feature in this case: Although the power of veto conferred on the State Government under Clause (5) to annul the decisions of the Administrative Tribunal was noticed by the summit Court, its constitutionality was not doubted. The reason, we think, is that the constitutionality of that provision was not challenged and so the Court adhered to the settled rule of interpretation that unless the constitutionality was specifically challenged, the Court would not consider the same.

78. The contention urged by Sri P.V. Krishnaiah, learned counsel (party-in-person), that under the scheme of our Constitution, no High Court has power to examine the constitutionality of an amendment of the Constitution hardly merits any serious consideration. As a constitutional Court, the High Court is undoubtedly vested with the power of judicial review to examine the validity of the constituent power of Parliament, See: *Raghubir Singh* - 41 supra at p.1938. *Indira Gandhi* - 8 supra at p.2394.

79. Civil servants - both at the national level and the State level - play a vital role in our democratic setup. They constitute the permanent executive and to a large extent, their advice weighs with the political executive in laying down policies for the common good of the people. It is the responsibility of the permanent executive to carry out the policies of the political executive. In the discharge of their onerous and delicate duties, members of the permanent executive must maintain objectivity and neutrality. A contented, informed and fearless civil service is a sine qua non of a good government. What acts as a chief propelling factor for the civil servants to maintain morale at a high level is their faith and confidence that because of the structural setup of the High Court, they will get justice if deprived unjustly of any of their rights in regard to their conditions of service. If the High Court's power of judicial review in relation to Articles 14 and 16 is taken away in respect of civil servants, they will not be able to maintain objectivity and neutrality in the required measure, which, in turn, will affect the quality of administration.

80. The Supreme Court and the High Courts - being the creatures of not ordinary legislation but the very Constitution itself - are the guardians of the rule of law and the survival of democracy depends upon, to a large extent, on the independence of the judiciary. The constitutional prescriptions regarding the judicial structure-qualifications of judges, method of appointment, security of tenure and the oath of office administered to them to uphold the Constitution and the laws - insulate the institutions and the judges from legislative and executive interference. These constitutionally ordained safeguards, not amenable to modification or alteration by ordinary legislation, instill confidence in the common man as to the impartiality, objectivity and a political nature of the judicial institutions. These safeguards and the nature of duties performed by the judiciary are inextricably interwoven thus providing the necessary prestige and authority to the judiciary in the scheme of the checks and balances between the three State organs - the legislature, the executive and the judiciary.

81. Administrative Tribunals established under the Administrative Tribunals Act, 1985 can, by no means, be equated with the High Courts as is evident from the structural set up and the legislative prescription regarding qualifications, method of appointment and fixity of tenure of the personnel constituting the tribunals. The legislative prescription ensuring the functional aspects of an adjudicative body is no substitute for a constitutional prescription. When the members of the Central Administrative Tribunal claimed parity of status with High Court Judges in

regard to their conditions of service, the Supreme Court in *M.B. Majumdar Vs. Union of India*, held that the members of Central Administrative Tribunal are not on par with the judges but belong to a separate mechanism created pursuant to Article 323-A of the Constitution.

82. As already noticed, Part-XIV-A of the Constitution which consists of two Articles 323-A and 323-B - was inserted by Section 46 of the Constitution (42nd Amendment) Act, 1976 with effect from 3-1-1977. The intention of enactment of Article 323-A, it would appear, was not to empower the tribunals to pronounce upon the constitutionality of legislative enactments. Moving the Constitution amendment bill in the Lok Sabha, the then Law Minister -H.R. Gokhale - observed:

"It is not correct to say that a tribunal will have the power to issue writs. That power is not given to the tribunal because the power to issue writs is not the power under the conditions of service of the employees. That was an extraordinary remedy ..... given by the Constitution for certain purposes, See: 65 L.S.D. Col. 121 - Quoted by K.I. Vibhute in "Administrative Tribunals and the High Courts: A Plea for Judicial Review" *Journal of the Indian Law Institute* - Vol.29 No. 4. Oct-Dec. 1987)."

Almost to the same effect was the view expressed by Sri K.P. Singh Deo, Minister of State, Department of Personnel and Administrative Reforms, while moving the Administrative Tribunal Bill, 1985 in the Lok Sabha:

"The tribunals are not going to be parallel High Courts but they will be doing the work of the High Courts as far as problems and cases pertaining to the service conditions are concerned, See: 1985 (1) L.S.D.98 - Quoted by K.I. Vibhute in "Administrative Tribunals and the High Courts: A Plea for Judicial Review" *Journal of the Indian Law Institute* -Vol.29 No. 4. Oct-Dec. 1987)."

