

‘TRIBUNALISATION’ OF INDIA’S COMPETITION REGIME

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The 42nd Amendment to the Constitution is often blamed for opening the floodgates for ‘tribunalisation’ in the country. The rapid growth in tribunals following the enactment of this amendment, has been viewed as an attempt by the executive to gain control over judicial functions. This has spurred the judiciary to be cautious in preserving its independence and power of judicial review, and has led it to decide upon the constitutional status of various tribunals. As a result, a rich body of judicial precedents, dealing with the principles of separation of powers and independence of the judiciary, has emerged, which aims at counteracting the use of tribunals by the executive to enfeeble and incapacitate the judiciary. I argue that the latest functionalities that have fallen into the ‘tribunal trap’ are the Competition Commission of India and the Competition Appellate Tribunal. By vesting the Competition Commission of India and the Competition Appellate Tribunal with judicial powers akin to courts under the provisions of the Competition Act, 2002, the legislature necessarily had to also provide for the constitution and functions of the two bodies in a manner akin to courts. By failing to do so, it has infringed upon judicial independence that forms part of the basic structure of our Constitution, and therefore the Competition Act, 2002 is liable to be struck down as unconstitutional.

I. INTRODUCTION

Since India achieved independence, the Indian judiciary has been widely acclaimed as the most powerful in the world, for its display of activism and grit.¹ However, the attainment of this stature has been subject to many concerted attempts at usurping political hegemony over judicial supremacy, and at throttling the judiciary’s independence and its power of judicial review – two significant factors determining the level of judicial empowerment in a country.²

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¹ See generally SANTOSH PAUL, CHOOSING HAMMURABI-DEBATES ON JUDICIAL APPOINTMENTS (2013) (for a discussion of judicial supremacy in India that is attributed to the attainment of “near-absolute independence from executive control.”).

² But see Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW AND SOCIAL

The insertion of Articles 323A and 323B, through the Forty Second amendment³ to the Constitution of India ('Forty Second amendment'), is often cited as a fitting illustration of such an attempt,⁴ for this amendment stripped away essential judicial functions from High Courts and Civil Courts, and vested them in tribunals instead.⁵

Since the Forty Second amendment, the Supreme Court of India ('SC') and the High Courts have considered a number of constitutional challenges relating to tribunals, in an attempt to preserve their independence and power of judicial review, which are features embedded in the basic structure of the Indian Constitution.⁶ These considerations became critical, because the attempt to usurp judicial power by the executive in the name of tribunals (such as the National Company Law Tribunal/National Company Law Appellate Tribunal,⁷ the National Tax Tribunal ('NTT'),⁸ the Central Administrative Tribunal,⁹ the Copyright Board,¹⁰ and the Intellectual Property Rights Appellate Board)¹¹ became increasingly evident. Through the judgments that were delivered in these cases, the judiciary attempted to build an impregnable boundary wall that would ensure that the principle of separation of powers is obeyed in letter and in spirit,¹² and that the power of judicial review remains intact.

The Competition Commission of India ('CCI') and the Competition Appellate Tribunal ('COMPAT') are amongst the latest functionaries to be assailed before the Delhi High Court, for not conforming to the limits and standards evolved by the SC with regard to the constitution and functioning of tribunals.¹³ This paper examines the constitutional validity of provisions of the Competition Act, 2002 ('2002 Act') relating to the constitution, powers and functions of the CCI and the COMPAT. The judgment of the Delhi High Court in this case would be an important precedent, when examined in light of the

INQUIRY 91, 99-149 (2000) (argues on the contrary that development of judicial review in Israel, Canada, New Zealand, and elsewhere is used as a strategy to preserve political hegemony of ruling elites who would lose out in majoritarian politics).

³ The Constitution (Forty Second Amendment) Act, 1976.

⁴ See Arvind P. Datar, *Tribunals: A Tragic Obsession*, available at http://india-seminar.com/2013/642/642_arvind_p_datar.htm (Last visited on August 4, 2016); Arun K. Thiruvengadam, *Tribunals* in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 413, 416-420 (1st ed., 2016).

⁵ See Part II.B.

⁶ Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225; Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1; Minerva Mills v. Union of India, (1980) 3 SCC 625.

⁷ Union of India v. R. Gandhi, (2010) 11 SCC 1.

⁸ Madras Bar Assn. v. Union of India, (2014) 10 SCC 1.

⁹ L. Chandra Kumar v. Union of India, (1997) 3 SCC 261.

¹⁰ South Indian Music Companies Assn. v. Union of India, 2016 SCC OnLine Mad 1787 : (2016) 3 MLJ 647.

¹¹ Shamnad Basheer v. Union of India, 2015 SCC OnLine Mad 299 : AIR 2015 Mad 250.

¹² Datar, *supra* note 4.

¹³ Mahindra and Mahindra Ltd. v. Competition Commission of India, WP (C) No. 6610 of 2014 (Del) (Pending).

constitutional history of tribunals and the law laid down by the SC and various High Courts. This is because the subject matter of the case before the Court ostensibly demonstrates the power struggle between the judiciary and Parliament, each of which is attempting to secure its own dominion. This, in turn, has been counterproductive to the very object that the 2002 Act was enacted to achieve. Part II of this paper thus provides an overview of the permissible limits within which quasi-judicial powers can be exercised by tribunals in India, and various other constitutional issues dealt with in the body of case law that has laid down the parameters which need to be overcome, so as to resist a constitutional challenge.

Thereafter in Part III, the case before the Delhi High Court against the CCI and COMPAT, which are both creatures of the 2002 Act, has been examined. An overview of the evolution of India's competition law regime, resulting in the enactment of the 2002 Act, has also been dealt with in Part III. What is striking with regard to this case is that earlier, in a similar challenge relating to the CCI before the SC, an opportunity was given to the legislature to suitably amend the 2002 Act.¹⁴ Under the garb of fulfilling such a judicial mandate, the Competition (Amendment) Act, 2007 ('2007 Amendment Act') came to be enacted. This amendment only exacerbated the unconstitutionality of the CCI's framework, which had been previously assailed before the SC. This paper tries to demonstrate the deliberate attempt of the Parliament to undermine judicial independence through the 2007 Amendment Act. In Part IV, I conclude that the unfortunate result of this battle for supremacy between the two wings of the Government has been the downfall of the competition regime in the country.

II. CONSTITUTIONAL LIMITS TO THE GROWTH OF TRIBUNALS IN INDIA

A. IS A TRIBUNAL A COURT?

In constitutional challenges relating to tribunals, a discernible trend has emerged in the primary defence taken by the executive, that the 'tribunal' in question does not perform judicial or quasi-judicial functions, or/and that the adjudication carried out by the tribunal concerned does not have all the attributes of judicial decisions of traditional courts.¹⁵ In this light, it is contended that the tribunal in question does not have to be subject to the standards of courts vested with judicial powers. This attempt of the executive to

¹⁴ *Brahm Dutt v. Union of India*, (2005) 2 SCC 431.

¹⁵ See *Competition Appellate Tribunal (New Delhi), Lafarge India Ltd., In re*, 2015 SCC OnLine Comp AT 1120, ¶28 (wherein, the Competition Commission of India took the plea that its functions are purely administrative and regulatory in character, and therefore it did not have to conform with the principles of natural justice in a manner required of traditional courts).

distance tribunals from judicial scrutiny became evident since India achieved independence.¹⁶

In *Bharat Bank Ltd. v. Employees* ('Bharat Bank'),¹⁷ an award rendered by a three-member tribunal, constituted by the Central Government for the adjudication of industrial disputes in banking companies, was appealed under Article 136 of the Constitution.¹⁸ An unsuccessful preliminary jurisdictional objection was raised that the appeal filed under Article 136 was not an appeal from a "decree" or "judgment", since industrial tribunals neither performed judicial functions, nor possessed all the attributes of a court. Two instances were cited in *Bharat Bank* that would render an award of a tribunal appealable under Article 136 – *first*, where the tribunal is a creature of the State and observes the provisions of a special law, and *second*, where the tribunal is found to be vested with certain functions of a court or to have the "trappings of a court". On noting that the same powers that were vested with Civil Courts were vested with industrial tribunals, and that the decision of the tribunal was binding on the parties before it, the SC went on to hold that:

"...the word "tribunal" in Article 136 has to be construed liberally and not in any narrow sense and an Industrial Tribunal inasmuch as it discharges functions of a judicial nature in accordance with law comes within the ambit of the article and from its determination an application for special leave is competent."¹⁹

The most basic and the fundamental feature that is common to both courts and tribunals is the discharge of judicial functions,²⁰ i.e. the discharge of duties exercisable by a judge or by justices in courts, which makes

¹⁶ *Bharat Bank Ltd. v. Employees*, AIR 1950 SC 188 (The Supreme Court first dealt with such an attempt, which was in relation to the tribunals constituted under the Industrial Disputes Act, 1947).