The power of the Supreme Court under Article 32 and the jurisdiction exercised by it under Article 136, in our considered view, cannot fill the void resulting from the exclusion of the High Court's power of judicial review. Though Article 32 is a fundamental right, a public servant seeking judicial review by the summit Court has to "surmount many a hurdle". Making the position clear, the Supreme Court observed:

"Although there is no rule or provision of law to prohibit the exercise of its extraordinary jurisdiction, this Court has always insisted upon recourse to ordinary remedies or the exhaustion of other remedies. It is in rare cases, where the ordinary process of law appears to be inefficacious, that this Court interferes even where other remedies are available. This attitude arises from the acceptance of a salutary principle that extraordinary remedies should not take the place of ordinary remedies, See: *Tilokchand and Motichand and Others Vs. H.B. Munshi and Another*, ."

83. Even if a writ petition is directly admitted by the Supreme Court under Article

32, many years elapse before it is finally disposed of and this delay is because of large pendency of the cases. Recently, the Supreme Court observed, adverting to this aspect, in Kanubhai Brahmabhatt Vs. State of Gujarat, :

"If this Court entertains Writ Petitions at the instance of parties who approach this Court directly instead of approaching the concerned High Court in the first instance, tens of thousands of Writ Petitions would in course of time be instituted in this Court." (p.1159)

and this will inevitably result in arrears assuming "alarming proportions". After citing two instances of Writ Petitions pending in the Supreme Court for 10 to 14 years, it was observed:

"The time for imposing self-discipline has already come, even if it involves shedding of some amount of institutional ego or raising of some eyebrows. Again it is as important to do justice at this level, as to inspire confidence in the litigants that justice will be meted out to them at the High Court level, and other levels. Faith must be inspired in the hierarchy of Courts and the institution as a whole. Not only in this Court alone. And this objective can be achieved only by this Court showing trust in the High Court by directing the litigants to approach the High Court in the first instance." (p.1160)

84. The aggrieved civil servant cannot approach the Supreme Court as a matter of right impugning an order of the tribunal. The power conferred on the Supreme Court under Article 136 is a discretionary one. This position admits of no doubt.

"Article 136 of the Constitution does not confer a right of appeal to any party from the decision of any tribunal but it confers a discretionary power on the Supreme Court to grant special leave to appeal from the order of any tribunal in the territory of India. It is implicit in the discretionary reserve power that it cannot be exhaustively defined. It cannot be obviously so construed as to confer a right to a party where he has none under the law, See: Bengal Chemical and Pharmaceutical Works Ltd., Calcutta Vs. Their Workmen, ."

If the question is not of public importance, Article 136 power is not exercised by the Supreme Court, See: S.G. Chemicals and Dyes Trading Employees" Union Vs. S.G. Chemicals and Dyes Trading Limited and Another, ; The State of Bombay Vs. Rusa Mistry and Another, .

85. The learned Additional Solicitor-General of India has endeavoured to impress upon us that the Administrative Tribunals are discharging their functions expeditiously and efficiently and, therefore, the divestiture of the power of judicial review from the High Courts would not result in any injustice to the civil servants. We are not inclined to agree. In judging the constitutionality of a provision, the fact that the substituted body created by the impugned provision is working efficiently, even if true, cannot be the basis for judicial assent. This is a well settled principle of Constitutional adjudication. As observed by the American Supreme Court:

"The fact that a given law or procedure is efficient, convenient and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives - or the hall-marks - of democratic government." (40 supra at P.340)

The above statement of law was again reiterated by the American Supreme Court in *Charles A. Bowsher v. Mike Synar* 92 L.Ed. 2d. 583 478 U.S. 714.

86. We have neither the data nor any of the counsel has made any submission based on empirical studies regarding the functioning of the tribunals. In a different context, his Lordship Justice Ahmedi, while dealing with CBGAT, Members (Recruitment and Conditions of Service) Rules, has observed in *R.K. Jain Vs. Union of India and Others*, :

".....the 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.....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."

Referring to *Majumdar* (47 supra), another learned judge - his Lordship Justice K. Ramaswamy - observed:

".....what was meant by this Court in *Sampath Kumar*'s ratio is that the Tribunals when exercise the power and functions, the Act created institutional alternative mechanism or authority to adjudicate the service disputes ..... This Court did not appear to have meant that the Tribunals are substitutes of the High Court under Articles 226 and 227 of the Constitution. *J.B. Chopra and Others Vs. Union of India (UOI) and Others*, merely followed the ratio of *Sampath Kumar*."

87. *R.K. Jain* (55 supra), from the aforesaid observations made by their Lordships, in our comprehension, would appear to weaken the authority, to a large extent, of *Sambamurthy* and *Sampath Kumar* (2 and 4 supra) as binding precedents under Article 141 of the Constitution even without *Keshavananda* (5 supra) *Privileges* (7 supra) and *Indira Gandhi* (8 supra): when a decision rendered by a larger Bench was interpreted subsequently by a smaller Bench of the same Court, the lower Courts in the hierarchy will have to follow the latter decision.

88. As the constituent power of Parliament under Article 368 does not extend to abrogating a basic feature of the Constitution, the power of judicial review cannot be divested from the High Courts by a Parliamentary enactment. The language of Article 323A(2)(d) clearly shows that legislative competence is

conferred on Parliament to enact a law for excluding the jurisdiction of all Courts except that of the Supreme Court under Article 136 with respect to persons appointed to public services. What is not permissible in the exercise of the constituent power is plainly prohibited in the sphere of ordinary legislative power. As already, noticed, the actual exclusion of the power of judicial review was brought about by Section 28 of the Administrative Tribunals Act, 1985. On this ground also, the exclusion of the power of judicial review of the High Courts under Article 226 is unconstitutional.

89. From Chief Justice Marshall to Chief Justice M.N. Venkatachallaiah, judicial pronouncements overwhelmingly lay down the proposition that the power of judicial review must be exercised only by constitutional Courts, but not by other Courts or tribunals set up by statutes.

90. One of the submissions made in support of the constitutionality of Article 323A(2)(d) is that the provision, being an integral part of the Constitution, its validity is not open to challenge. This contention is but a different facet of the argument that the exercise of constituent power by Parliament is not open to judicial review, which we have already considered and negated. On closer examination, we find that the foundation for this contention seems to be the minority view of Mathew, J., in *Keshavananda* (5 *supra*), albeit the same was not expressly stated so by the learned counsel. The learned Judge, in his minority opinion, while discussing the differentiating features between "constitutional law" and "ordinary law" and the "basic norm theory" propounded by the well known legal philosopher, Hans Kelsen, has said:

"Once it is realised that a Constitution differs from law in that a Constitution is always valid whereas a law is valid only if it is in conformity with the Constitution and that the body which makes the Constitution is a sovereign body and generally needs no legal authority. Whereas a body which makes the ordinary law is not sovereign, but derives its power from the Constitution, an amendment to the Constitution has the same validity as the Constitution itself, although the question whether the amendment has been made in the manner and form and within the power conferred by the Constitution is always justiciable." (p.1911).

These observations, no doubt, would show that an amendment to the Constitution is immune from challenge in a Court of law except as regards compliance with procedural prescriptions - mode of amendment. It is in that context, evidently, the learned Judge made the further observations:

"Just as an ordinary law derives its validity from its conformity with the Constitution, so also, an amendment of the Constitution its validity from the Constitution. An amendment of the Constitution can be ultra vires just as an ordinary law can be." (p.1911)

This view did not find favour with the majority, according to whom, the constitutionality of an amendment of the Constitution has to be judged on the touch-stone of the Constitution, as originally enacted. The initial norm, we

therefore hold is what was brought into being as the Constitution by the Founding Fathers but not what was subsequently added to the basic document by - as some of the learned counsel for the petitioners described - "Foster Fathers! Amendments to the original Constitution by Parliament in exercise of its constituent power, as already noticed, in the opinion of the majority, should not result in abrogation of any of the basic features of the Constitution. Law attains sublimation in the Constitution. It incorporates, as in the case of ours, not only the mechanism for the governance of the country but also certain fundamental principles and enduring values the nation wanted to preserve permanently, which are held to be the basic features by the Supreme Court in *Keshavananda* (5 *supra*). These basic features, therefore, are integral to the basic norm, in which one ought to believe. It is imperative that the unconstitutionality of a constitutional provision needs to be examined from this stand point. In that sense, the Constitution, as originally enacted, represents - in the phraseology of Kelsen - "the highest level of positive law, See: Han Kelsen: Pure Theory of Law- p.222".