¹⁷ *Id.*

¹⁸ The judicial system in our country is organized in a hierarchy of courts with the Supreme Court of India at the top, followed by the High Courts, district courts, magistrate courts and other equivalent courts. The Constitution explicitly recognised tribunals within this hierarchy through Article 227, by virtue of which High Courts were to have superintendence over all courts 'and' tribunals, and through Article 136, which empowered the Supreme Court to grant leave to appeal from any judgment, decree, determination, or sentence made or passed by any court or tribunal. Besides the supervisory powers vested in the Supreme Court and High Courts *vide* these two Articles, the Constitution does not lay down any limitations to powers exercisable by tribunals. See Nick Robinson, *Judicial Architecture and Capacity in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION* 330 (1st ed., 2016) (for an overview of the Indian court system- the different types of courts and judges in the Indian judicial system and the hierarchies and relations between them); See also Arvind P. Datar, *The Tribunalisation of Justice in India*, ACTA JURIDICA 228 (2006) (for an analysis of various constitutional provisions relating to tribunals).

¹⁹ *Bharat Bank Ltd. v. Employees*, AIR 1950 SC 188, ¶58 (per Mahajan J.).

²⁰ *Associated Cement Companies Ltd. v. P.N. Sharma*, AIR 1965 SC 1595, ¶9.

the nature of a tribunal's functions crucial.²¹ To understand what distinguishes a court from a tribunal in India, it would suffice to state that tribunals are exclusively constituted to carry out certain judicial functions in addition to certain administrative/regulatory/inquisitorial functions, in a manner not necessarily *in pari materia* with traditional courts. For instance, unlike courts, persons not having any judicial experience may be present amongst members presiding over tribunals, which are created as specialist bodies.²² In practice, the difference can also be on account of its functions or/and constitution. For instance, certain regulatory/administrative functions that courts traditionally do not perform, may also be vested in tribunals along with their judicial/adjudicatory functions. These distinctions have rendered tribunals 'quasi-judicial' in character.²³

This quasi-judicial characteristic of tribunals is associated with powers, which are exercisable only when certain facts have been found to exist,²⁴ which are guided by executive authority, and which are ideally underpinned by judicial restraints. However, it is important to bear in mind, that while the word 'tribunal' attaches to itself the exercise of quasi-judicial power, the converse is not necessarily always the case. In other words, it is not only 'tribunals' that can exercise quasi-judicial power. For instance, in cases where the Central or State Government is empowered to reach a decision affecting contesting parties in accordance with evidence, and not on grounds of policy or expediency, a duty is imposed upon the Government concerned to act judicially and not just judiciously, irrespective of the fact that a 'tribunal' *per se* has not been constituted for the purpose.²⁵

A court, in the strict sense, is necessarily a tribunal that is a part of the ordinary hierarchy of courts, however, not all tribunals are akin to courts- for instance, where no judicial functions are vested in them, or the nature of judicial functions vested in them are only supplementary to the main regulatory/administrative functions, then in such a case, they would not be akin to courts.²⁶ A tribunal is tested against judicial standards and restraints, laid

²¹ Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson, (1892) 1 QB 431 (per Lopes L.J.).

²² L. Chandra Kumar v. Union of India, (1997) 3 SCC 261, ¶95.

²³ See generally H.W.R. Wade, 'Quasi-Judicial' and its background, 10 CAMBRIDGE L.J. 216 (1948-1950) (for an analysis of 'quasi-judicial' function and the powers that attach with such nature of functions).

²⁴ For instance, the Competition Commission of India is empowered to exercise its jurisdiction only under the mandate of the provisions of the 2002 Act. See *id.*, 212.

²⁵ Harinagar Sugar Mills Ltd. v. Shyam Sunder Jhunjhunwala, AIR 1961 SC 1669 : (1962) 2 SCR 339, ¶10.

²⁶ In India there are many such tribunals vested with regulatory functions, for instance, the Airports Authority of India, Telecom Regulatory Authority of India, etc. Principally, these are not involved in adjudicatory functions. Instead, they are involved in regulating a market or an industry. Nonetheless, in the process of such regulation, they may also undertake, in certain circumstances, functions which require them to act in a judicial manner.

down by a large number of precedents, only where it possesses all the trappings of a court, or/and there has been a transfer of judicial power to a tribunal, which was previously vested in courts, or it is a functionary akin to a court.²⁷ In such cases, the law authorising and creating tribunals, in order to be constitutionally valid, must vest in them, those salient characteristics and standards of a court that are sought to be substituted.²⁸

B. “TRIBUNALISATION” AND THE FORTY-SECOND AMENDMENT

The examination of Bharat Bank also brings to light the fact that tribunals have been in existence much prior to the Forty Second amendment, which entailed express Constitutional authorization of their creation for the first time.²⁹ As a result of the Forty Second amendment, the Administrative Tribunals Act, 1985 (‘1985 Act’) was enacted, and administrative tribunals were created. Since then, there has been a rapid increase in the number of tribunals that have been created by the State in different areas of law.³⁰ It is important to understand the changing trends in the reasons for creating such tribunals.

Initially, the primary reason attributed to the creation of tribunals was overcoming the crisis of delays and backlogs in the administration of justice,³¹ a problem which has come to haunt our judicial system from the colonial era.³² As early as 1958, the Law Commission of India (‘Law Commission’) recognised the ‘tribunal solution’ for the mounting number of cases before courts, relating to administrative law.³³ Consequently, the Law Commission recommended a new system of tribunals at the Centre and States, empowered to specifically deal with claims of government servants relating to their constitutional rights, conditions of service, etc. It is significant to note that the report of the Law Commission, much prior to the Forty-second amendment, cautioned against ‘executive-adjudication’, and emphasised the supplementary role that tribunals should take, as opposed to supplanting traditional courts.³⁴

²⁷ S.D. Joshi v. High Court of Bombay, (2011) 1 SCC 252, ¶62; Madras Bar Assn. v. Union of India, (2014) 10 SCC 1, ¶113.2.

²⁸ Madras Bar Assn. v. Union of India, (2014) 10 SCC 1.

²⁹ The Income Tax Appellate Tribunal was the first tribunal to be set up in the year 1941.

³⁰ Supreme Court of India, *Tribunals and Authorities*, available at <http://supremecourtindia.nic.in/judlib/RelIks.pdf> (Last visited on August 5, 2016) (The Supreme Court website lists a total of 19 tribunals).

³¹ See Law Commission of India, *Reform of Judicial Administration*, Report No. 14, Vol. 2, 694 (September 1958), available at <http://lawcommissionofindia.nic.in/1-50/Report14Vol2.pdf> (Last visited on August 5, 2016) (‘Law Commission Report’).

³² See Robinson, *supra* note 18, 336; See also GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE* 139 (2000) (for an account of the arrears of cases pending before the courts at the time).

³³ Law Commission Report, *supra* note 31.

³⁴ *Id.* (The tribunals, according to the Law Commission, ought to be presided over by a legally qualified chairman – with qualifications similar to those of a High Court Judge – and the

Since then, the body of case law that has developed from constitutional challenges to various tribunals over the years, has reiterated the same sentiment.

Another reason attributed to the creation of tribunals was the rise of socio-economic legislations. The nature of these statutes, it was felt, required specialised bodies, comprising of persons having expert knowledge of the working of these laws to deal with the application of statutory provisions.³⁵ With these legislations, the rationale for the constitution of the tribunals was not only the promise of speedy, effective, decentralised dispensation of justice, but also the expertise and knowledge in specialised areas of law that was felt to be insufficiently demonstrated by judges of traditional courts.³⁶

It was during the 'emergency era' of the 1970s, when various amendments to the Constitution *vide* the Forty Second amendment were brought into force, that a new dimension was added to the aforementioned rationale (of decentralization, speedy justice and expertise) for the creation of tribunals – balancing power between the judiciary and the Parliament, which was perceived by the contemporary Government to have tipped in favour of the judiciary.³⁷ Owing to the Forty Second amendment, the Parliament was constitutionally empowered to create two separate categories of tribunals by law – “administrative tribunals” and “tribunals of other matters.”³⁸ Through Article 323A of the Constitution, the power to adjudicate disputes relating to recruitment and conditions of service of the Union and States, was taken away from the jurisdiction of Civil Courts, and vested in administrative tribunals instead. Article 323B of the Constitution provided for constitution of tribunals for other matters, illustrated under Article 323B(2). The jurisdiction of all courts was excluded, including the exercise of writ jurisdiction, and only the SC's power to grant leave to appeal was allowed. In effect, the SC and High Courts' powers

jurisdiction of the High Court under Article 226 ought to be retained.)

³⁵ See generally MONOPOLIES INQUIRY COMMISSION, *Report of the Monopolies Inquiry Commission*, Vol. 1, (1965) ('MIC Report') (The MRTP Act was enacted to strike at the concentration of economic power which leads to common detriment; and, as the Commission highlighted, the nature of claims under the MRTP Act required the members empowered to adjudicate such claims, to possess expertise in or special knowledge of economics).

³⁶ See RAGHAVAN COMMITTEE, *Report of the High Level Committee on Competition Policy*, ¶6.1.2 (May, 2002) ('Raghavan Committee Report'), available at http://www.competitioncommission.gov.in/Act/Report_of_High_Level_Committee_on_Competition_Policy_Law_SVS_Raghavan_Committee29102007.pdf (Last visited on August 5, 2016) (where the need for specialised courts was highlighted).

³⁷ The Swaran Singh Committee, appointed to study the question of the Forty Second Constitutional Amendment in 1976, recommended the exclusion of jurisdiction of all courts in relation to tribunals, except that of the Supreme Court under Article 136. It also recommended limiting the High Court's writ jurisdiction – the High Courts were to lose their power to declare law unconstitutional, and they could exercise no power of any kind over administrative action or adjudication, unless fundamental rights were involved. See SWARAN SINGH COMMITTEE, *Report of the Swaran Singh Committee* (April, 1976) ('Swaran Singh Committee Report').

³⁸ *Supra* note 3, §46.

to examine a constitutional challenge to enactments under Articles 323A and 323B were stripped away.

Even though Articles 323A and 323B were enabling provisions that authorised the setting up of the tribunals contemplated therein, there was nothing prohibiting the legislature from establishing ‘other tribunals’ not covered by these two Articles.³⁹ In other words, as long as requisite legislative competence subsisted, there was nothing stopping the legislature from creating tribunals outside the purview of Articles 323A and 323B; and as stated earlier,⁴⁰ the Constitution had vested supervisory powers in the High Courts and the SC over these ‘other tribunals’, under Articles 227 and 136 of the Constitution respectively.

The Forty-second amendment, besides excluding the courts’ jurisdiction under Articles 323A and 323B, also took away the High Courts’ superintendence over ‘other tribunals’ under Article 227. Therefore, though the official justification for the insertion of these provisions in the Constitution spoke of mounting arrears in High Courts and the need for speedy disposal in service matters, it was apparent the real purpose for adding impetus was to strengthen government control at the expense of the judiciary, that had stood up against the Congress Government during the Emergency era.

Moreover, it is important to note the fact that only the SC’s power under Article 136 was saved by the Forty-second amendment. Exceptions were carved out to preserve the SC’s jurisdiction,⁴¹ seemingly satisfying the judicial mandate in *Bharat Bank*. This trend of unconstitutional Acts giving rise to tribunals, under the garb of respecting judicial precedent, started with the Forty-second amendment, and has a significant bearing even today, as will be seen even in the case against the CCI and COMPAT in the Delhi High Court. For this reason, “tribunalisation”, as commonly understood to signify the numerical rise of tribunals, also evinces the beginning of a period when judicial hostility towards tribunals was ignited, making the judiciary cautious about its independence and power of judicial review.

1. Safeguarding the Power of Judicial Review

Over 200 years ago, in *William Marbury v. James Madison*,⁴² Chief Justice Marshall described “judicial review” in terms of a “superior law” and a “judicial duty”,⁴³ which implied the duty cast on the courts to test

³⁹ *Union of India v. Delhi High Court Bar Assn.*, (2002) 4 SCC 275, ¶12.

⁴⁰ *See* Part II.A.

⁴¹ The Constitution of India, Arts. 323A(2)(d), 323B(3)(d).

⁴² *William Marbury v. James Madison*, 2 L Ed 60 : 5 US 137 (1803).

⁴³ *See generally* PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 101-148 (2009) (for a history of the power of judicial review, and a discussion on the relationship between judicial duty and

the validity of acts of the executive and legislature on the touchstone of the basic principles of the Constitution. This was emphatically reiterated by the SC in *Kesavananda Bharati v. State of Kerala*,⁴⁴ wherein it was held that our Constitution is the *suprema lex* and there is no authority of the State which is above or beyond the Constitution or which has powers unfettered and unrestricted by the Constitution. In this context, the power of judicial review to examine the question as to whether any authority under the Constitution has exceeded the limits of its powers, was held to be part of the basic structure of the Constitution, and this power could not be curtailed.⁴⁵

Though many of the amendments to the Constitution made through the Forty-second amendment were reversed by the Constitution (Forty-Fourth Amendment) Act, 1978, and the High Courts' power of superintendence over 'other tribunals' under Article 227 was restored, no amendments were made to Articles 323A and 323B, and the courts continued to remain divested of their powers in relation to these two Articles, except under Article 136. Therefore, when the 1985 Act was enacted in line with Articles 323A and 323B, a challenge to its constitutional validity was immediately filed.⁴⁶ The petitioner's case was that the power of judicial review under Articles 32 and 226 had been held to be part of the basic structure of the Constitution, and therefore no law could be passed by the Parliament to abrogate it.⁴⁷ A constitutional bench of the SC that adjudicated the challenge to the 1985 Act, reiterated that judicial review was a basic and essential feature of the Constitution and that it could not be negated. However, the Court went on to hold that an 'effective alternative institutional mechanism' could be vested with such powers in place of High Courts.⁴⁸

Smaller benches of the SC and the High Courts expressed disagreement and doubt with respect to this sanction for an 'effective alternative institutional mechanism' in *S.P. Sampath Kumar v. Union of India* ('Sampath Kumar').⁴⁹ Finally, in 1997 a bench of seven judges, in *L. Chandra Kumar v. Union of India* ('L. Chandra Kumar'),⁵⁰ held that tribunals could not be considered as full and effective substitutes for the superior judiciary, in discharging its judicial review functions under Articles 32 and 226. Chief Justice Ahmadi (as he then was), who delivered the unanimous judgment, reasoned that constitutional safeguards ensuring independence of judges of the superior judiciary

judicial review).

⁴⁴ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225; *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1; *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625.

⁴⁵ *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625, ¶85.

⁴⁶ *S.P. Sampath Kumar v. Union of India*, (1987) 1 SCC 124.

⁴⁷ See *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225; Powers, Privileges and Immunities of State Legislatures, In re, AIR 1965 SC 745; *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625.

⁴⁸ *S.P. Sampath Kumar v. Union of India*, (1987) 1 SCC 124, ¶3, 17.

⁴⁹ See *R.K. Jain v. Union of India*, (1993) 4 SCC 119; *Sakinala Harinath v. State of A.P.*, 1993 SCC OnLine AP 195 : (1993) 3 ALT 471 (FB).

⁵⁰ *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261.

were not available to those who man tribunals; therefore, tribunals could never be effective substitutes for a High Court or the SC.⁵¹

Echoing the words of the Fourteenth Law Commission that had cautioned against “executive-adjudication”,⁵² the Court also went on to hold that tribunals could not exercise the power of judicial review of legislative action to the exclusion of the High Courts and the SC.⁵³ However, the judgment in *L. Chandra Kumar* recognised that tribunals were an important institutional mechanism to solve the problems of delay and backlogs in the administration of justice; and in this context, it was clarified that there was no constitutional prohibition against their performing a supplemental role, as opposed to a supplanting role, in this respect.⁵⁴

Following *L. Chandra Kumar*, attempts to abrogate or take away the power of judicial review from courts in the name of tribunals, have been struck down on various occasions, even where they were sought to be done through the creation of a two-tier system or an appellate tribunal like the case of the NTT.⁵⁵ Therefore, if the power of judicial review, either under Article 32 or 226, is taken away through the creation of a tribunal, then the exercise of that power would be deemed to become part of the powers vested in the tribunal; and it is no longer *res integra* that such a case is impermissible, as it would effectively amount to substitution of either the High Courts or the SC.

2. Preserving Independence

In *L. Chandra Kumar*, the contention that tribunals should not be allowed to adjudicate upon matters where the *vires* of a legislation are raised or other constitutional questions arise, was rejected and it was held that if the Constitution had allowed the Parliament to empower any other court to exercise jurisdiction under Article 32(3), then certainly tribunals could supplant High Courts in exercise of their jurisdiction under Articles 226 and 227.⁵⁶ Therefore, a ‘wholesale transfer of jurisdiction in regard to any specified subject (other than those which are vested with courts by express provisions of the Constitution) to tribunals, also came to be allowed.⁵⁷

When such wide powers, purely curial in character, were vested in tribunals, it became imperative to insulate judges from political influences, so as to guarantee the performance of judicial duty without ‘fear or favour,

⁵¹ *Id.*, ¶78.

⁵² Law Commission Report, *supra* note 31.