91. It needs to be stated in this context that the Constitution, as originally enacted, has excluded interference of Courts in certain respects like electoral matters (Article 329) and inter-State disputes relating to waters, inter-State rivers or river valleys (Article 262). Such exclusion of judicial review, it is obvious, cannot be challenged in any Court of law since the exclusion is by the basic norm itself. Any analogy to this situation in support of the contention that the constituent power extends to exclusion of judicial review, obviously, is devoid of merit. The advisory opinion of the Supreme Court in *In the Matter of: In the matter of : CAUVERY WATER DISPUTES TRIBUNAL*, which has been cited to show that even the Supreme Court's jurisdiction can be ousted is not in point.

92. After answering the questions of law, the Special Bench of the Supreme Court in *Keshavananda* (5 *supra*) has remitted the matter to the Constitution Bench for disposal in accordance with law and so *Shri Raghunathrao Ganpatrao Vs. Union of India*, in which the validity of the Constitution (26th Amendment) Act, 1971 was challenged *inter alia*, was decided subsequently. The approach of the Court in dealing with the legality of the constituent power was formulated thus, by his Lordship Ratnavel Pandian, J.

- (1) whether the procedure prescribed by Article 368 is strictly complied with; and
- (2) whether the amendment has destroyed or damaged the basic structure or the essential features of the Constitution.

Another learned Judge- his Lordship Mohan, J.,-in his separate but concurring opinion, expressed the view:

".....the question to be addressed is, can it (the Constitution) maintain its identity if something quite different is substituted? The personality of the Constitution must remain unchanged."

It was not necessary that the effect of abrogation of a basic feature should be instant or immediate. The test to be applied is "whether the amendment contravenes or runs counter to an imperative rule or postulate, which is an integral part of the Constitution."

93. The axiomatic rule that emerges in testing the validity of the constituent power of Parliament is: whether the impugned provision, even though it complies with the prescribed mode of amendment, has the effect of changing the personality of the Constitution. If, in its vital aspects, the Constitution is changed by Parliament in exercise of its constituent power, we think it is hardly possible to hold that what was left untouched still retained its original personality. We may explain this with reference to a common example: If the chassis, body and engine of a motor car are substituted, can it still be said that the vehicle continued to be the old one? When the High Court is divested of its power of judicial review, under Article 226, it cannot be said that after the divestiture, the personality of the Constitution still remains unchanged: the disfiguration is too "prominent to be ignored."

94. Interpreting sub-paragraph (1) of paragraph 6 of the Tenth Schedule to the Constitution, by which power was vested in the Presiding Officer of each of the two houses of Parliament—Chairman in the case of Rajya Sabha and Speaker in the case of Lok Sabha—to decide any question regarding the disqualification of a member and whose decision "shall be final", his Lordship Venkatachallaiah, C.J., in *Kihoto Hollohan* (32 *supra*) after holding that such power is judicial power, stated the legal principle thus:

"It is settled that such a finality clause in a statute by itself is not sufficient—to exclude the jurisdiction of the High Courts under Articles 226 and 227—and the Supreme Court under Article 136 of the Constitution, the finality being for the statute alone. This is apart from the decision being vulnerable on the ground of nullity." (p.727).

95. We, therefore, conclude that although judicial power can be vested by a statute in a Court or tribunal, the power of judicial review of the High Court under Article 226 cannot be excluded even by a constitutional amendment and accordingly, we declare that Article 323A(2)(d), to the extent it does so, is unconstitutional.

96. The next important question for consideration is: what is the effect of the order of the President dated 25-10-1989 abolishing the Andhra Pradesh Administrative Tribunal constituted under Article 371D?

97. According to Sri M.R.K. Choudhary and Smt. Tripura Sundari, learned Counsel appearing for some of the petitioners, the consequence of such abolition necessarily leads to revival of the jurisdiction of this Court under Article 226 to deal with service matters of State Government employees.