⁵³ *S.P. Sampath Kumar v. Union of India*, (1987) 1 SCC 124.

⁵⁴ *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261, ¶80.

⁵⁵ *See Madras Bar Assn. v. Union of India*, (2014) 10 SCC 1.

⁵⁶ *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261, ¶80.

⁵⁷ *See Union of India v. R. Gandhi*, (2010) 11 SCC 1, ¶107.

affection or ill-will⁵⁸ and to preserve the rule of law.⁵⁹ The fulfilment of judicial duty in this spirit was essential, especially since the Constitution has guaranteed several fundamental rights to citizens, and has empowered the SC and High Courts under Article 32 and Article 226 respectively to protect these rights. The fundamental right to equality guaranteed under Article 14 of the Constitution includes the right to have a person's claim adjudicated by a forum which exercises judicial power in an impartial and independent manner, consistent with recognised principles of adjudication.⁶⁰ Therefore the idea of judicial independence of tribunals is indispensably rooted in the dispensation of 'equal justice for all', which runs through the fabric of our entire Constitution.⁶¹

In order to preserve judicial independence while moulding a place for tribunals within the judicial hierarchy, it thus became essential to assess the practical conditions of their operation. This is to ensure that they were able to function effectively and that they could maintain the quality and standards expected of regular courts.⁶² In *Sampath Kumar*, it was held that in order to be 'effective' substitutes to High Courts, appointments to the tribunals should be made by the Government in consultation with the Chief Justice.⁶³ Justice Bhagwati, taking into account the absence of any provision under the impugned 1985 Act for consultation with the Chief Justice for appointment of the Chairman, Vice Chairman and other members of the Administrative Tribunal, noted in his concurring opinion that such unfettered powers of appointment in the hands of the executive would not be conducive for the independence of the judiciary, particularly when all matters before the Administrative Tribunal would be against the Government or its officers.⁶⁴

Even where the transfer of jurisdiction to a tribunal was with respect to statutorily vested powers of courts, it was necessitated that the tribunal ought to be composed of members of a rank, capacity and status, as equal as possible to the rank, status and capacity of the court which had hitherto dealt with such matters.⁶⁵ Further, in order to preserve its independence, the SC held

⁵⁸ The Constitution of India, Schedule III (Form of Oath or Affirmation to be made by the Judges of the Supreme Court and the Comptroller and Auditor General of India).

⁵⁹ See David Boies, *Judicial Independence and the Rule of Law*, 22 WASHINGTON JOURNAL OF LAW & POLICY 57 (2006).

⁶⁰ *Union of India v. R. Gandhi*, (2010) 11 SCC 1, ¶102.

⁶¹ See *Subhash Sharma v. Union of India*, 1991 Supp (1) SCC 574, ¶29.

⁶² *Thiruvengadam*, *supra* note 4, 425.

⁶³ *S.P. Sampath Kumar v. Union of India*, (1987) 1 SCC 124, ¶21.

⁶⁴ *Id.*, ¶7.

⁶⁵ See Ananth Padmanabhan, *Copyright Board and Constitutional Infirmities: Failure of the Copyright Amendment Act, 2012 and suggestions for reforms*, 5 NUJS L. REV. 703, 711 (2012) (for an excellent discussion on the unique factual considerations in *Union of India v. R. Gandhi*, (2010) 11 SCC 1, which involved a constitutional challenge to the National Company Law Tribunal – while *Sampath Kumar* and *L. Chandra Kumar* were decisions that concerned the transfer of constitutionally vested powers to tribunals, the NCLT case dealt with the transfer of statutory powers that were previously vested in courts).

that members of the tribunal should have the independence and security of tenure associated with courts.⁶⁶

Therefore, when the NTT was created, and the Central Government had been authorised, to notify the area in relation to which each bench would exercise jurisdiction, to determine the constitution of benches, and even to exercise the power of transfer of members of one bench to another bench, the same was held unconstitutional.⁶⁷ Striking down the provisions that vested such authority, the SC held that permitting the Central Government to have any administrative dealings with the NTT would impinge upon the independence and fairness of members of the NTT.⁶⁸ The bench of five judges also went on to hold that:

“For the NTT Act to be valid, the Chairperson and members of the NTT should be possessed of the same independence and security, as the judges of the jurisdictional High Courts (which the NTT is mandated to substitute). Vesting of the power of determining the jurisdiction, and the postings of different members, with the Central Government, in our considered view, would undermine the independence and fairness of the Chairperson and the members of the NTT, as they would always be worried to preserve their jurisdiction based on their preferences/inclinations in terms of work, and conveniences in terms of place of posting. An unsuitable/disadvantageous Chairperson or member could be easily moved to an insignificant jurisdiction, or to an inconvenient posting. This could be done to chastise him, to accept a position he would not voluntarily accede to. We are, therefore of the considered view, that Section 5 of the NTT Act is not sustainable in law, as it does not ensure that the alternative adjudicatory authority, is totally insulated from all forms of interference, pressure or influence from co-ordinate branches of Government.”⁶⁹

If the CCI or the COMPAT is found to be vested with primarily judicial functions or has been substituted for a court or a body that was previously performing judicial functions, then, to stand the test of constitutionality, it must satisfy the criteria laid down by the SC through various judgments. Briefly, the requirements are that the judicial power of the State can be vested only in courts; and it can be vested in tribunals only if they are analogous to

⁶⁶ Union of India v. R. Gandhi, (2010) 11 SCC 1, ¶106.

⁶⁷ Madras Bar Assn. v. Union of India, (2014) 10 SCC 1.

⁶⁸ *Id.*, ¶124.

⁶⁹ *Id.*

courts.⁷⁰ Thus, it is essential that the nature and manner of appointments to the CCI and the COMPAT are in consonance with the established principles relating to preserving judicial independence in judicial appointments.⁷¹ In order to test the validity of the provisions relating to the CCI or the COMPAT, therefore, the nature of the powers and functions vested in the CCI and the COMPAT has to be understood in the backdrop of the evolution of the India's competition regime. This is critical in order to demonstrate that the nature of powers vested in the CCI and the COMPAT is essentially judicial, and that they were both constituted as judicial bodies.

III. CONSTITUTIONALITY OF THE PROVISIONS RELATING TO THE CCI AND THE COMPAT

A. THE MRTP COMMISSION AND THE TRANSFER OF ITS JUDICIAL FUNCTIONS

Influenced by its colonial experience, a newly independent India adopted an economic policy often termed as "protectionist" or "planned", which subjected almost all areas of economic activity to State regulation; and as a consequence, a handful of groups or business houses came to be entrenched with concentrated economic power.⁷² In order to address this issue, the Monopolies and Restrictive Trade Practices Act, 1969 ('MRTP Act'), was enacted, which was the first piece of legislation in the field of competition law in the country.⁷³ The MRTP Act was primarily aimed at controlling monopolies by prohibiting monopolistic and restrictive trade practices.⁷⁴

The MRTP Act provided for the appointment of an investigative wing headed by a Director General, and for the constitution of a permanent body called the Monopolies and Restrictive Trade Practices Commission ('MRTP Commission'), which was to be appointed by the Central Government.⁷⁵ The

⁷⁰ See *Union of India v. R. Gandhi*, (2010) 11 SCC 1, ¶106; *Id.*, ¶113.3.

⁷¹ *Supreme Court Advocates-on-Record Assn. v. Union of India*, (1993) 4 SCC 441; *Supreme Court Advocates-on-Record Assn. v. Union of India*, (2016) 5 SCC 1.

⁷² See The Harris School, *Economic Reform in India*, January, 2006, available at <http://harris.uchicago.edu/sites/default/files/IPP%20Economic%20Reform%20in%20India.pdf>. (Last visited on November 3, 2016).

⁷³ It is pertinent to mention that the MRTP Act was enacted based on the recommendations in the Report of the Monopolies Inquiry Commission under the Chairmanship of Mr. K.C. Das Gupta. The recommendations highlighted the need for a legislation to strike at the concentration of economic power when such concentration leads to common detriment and to reach such a finding it was recommended that the matter should be *judicially decided* by those at the head of the permanent body after an investigative branch (which is attached to the permanent body) had reported that there was *prima facie* evidence to that effect.

⁷⁴ *Statement of Objects & Reasons* of The Monopolies and Restrictive Trade Practices Act, 1969.

⁷⁵ *Id.*, §§8, 5.

M RTP Commission was vested with all the powers of a Civil Court, and proceedings before it were deemed to be judicial proceedings.⁷⁶ It was also vested with wide powers to pass orders granting interim relief, compensation, levy of penalty for contravention of its orders, and even to direct contravening parties to cease and desist from indulging in those activities.⁷⁷ A party aggrieved by the orders of the MR TP Commission was only permitted to file an appeal directly to the SC.⁷⁸ In consonance with the primarily judicial nature of powers vested in MR TP Commission, the MR TP Act mandated that the Chairman of the MR TP Commission was required to have been or qualified to be a judge of a High Court or the SC, and other members were necessarily required to have adequate knowledge or experience in dealing with the law.⁷⁹ However, unlike the procedure for appointment to traditional courts, the power to make appointments remained with the Central Government.⁸⁰

With the economic reforms taking centre stage in 1991, the MR TP Act eventually became obsolete owing to the shift in the needs of the regime, from curbing monopolistic and restrictive trade practices to preserving competition in the economy.⁸¹ A Committee headed by Mr. S.V.S., Raghavan ('Raghavan Committee') was constituted by the Central Government to advise on a modern competition law regime for the country in line with international developments, and to suggest a legislative framework that may entail a new law or appropriate amendments to the MR TP Act.

The Raghavan Committee recommended enacting a new law and the setting up of a competition law authority called the CCI, which, in its 'adjudicatory effort', would deal effectively against specified anti-competitive practices, and would have powers to mete out deterrent punishment to those violating its provisions.⁸² The need for an independent authority was reaffirmed⁸³ by the Raghavan Committee and it was emphasised specifically that the com-

⁷⁶ *Id.*, §12.

⁷⁷ *Id.*, §§12, 12A, 12B, 12C.

⁷⁸ *Id.*, §55.

⁷⁹ *Id.*, §5.

⁸⁰ *Id.*; The MR TP Act was enacted before L. Chandra Kumar and Sampath Kumar had been decided, which mandated consultation with the Chief Justice. Therefore, in relation to the MR TP Commission, the legislature may be precluded from allegations of ignoring the judicial mandate that appointments to tribunals which perform judicial functions akin to courts, could not be left solely in the hands of the Executive.

⁸¹ CUTS International, *Why India Adopted a new Competition Law*, available at http://www.cuts-ccier.org/pdf/Why_India_Adopted_a_new_Competition_Law.pdf (Last visited on November 3, 2016); Vijay Kumar Singh, *Competition Law and Policy in India: The Journey in a Decade*, 4 NUJS L. REV. 523, 526 (2011).

⁸² Raghavan Committee Report, *supra* note 36, ¶6.1.4.

⁸³ Before the MR TP Act was enacted, a committee called the Monopolies Inquiry Commission was set up under the Chairmanship of Mr. K.C. Das Gupta, with a mandate to enquire into the extent and effects of concentration of economic power in private hands, and the prevalence of monopolistic and restrictive trade practices in important sectors of economic activity. The Monopolies Inquiry Commission had recommended that an independent body be set up in

petition law authority should be independent and insulated from political and budgetary controls of the Government.⁸⁴ The need for an investigative wing was also recognized, and it was recommended that the investigative, prosecutorial and adjudicative functions should be separated, thereby respecting the need for judicial independence.⁸⁵

The 2002 Act was enacted after taking into consideration the recommendations made by the Raghavan Committee. It provided for the establishment of the CCI, to prevent practices having adverse effects on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in Indian markets, and for matters connected therewith.⁸⁶ The rubric of the new law broadened the scope of enquiry and powers that were vested in the CCI, as compared to the MRTP Act.⁸⁷ Akin to the MRTP Act, monopolistic trade practices such as predatory pricing, discriminatory treatment, denial of market access, limiting and restricting provision of services and leveraging, were prohibited under the 2002 Act.⁸⁸ Furthermore, like the MRTP Act, the prohibition on restrictive trade practices in the form of vertical agreements such as exclusive dealing, resale-price maintenance and forming a cartel, tie-in arrangements, exclusive supply agreements, exclusive distribution agreements and refusal to deal, was also provided for, under §3 of the 2002 Act.⁸⁹

§66 of the 2002 Act repealed the MRTP Act, and the MRTP Commission was dissolved in effect. The CCI was vested with all powers of the MRTP Commission to pass orders granting interim relief and compensation, levy penalty for contravention of its orders, failure to comply with its directions, making of false statements or omission to furnish material information and direct contravening parties to cease and desist from indulging in those activities.⁹⁰

The 2002 Act also expressly divested the Civil Courts from entertaining any suit or proceeding on any matter in respect of which the CCI

order to tackle the problem, and based on this recommendation the MRTP Commission was set up. See MIC Report, *supra* note 35.

⁸⁴ Raghavan Committee Report, *supra* note 36, ¶4.8.4.

⁸⁵ *Id.*

⁸⁶ The Competition Act, 2002, Statement of Objects and Reasons.

⁸⁷ Dr. S. Chakravarthy, *MRTP Act Metamorphoses into Competition Act*, 12, available at <http://www.cuts-international.org/doc01.doc> (Last visited on August 15, 2011).

⁸⁸ §3 of The Competition Act, 2002 declares any agreement entered into by an enterprise or association of enterprises, or person or association of persons in respect of production, supply, distribution, storage, acquisition or control of goods or provisions of service which causes or is likely to cause an appreciable adverse effect on competition within India, to be void. Monopolistic Trade Practices have an appreciable adverse effect on competition, and are therefore prohibited under §3.

⁸⁹ The Competition Act, 2002, §3.

⁹⁰ *Id.*, §§27, 28, 31, 33, 35.

was empowered under the 2002 Act.⁹¹ In effect, the powers of the MRTTP Commission which was admittedly performing judicial functions, were transferred to the CCI. Further, the 2002 Act broadened the scope of powers that was vested previously in the MRTTP Commission, as demonstrated in the preceding paragraphs, and the additional functions that were vested in the CCI were also curial in nature. Therefore, under the 2002 Act, proceedings before the CCI were undoubtedly judicial in nature.

B. THE CONSTITUTIONAL CHALLENGE TO THE 2002 ACT

Though the CCI was vested with powers akin to a court, the constitution of the CCI did not conform with the acceptable norms of procedure for appointments to the judiciary, and qualifications required for such appointments.⁹² §8(1) of the 2002 Act provided that the CCI was to consist of a Chairman and two or more members (maximum ten). The Chairman and other members had to have been/qualified to be a judge of the SC/High Court, ‘or’ necessarily have special knowledge ‘or’ professional experience of at least fifteen years in “international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or in any other matter, which in opinion of the Central Government, may be useful for the Commission”.⁹³ Therefore, neither was any eligibility criteria, which would ensure the presence of judicial members to man the CCI, outlined; nor was a person who is or has been a Chief Justice of a High Court or a senior judge of a High Court, appointed as the Chairman. The qualification prerequisites in the 2002 Act for the Chairman and other members did not even mandate that the person selected had to be a judge or qualified to be a judge of a High Court, let alone possess experience in, or specialised knowledge in the law. This was completely contrary to the law laid down in Sampath Kumar and the cases that followed.⁹⁴

The manner for selection of the Chairperson and other members of the CCI was notified in accordance with §9 of the 2002 Act, and the Competition Commission of India (Selection of Chairperson and members of the Commission) Rules, 2003 (‘2003 Rules’) were brought into force.⁹⁵ As per Rule 3 of the 2003 Rules, a Selection Committee was to be constituted by the Central Government for the purpose of selection of the Chairperson and members of the CCI. The Selection Committee was to consist of i) a person who was a retired Judge of the SC or a High Court or a retired Chairperson of a Tribunal established under an Act of Parliament or a distinguished jurist or a

⁹¹ *Id.*, §61.

⁹² *See* Parts II.A and II.B.

⁹³ The Competition Act, 2002, §8(2).

⁹⁴ *See* Parts II.A and II.B.

⁹⁵ Rule making power was provided under §63(2)(a) of The Competition Act, 2002.

Senior Advocate for five years or more, ii) a person who had special knowledge of and professional experience of twenty-five years or more in international trade, economics, business, commerce or industry, and iii) a person who had special knowledge of and professional experience of twenty-five years or more in accountancy, management, finance, public affairs or administration, to be nominated by the Central Government.⁹⁶ The Central Government was also authorised to nominate one of the members of the committee to act as the Chairperson;⁹⁷ and the joint secretary in the Ministry of Finance and Company Affairs was to be the Convener of the committee.⁹⁸ This committee was left with the discretion to devise its own procedure for the selection of Chairperson or members of the CCI.⁹⁹

In *Sampath Kumar* it was suggested that appointments to the tribunals that were vested with powers akin to courts, should be made by the Government in 'consultation' with the Chief Justice.¹⁰⁰ Interestingly, when the question of whether 'consultation' meant that judicial primacy was to be accorded to appointments to the superior judiciary came up for consideration in *Supreme Court Advocates-on-Record Assn. v. Union of India*, Justice Ahmadi held, in his dissenting opinion, that the suggestion made in *Sampath Kumar* was to provide 'consultation' with the Chief Justice of India and not 'concurrency' in the matter of appointments to tribunals.¹⁰¹ However in the majority opinion, it was settled that primacy in the matter of appointment of judges to the superior courts was to vest with the judiciary.¹⁰² Even the observation made in Justice Ahmadi's dissenting judgment, that the suggestion in *Sampath Kumar* meant mere consultation with the Chief Justice and did not impute primacy of the judiciary's choice in appointments, was completely ignored by the Parliament while providing for the manner of selection of members and the Chairman of the CCI under the 2002 Act and 2003 Rules. The 2003 Rules explicitly vested unfettered powers of appointment of members and the Chairman of the CCI, with the Central Government.