98. In exercise of powers conferred by Clauses (3) and (4) of Article 371-D the

President of India in GSR 285-E made the Andhra Pradesh Administrative Tribunal Order, 1975. Paragraph 3 of the Order speaks of constitution-of the Andhra Pradesh Administrative Tribunal and its composition. By paragraph 6, the Tribunal was vested with the jurisdiction to deal with service matters of specified classes of employees to the exclusion of the jurisdiction, powers and authority of all Courts except the Supreme Court. This exclusion of the jurisdiction was based upon clause (7) of Article 371-D. The Tribunal was actually constituted by a consequential order issued by the President in GSR 443-E dated 6-7-1976 by which the Chairman and two members were appointed. Clause (8) of Article 371-D confers power on the President to abolish the Administrative Tribunal and make consequential provisions for transfer and disposal of cases pending before the Tribunal immediately before the abolition. In exercise of the power conferred under Clause (8), the President, on being satisfied that the continued existence of the Tribunal constituted under paragraph 3 of the Andhra Pradesh Administrative Tribunal Order, 1975 is not necessary, abolished the same with effect from 1st November, 1989 and directed that the cases pending before the Tribunal immediately prior to that date together with records shall stand transferred to the Andhra Pradesh Administrative Tribunal established under Sub-section (2) of Section 4 of Act No. 13 of 1985, for disposal in accordance with law. By another order dated 26-10-1989, the President, on receipt of request from the Government of Andhra Pradesh, established with effect from 1-11-1989, the Andhra Pradesh Administrative Tribunal under Act No. 13 of 1985.

99. The order of the President dated 25-10-1989 abolishing the Administrative Tribunal in the State of Andhra Pradesh is in the following terms:

"In exercise of the powers conferred by Clause (8) of Article 371-D of the Constitution, the President, being satisfied that the continued existence of the Andhra Pradesh Administrative Tribunal constituted under paragraph 3 of the Andhra Pradesh Administrative Tribunal Order, 1975, issued under Clauses (3) and (4) of the said Article, is not necessary, hereby ablishes the said Tribunal with effect from the 1st November, 1989 and directs that every case or other proceedings pending before the said Tribunal immeidately before that date together with the records thereof shall stand transferred on that date to the Andhra Pradesh Administrative Tribunal established under Sub-section (2) of Section 4 of the Administrative Tribunals Act, 1985 (13 of 1985) and the said Tribunal may proceed to deal with such case or other proceeding, so far as may be, in the same manner as in the case of an application u/s 19 of the Act, from the stage which was reached before such transfer or from any earlier stage or de novo as the Tribunal may deem fit."

Clause (1) of Article 323-A confers power on Parliament to establish, by law, Administrative Tribunals. What the law may contain is set out in Clause (2). Sub-clause (f) says that the law made under Clause (1) setting up administrative tribunals may "repeal or amend any order made by the President under Clause (3) of Article 371-D".

100. The argument advanced for the petitioners is that Sub-clause (f) of Article 323A(2) is not an enabling provision conferring power on Parliament, by law, to repeal or amend an order made by the President under Clause (3) of Article 371-D but it is a specific conferment of power. The non-obstante provision contained in Clause (3) of Article 323-A gives primacy to the provisions of the entire Article 323-A notwithstanding anything in any other provision in the Constitution or in any other law. Inasmuch as Article 323-A is later in point of time in relation to Article 371-D, even though such a non-obstante clause is also incorporated in Clause (10) of Article 371-D, the former shall prevail over the latter since it represents the latest will of the law making body. The moment the Andhra Pradesh Administrative Tribunal constituted under Article 371-D was abolished, the injunction in Clause (7) of Article 371-D excluding the jurisdiction of the High Court in relation to the Tribunal automatically becomes inoperative, with the necessary consequence of revival of the jurisdiction of the High Court in relation to service conditions of State Government employees with effect from 1-11-1989.