Naturally, almost immediately after the notification for appointments made under the 2003 Rules was published, a writ petition came to be filed praying for the striking down of Rule 3 of the 2003 Rules and for issuance of directions. *First*, it was prayed that the Central Government should only appoint a person who was a retired Chief Justice or Judge of the SC or a High Court to the CCI. *Second*, it was prayed that the appointees should be nominated by the Chief Justice of India or by a Committee presided over by the

⁹⁶ Competition Commission of India (Selection of Chairperson and members of the Commission) Rules, 2003, Rule 3.

⁹⁷ *Id.*, Rule 3(3).

⁹⁸ *Id.*, Rule 3(4).

⁹⁹ *Id.*, Rule 4(2).

¹⁰⁰ *S.P. Sampath Kumar v. Union of India*, (1987) 1 SCC 124.

¹⁰¹ *Supreme Court Advocates-on-Record Assn. v. Union of India*, (1993) 4 SCC 441, ¶302.

¹⁰² *Id.*, ¶450, 456.

Chief Justice of India.¹⁰³ The challenge, essentially based on the separation of powers doctrine, entailed that the Chairman of the CCI had to be a person connected with the judiciary, and selected by the head of the judiciary, as opposed to the mechanism under the 2002 Act wherein the appointments were allowed to be made by the executive or a non-judicial member was allowed to head the CCI – which effectively amounted to usurpation of judicial power and conferment of the same on a non-judicial body, and which was impermissible under the Constitution.¹⁰⁴

The defence taken by the Government, though it was not finally adjudicated upon, is interesting to note. Even after the Raghavan Committee had observed in its report that the CCI was admittedly a judicial body being vested with powers of a court, it was posited that the CCI was only an ‘expert body’ performing mainly regulatory functions; and therefore there was no need for the judiciary to have any say in the appointment of its members, or for the members to possess any knowledge of the law.¹⁰⁵ During the pendency of the writ petition, however, the challenge of the petitioner (that there was usurpation of judicial power and conferment of the same on a non-judicial body) was sought to be met by the Central Government by taking the stand that an appellate authority would be constituted.¹⁰⁶ Therefore, the SC allowed the Central Government to carry out the amendments, and did not decide finally on the issues involved.¹⁰⁷

C. *THE JUDGMENT IN BRAHM DUTT V. UNION OF INDIA AND THE AMENDMENTS THAT FOLLOWED*

It was the Central Government’s claim that the appellate body which would be constituted would essentially be a judicial body conforming to the standards that had been laid down by the SC.¹⁰⁸ It was on the basis of this stand alone, that the Central Government was given an opportunity to amend the provisions of the 2002 Act, without prejudicing the petitioner’s right to approach the SC post the amendments.¹⁰⁹

Regardless of the fact that the SC declined to answer any of the questions raised in the writ petition, it was unequivocal in expressing that the Central Government could not shy away from the fact that the CCI was vested with a number of adjudicatory functions under the 2002 Act.¹¹⁰ More

¹⁰³ *Brahm Dutt v. Union of India*, (2005) 2 SCC 431.

¹⁰⁴ *Brahm Dutt v. Union of India*, (2005) 2 SCC 431, ¶3.

¹⁰⁵ *Id.*, ¶5.

¹⁰⁶ *Id.*, ¶4.

¹⁰⁷ *Id.*, ¶7.

¹⁰⁸ *Id.*, ¶4.

¹⁰⁹ *Id.*, ¶5.

¹¹⁰ *Id.*, ¶6.

importantly, noting the proposed amendments by the Central Government, the SC observed that:

“...if an expert body is to be created as submitted on behalf of the Union of India consistent with what is said to be the international practice, it might be appropriate for the respondents [Central Government] to consider the creation of two separate bodies, one with expertise that is advisory and regulatory and the other adjudicatory. This followed up by an appellate body as contemplated by the proposed amendment, can go a long way, in meeting the challenge sought to be raised in this Writ Petition based on the doctrine of separation of powers recognized by the Constitution.”¹¹¹

Taking into account the judgment of the SC in *Brahm Dutt v. Union of India* ('Brahm Dutt'), and consultations with various Ministries, the Competition (Amendment) Bill, 2006 ('2006 Bill') was drafted and introduced in the Parliament.¹¹² Thereafter, the 2006 Bill was referred for examination to the Parliamentary Standing Committee and based on the recommendations of the said Committee, the 2007 Amendment Act came to be passed. The Statement of Objects and Reasons of the Competition (Amendment) Bill, 2007 expressly stated that the amendments being brought were in light of the observations made by the SC in the *Brahm Dutt*.¹¹³ However, the structural amendments in respect of the CCI, brought about by the 2007 Amendment Act, as examined below, will go on to show that it was absolutely illusory and an exercise in complete misapplication of the *dictum* in *Brahm Dutt*.

In accordance with the stand taken by the Central Government in *Brahm Dutt*, the 2007 Amendment Act provided for the establishment of an appellate body, the COMPAT, through the insertion of Chapter VIIIA in the 2002 Act.¹¹⁴ The COMPAT was empowered to hear and dispose of appeals against

¹¹¹ *Id.*

¹¹² The Competition (Amendment) Bill, 2006, Statement of Objects and Reasons.

¹¹³ The Competition (Amendment) Bill, 2007, Statement of Objects and Reasons, recorded that: “2. The Competition Commission of India was established on the 14th October, 2003 but could not be made functional due to filing of a writ petition before the Hon'ble Supreme Court. While disposing of the writ petition on the 20th January, 2005, the Hon'ble Supreme Court held that if an expert body is to be created by the Union Government, it might be appropriate for the Government to consider the creation of two separate bodies, one with expertise for advisory and regulatory functions and the other for adjudicatory functions based on the doctrine of separation of powers recognised by the Constitution. Keeping in view the judgment of the Hon'ble Supreme Court, the Competition (Amendment) Bill, 2006 was introduced in Lok Sabha on the 9th March, 2006 and the same was referred for examination and report to the Parliamentary Standing Committee. Taking into account the recommendations of the Committee, the Competition (Amendment) Bill, 2007 is being introduced.”

¹¹⁴ The Competition (Amendment) Act, 2007, §43.

any decision, direction or order of the CCI, or to adjudicate on any claim for compensation that may arise from findings of the CCI.¹¹⁵

The CCI was contemplated to be an ‘expert body’.¹¹⁶ However, no requisite amendments were made to provisions relating to the functions exercisable by the CCI under the 2002 Act. The changes brought about by the 2007 Amendment Act with regard to the CCI were only on the *structural level* – amendments were made to §§22, 23, 24 and 25 of the 2002 Act, which, prior to being amended, provided for distribution of business while the CCI exercises its jurisdiction and powers ‘sitting in benches’. The 2007 Amendment Act provided that the CCI was required to meet at such times and places, and to observe such rules of procedure in regard to transaction of business at its ‘meetings’, as may be provided by regulations.¹¹⁷ Another amendment on the structural level was in respect of §8 of the 2002 Act, which no longer contained the requirement that a person appointed as a member or Chairman of the CCI must be qualified to be a judge of a High Court, after the 2007 Amendment Act.¹¹⁸

The only amendment made with regard to the CCI’s functions was the deletion of §34 of the 2002 Act that vested the power to grant compensation in the CCI.¹¹⁹ The power to grant compensation by virtue of the 2007 Amendment Act was transferred to the COMPAT.¹²⁰ Thus, it is evident that though the amendments were intended to divest the CCI of any adjudicatory role, such divestment was entirely illusory since the 2007 Amendment Act merely effected changes at the structural level. All other functions of the CCI were left intact.

The observations in *Brahm Dutt* clearly evince that the SC set out the need to establish three separate bodies – the first to deal with regulatory and advisory functions, the second to perform purely adjudicatory functions, and the third to act as an appellate authority. The impossibility of divesting the CCI of any adjudicatory role, especially when it was conceptualised and established as a judicial body, perhaps weighed in the minds of the learned judges in *Brahm Dutt*, when they observed that “it cannot be gainsaid that that the Commission as now contemplated [prior to the 2007 Amendment Act], has a number [of] adjudicatory functions as well”.¹²¹ By blatantly misapplying the observation

¹¹⁵ The Competition Act, 2002, §53A.