101. We are not inclined to agree with these submissions. The doctrine of repugnancy has no role to play in the interpretation of two different provisions of the Constitution which are seemingly in conflict with each other. The principle that when there are two amendments to a statute and if there is any repugnancy between the two, the latter amendment shall have effect because it represents the latest thinking of the law making body, although is a recognised canon of interpretation, has no application in the present context. We do not find any conflict between Clause (10) of Article 371-D and Clause (3) of Article 323-A. So long as no law was enacted by Parliament under Article 323-A(2)(f) repealing or amending any order made by the President under Clause (3) of Article 371-D, there is no impediment, whatever, for the President to exercise his power under Clause (8) of Article 371-D to abolish the Administrative Tribunal. Article 371-D is concerned exclusively with the State of Andhra Pradesh and as there is no provision in the Administrative Tribunals Act, 1985 (13 of 1985) in regard to repeal or amendment of any order made by the President under Clause (3) of Article 371-D, the inevitable legal consequence is that there is no embargo on the President to invoke the power vested in him under Clause (8) of Article 371-D for abolishing the Tribunal. We think, the two

provisions have to be read and construed in this harmonious way; any other construction will result in bizarre consequences totally contrary to both textual and teleological canons of interpretation. The satisfaction of the President (meaning the Central Government) is the jurisdictional factor for exercising power under Clause (8) of Article 371-D. When the President abolishes the Tribunal, he has to make provision, in the order of abolition, for the transfer and disposal of cases pending before the Tribunal immediately before the abolition, the words "if the President is satisfied that the continued existence of the Administrative Tribunal is not necessary, the President may, by order, abolish the Administrative Tribunal" must be read in juxtaposition with the words "the President may, by order, provide for the constitution of an Administrative Tribunal

for the State of Andhra Pradesh....." occurring in Clause (3) of the same Article, to discern the intention of Parliament. It is only when the President is satisfied that the continued existence of the Tribunal is not necessary, he will exercise the power of abolishing the same which was constituted by him in exercise of the power under Clause (3) of Article 371-D. When the Tribunal was abolished, since its continued existence was found to be not necessary, the order providing for the constitution of the Tribunal under Clause (3), it could not be said, would still survive. The order of abolition dated 25-10-1989 clearly mentions that the President is "satisfied that the continued existence of the Andhra Pradesh Administrative Tribunal constituted under paragraph 3 of the Andhra Pradesh Administrative Tribunal Order, 1975 issued under Clauses (3) and (4) of the said article is not necessary" and, therefore, it will be totally unrealistic to hold, as the learned counsel for the petitioners want us to do, that even after the abolition of the Tribunal, the 1975 Andhra Pradesh Administrative Tribunal Order constituting the Administrative Tribunal, would survive. The order of abolition does not give any scope for such an interpretation. On the other hand, it clearly mentions that after the abolition, all the cases pending before the tribunal "shall stand transferred on that date to the Andhra Pradesh Administrative Tribunal established under Sub-section (2) of Section 4 of the Administrative Tribunals Act, 1985 and the said tribunal may proceed to deal with such cases or other proceedings.....". We, therefore, hold that the Andhra Pradesh Administrative Tribunal Order, 1975 stood abrogated with effect from 1-11-1989 and no legal device or technic can breathe life into it.

102. We do not think it necessary to consider the argument advanced for the petitioners that Act 13 of 1985 is unconstitutional since it has not incorporated the Sampath Kumnar (4 supra) prescriptions regarding qualifications, method of appointment, tenure and other service conditions of the Chairman and members of the tribunals constituted under the Act. Two reasons prompt us to say so: (i) our declaration that the power of judicial review of the High Court under Article 226 cannot be excluded by Article 323A(2)(d) and Section 28 of the Administrative Tribunals Act, 1985; and (ii) neither the Andhra Pradesh Administrative Tribunal nor its Chairman or members are parties to these Writ Petitions and in their absence, any question affecting their interests cannot be adjudicated.

103. In the result, we declare that Article 323-A(2)(d) of the Constitution of India is unconstitutional to the extent it empowers Parliament, by law, to exclude the jurisdiction of the High Court under Article 226 and consequently, we further declare that Section 28 of the Administrative Tribunals Act, 1985 to the extent it divests the High Court of its jurisdiction under Article 226 is unconstitutional. As the vires of no statute is questioned in any of the Writ Petitions, we are of the view that the petitioners should approach the Andhra Pradesh State Administrative Tribunal established under the Administrative Tribunals Act, 1985 for redressal of their grievances: when the petitioners have an effective alternative remedy, we are not inclined to adjudicate the individual merits of any

case. If the petitioners approach the Administrative Tribunal, it shall entertain their representations and dispose of them in accordance with law. With the above declarations and directions, both the Writ Petitions and Writ Appeals are disposed of. No costs.

104. Before taking leave of these cases, we would like to thank immensely all the learned Counsel who assisted us in our highly delicate task of constitutional interpretation.