¹¹⁶ The Competition (Amendment) Bill, 2007, Statement of Objects and Reasons, recorded: “3. The Competition (Amendment) Bill, 2007, inter alia, provides for the following :— (a) the Commission shall be an expert body which would function as a market regulator for preventing and regulating anti-competitive practices in the country in accordance with the Act and it would also have advisory and advocacy functions in its role as a regulator;”

¹¹⁷ The Competition (Amendment) Act, 2007, §17.

¹¹⁸ *Id.*, §6.

¹¹⁹ *Id.*, §27.

¹²⁰ The Competition Act, 2002, §53A(1)(b).

¹²¹ *Brahm Dutt v. Union of India*, (2005) 2 SCC 431, ¶6.

in Brahm Dutt to exclude the CCI from being subjected to the standards of a court, the 2002 Act was inevitably left susceptible to a constitutional challenge.

D. THE CASE AGAINST THE CCI AND THE COMPAT

As observed above, the seeds for a constitutional challenge were effectively sown by the 2007 Amendment Act. The structural changes brought about in the functioning of the CCI through the 2007 Amendment Act, only served to upsurge the case against the 2002 Act that was subject to challenge in Brahm Dutt. It has also acted counterproductively towards achieving the very object that was sought to be achieved by the 2002 Act, as is discernable from the following analysis of the challenge against various provisions of the 2002 Act, of which the judgment is awaited before the Delhi High Court.¹²²

The aforementioned challenge arose in a case against a group of automobile manufacturers, wherein the CCI, in its final Order dated August 25, 2014, held that the automobile manufacturers had contravened §§3 and 4 of the 2002 Act.¹²³ The allegation in the complaint was that anti-competitive practices were being carried out in relation to spare parts for the cars, which were not available in the open market. In addition to imposing a penalty of about INR 2545 crores along with a cease and desist order,¹²⁴ the CCI also directed the automobile manufacturers to establish an effective system, to make the spare parts and diagnostic tools easily available through an efficient network, and to ensure that no impediments were placed on the operations carried out in independent garages.¹²⁵ It was this Order of the CCI that gave rise to writ petitions in the Delhi High Court that were filed by the automobile manufacturers challenging various provisions of the 2002 Act as unconstitutional.¹²⁶

One ground particularly relating to the Order of the CCI dated August 25, 2014, which also led to impugning §22 of the 2002 Act, merits mention, as it serves to demonstrate the repercussions of the 2007 Amendment Act. As mentioned above, prior to the 2007 Amendment Act, §22 provided for the constitution of 'Benches of Commission' to exercise its jurisdiction and powers. With the 2007 Amendment Act, this was changed to 'Meetings of the Commission'.¹²⁷ Further, after the 2007 Amendment Act, §22(2) provides that if the Chairperson is unable to attend a meeting, the senior-most member present at the meeting is to preside over the meeting; and §22(3) provides that all questions brought up in any meeting of the CCI are to be decided by a majority

¹²² Mahindra and Mahindra Ltd. v. Competition Commission of India, WP (C) No. 6610 of 2014 (Del) (Pending).

¹²³ Competition Commission of India, Shamsheer Kataria, In re, 2014 SCC OnLine CCI 95.

¹²⁴ *Id.*, ¶22.3.

¹²⁵ *Id.*, ¶22.6.

¹²⁶ Mahindra and Mahindra v. Competition Commission of India, WP (C) No. 6610 of 2014 (Del) (Pending).

¹²⁷ The Competition (Amendment) Act, 2007, §17.

of members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the member presiding is to have a second or casting vote. The proviso to §22(3) states that the quorum for such meetings will be three members.¹²⁸

According to the amended §8 of the 2002 Act, the maximum number of members that may be appointed to the Commission at a time, excluding the Chairperson, is six.¹²⁹ In view of §8, it is important to point out that the proviso to §22(3) (that provides for a quorum of three members), is contradictory to the main provision which gives statutory recognition only to a decision rendered by a majority of members (which may be up to six in number).¹³⁰ The proviso therefore validates a decision by three members present and voting in a meeting, even though the same may not constitute a majority of the members who are appointed to the Commission at a given time. Thus, the proviso is inconsistent with the main provision, and with settled law that a proviso to a section is not independent of the main section of an Act, and cannot render the main provision itself ineffective.¹³¹

§23(3) of the 2002 Act, and the proviso thereunder, also envisage a scenario wherein a matter can be heard by different sets of members at different stages, and a decision may be given by a different set of members. This negates the established rule of ‘he who hears must decide’.¹³² A failure to follow this basic procedural mandate would result in a situation where one person hears and another decides, or not all persons who have heard the matter, decide finally upon it. It has been held that in such a case, affording a right to hearing – an important facet of natural justice – would become an empty formality.¹³³

Because of the 2007 Amendment Act, in the case before the CCI against the automobile manufacturers mentioned above,¹³⁴ seven members of the CCI were present at the meeting, at the initiation of hearing. However, due to the retirement of four members, the final Order dated August 25, 2014, was passed only by three members; and the three members were not even

¹²⁸ *Id.*

¹²⁹ *Id.*, §6.

¹³⁰ §10 of The Competition Act, 2002 provides that 10 members shall be maximum number of members be selected to the CCI.

¹³¹ *South Asia Industries (P) Ltd. v. S. Sarup Singh*, AIR 1966 SC 346, ¶16, 17; *CIT v. Ajay Products Ltd.*, AIR 1965 SC 1358, ¶18, 19.

¹³² *See United Commercial Bank Ltd. v. Workmen*, AIR 1951 SC 230 (wherein it was held that all members who commenced hearing the matter ought to finally decide it. Further it was held that a practice to the contrary, where only a few amongst the members who started hearing finally decided the matter, would violate principles of fair hearing, which include the principle of ‘he who hears must decide’.)

¹³³ *See Competition Appellate Tribunal (New Delhi)*, All India Organization of Chemists and Druggists, In re, 2015 SCC OnLine Comp AT 380; *Gullapalli Nageswar Rao v. A.P. SRTC*, AIR 1959 SC 308, ¶27.

¹³⁴ *Competition Commission of India, Shamsher Kataria*, In re, 2014 SCC OnLine CCI 95.

consistently present at all the meetings before passing of the Order.¹³⁵ This practice was clearly against established norms of judicial procedure and principles of natural justice that require that all those who have heard the matter ought to finally decide it.¹³⁶ This formed one of the main grounds of challenge before the Delhi High Court.

The provision of casting vote or second vote is also antithetical to the judicial process and suffers from the vice of arbitrariness and unreasonableness.¹³⁷ Under our judicial system, the seniority of the member concerned/judge has never been a criteria based upon which a decision can be reached. Therefore, §22(3) that vests the Chairperson or member presiding with such an extraneous power, is liable to be struck down as unconstitutional.

§§8 and 9, and §§53C and 53D of the 2002 Act, which relate to composition of the CCI and the COMPAT, and the manner of selection of members and the Chairperson of the CCI and the COMPAT are also the subject matter of challenge and will be analysed in the following paragraphs. Predictably, the Central Government's defence was aimed at claiming that after the 2007 Amendment Act, the CCI no longer had any adjudicatory role. The following paragraphs point out the constitutional infirmities in these provisions relating to the CCI and the COMPAT, and the reasons for which the defence of the Central Government does not hold any water.

1. Nature of Functions under the 2002 Act

Despite an effort of the legislature to distance the CCI from being viewed as a judicial body, the judicial nature of functions vested with the CCI remained intact even after the 2007 Amendment Act. For instance, the CCI continues to be vested with the power to declare any 'agreement' defined in §2(b) of the 2002 Act, which is entered into between parties in contravention of §3, to be void. Such a power of voiding an agreement is otherwise only vested with courts, as is evident on an examination of provisions of the Indian Contract Act, 1872.¹³⁸

Furthermore, under §19 of the 2002 Act, the CCI was empowered to pass orders based on enquiry into agreements. Besides being vested with powers to impose penalty and give directions, the CCI is even vested with powers to direct that the agreement shall stand modified to the extent and in the manner that may be prescribed.¹³⁹ Annulment of a contract under the Indian

¹³⁵ *Id.*

¹³⁶ *Supra* note 132.

¹³⁷ *Shobhana Shankar Patil v. Ramchandra Shirodkar*, 1996 SCC OnLine Bom 55 : AIR 1996 Bom 217, ¶9.

¹³⁸ Unless the parties to an agreement have agreed to arbitration.

¹³⁹ The Competition Act, 2002, §19.

Contract Act, 1872 can only be either through consent of the parties to the contract, or through the discharge of judicial/curial functions giving such effect.¹⁴⁰ Since the provisions of the 2002 Act vest the power to modify a contract or declare such a contract to be void, with the CCI, it necessarily follows that the CCI cannot be a mere expert or regulatory body, and that it is also performing functions that are purely curial in nature. Besides, under the 2002 Act itself, even post the 2007 Amendment Act, the CCI has been vested with powers that are vested in a Civil Court.¹⁴¹ While §36 of the 2002 Act provides the CCI with the power to regulate its own procedure, §36(2) grants it the same powers as that of a Civil Court with respect to certain matters, including summoning witnesses, requesting production of documents and receiving evidence on affidavits.

The fact that the CCI performs adjudicatory functions is also no longer *res integra*.¹⁴² There was a complete transfer of power from the MRTP Commission, a body vested with judicial functions, to the CCI; the powers of the CCI only came to be broadened under the 2002 Act (as compared to the powers of the MRTP Commission).¹⁴³ It was for this reason that under the 2002 Act, prior to the 2007 Amendment Act, all proceedings were deemed to be judicial proceedings.¹⁴⁴

Both the Monopolies Inquiry Commission Report and the Raghavan Committee Report, to which the MRTP Act and the 2002 Act were corollary, had stressed on the judicial nature of the primary functions to be carried out by the MRTP Commission and the CCI, which necessitated that they be kept at arm's length from the executive.¹⁴⁵ It is also pertinent to reiterate here that the creation of the COMPAT did not in any way divest the CCI of its adjudicatory role, as was sought to be projected by the Central Government, since the functions of the CCI under the 2002 Act remained the same even after the 2007 Amendment Act.¹⁴⁶ That the CCI continues to primarily perform judicial functions, thus, cannot be gainsaid.

When the jurisdiction of a court is ousted, or when there is a transfer of judicial power, it is incumbent that a judicial or quasi-judicial body then necessarily exercises the jurisdiction.¹⁴⁷ In *Madras Bar Assn. v. Union of India* ('Madras Bar Association'),¹⁴⁸ it was settled that judicial power could be transferred to tribunals. However, it was held that whenever there was such transfer,

¹⁴⁰ See The Indian Contract Act, 1872, §§62, 19-25.

¹⁴¹ The Competition (Amendment) Act, 2007, §29.

¹⁴² *Competition Commission of India v. SAIL*, (2010) 10 SCC 744, ¶9; *Rangi International v. Nova Scotia Bank*, (2013) 7 SCC 160, ¶3.

¹⁴³ See Part III.A.

¹⁴⁴ The Competition Act, 2002, §36(3).

¹⁴⁵ Raghavan Committee Report, *supra* note 36, ¶4.8.4; MIC Report, *supra* note 35, 159.

¹⁴⁶ See Part III.C.

¹⁴⁷ *Supra* note 115

¹⁴⁸ *Madras Bar Assn. v. Union of India*, (2014) 10 SCC 1, ¶113.2.

all conventions/customs/practices of the court, sought to be replaced, had to be incorporated in the court/tribunal created.¹⁴⁹ Therefore, the CCI, which was vested with judicial functions that were previously performed by an adjudicatory body (the MRTP Commission), and were divested from civil courts, was required to be constituted and to function in consonance with the salient characteristics and standards of a traditional court.¹⁵⁰ However, as the following paragraphs will illustrate, the procedure and qualifications prescribed for appointment of members and the Chairman of the CCI and the COMPAT, are antithetical to judicial independence, and to the doctrine of separation of powers, which is the *sine qua non* for any court/tribunal that is vested with curial functions previously vested in a court.¹⁵¹

2. Appointments and Qualifications under the 2002 Act

With regard to the composition of, and appointments to judicial tribunals, two important requisites emerging from the preceding discussion can be summarised as follows.¹⁵² The CCI being a judicial tribunal, should have members of rank, status and capacity, as equal as possible to the rank, status and capacity of judges of a court;¹⁵³ and most importantly, the CCI would be able to carry out judicial functions, in a manner consistent with the Constitution, only where independence of its members is assured, without any threat of executive interference.¹⁵⁴

In L. Chandra Kumar, while addressing the issue of competence of those who man administrative tribunals, the contention that only those with a judicial qualification or background should be appointed was not accepted.¹⁵⁵ It was held that it was necessary to bear in mind that the setting up of these tribunals was founded on the premise that specialist bodies, comprising both trained administrators and members with judicial experience, would by virtue of their specialised knowledge, be better equipped to dispense speedy efficient justice.¹⁵⁶ Therefore a “judicious mix” of judicial members, and those with specialised knowledge or grass root level experience, was contemplated. However, even with regard to the latter category, it was contemplated that members should

¹⁴⁹ *Id.*

¹⁵⁰ The rationale stems from the fact that the judicial power of State can be vested only in courts; and it can be vested in tribunals, only if the tribunals are analogous to courts (and such tribunals are judicial tribunals).

¹⁵¹ *See* Union of India v. R. Gandhi, (2010) 11 SCC 1; Madras Bar Assn. v. Union of India, (2014) 10 SCC 1.

¹⁵² *Infra* Part I.D

¹⁵³ *See* Union of India v. R. Gandhi, (2010) 11 SCC 1; Madras Bar Assn. v. Union of India, (2014) 10 SCC 1.

¹⁵⁴ *See* Union of India v. R. Gandhi, (2010) 11 SCC 1, ¶64.

¹⁵⁵ L. Chandra Kumar v. Union of India, (1997) 3 SCC 261, ¶95.

¹⁵⁶ *Id.*

have some legal/judicial background. Therefore, the qualification requirement for even non-judicial members was knowledge of the law.¹⁵⁷

In the later decision of Madras Bar Association, it was held that technical members could be appointed to tribunals only where technical expertise was essential for disposal of matters and not otherwise.¹⁵⁸ Further, it was held that where the adjudicatory process was transferred to tribunals, the stature of members who constitute the tribunal would depend on the jurisdiction that was being transferred to the tribunal.¹⁵⁹ For instance, if the jurisdiction of a High Court was transferred to a tribunal, the members of the newly constituted tribunal should possess the qualifications required of judges of a High Court. Similarly, if the jurisdiction and functions were sought to be transferred from District Courts or Civil Courts, then the members of the tribunal should possess equivalent qualifications of District Court judges.¹⁶⁰

As detailed above, the CCI retained essential judicial functions even post the 2007 Amendment Act. However, §8 of the 2002 Act, that provides for the composition of the CCI, does not make it mandatory for the Chairperson or members appointed to the CCI to have any qualifications in the law, let alone qualifications equivalent to a judge of a District Court or High Court. The COMPAT, unlike the CCI, was admittedly constituted as a judicial body after the 2007 Amendment Act.¹⁶¹ As per §53C of the 2002 Act, the COMPAT is to consist of a Chairperson and a maximum of two and minimum of one other member/members. As per §53D of the 2002 Act, it is mandatory for the presence of one judicial member on the COMPAT, i.e. the Chairman appointed necessarily has to be a judge/have been a judge of a High Court or the SC. Therefore, where a Chairman and two other members are appointed, it would result in a situation where the presence of non-judicial members would be greater than judicial members.

In a similar issue regarding the qualifications of members of the NTT, as provided under the National Tax Tribunal Act, 2005, the SC found it difficult to appreciate how technical members would handle complicated questions of law related to tax matters and also questions of law on a variety of subjects (unconnected with tax), in exercise of jurisdiction vested with the NTT.¹⁶² Striking down the provision containing the qualification requirement, which did not mandate knowledge of or qualification in the law, it was held that:

¹⁵⁷ *Id.*

¹⁵⁸ *See* Madras Bar Assn. v. Union of India, (2014) 10 SCC 1, ¶107.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *See* Part III.C; *See also* The Competition Act, 2002, §53O(3) (by virtue of which every proceeding before the COMPAT is deemed to be a judicial proceeding).

¹⁶² Madras Bar Assn. v. Union of India, (2014) 10 SCC 1, ¶126.

“...That in our view would be a tall order. An arduous and intimidating asking. Since the Chairperson/members of NTT will be required to determine “substantial questions of law”, arising out of decisions of the Appellate Tribunals, it is difficult to appreciate how an individual, well-versed only in accounts, would be able to discharge such functions. Likewise, it is also difficult for us to understand how Technical members, who may not even possess the qualification of law, or may have no experience at all in the practice of law, would be able to deal with “substantial questions of law”, for which alone, NTT has been constituted.”¹⁶³

Both the CCI and the COMPAT, while exercising functions under the 2002 Act, would necessarily be confronted with questions related to other laws such as contract law, constitutional law, etc. For instance, the determination of whether an agreement entered into should be rendered void for having an appreciable adverse effect on competition,¹⁶⁴ necessarily involves the determination of a question of “law.”¹⁶⁵ Moreover, the CCI and the COMPAT are vested with powers to impose levy of penalty, to direct modification of contract, and to even direct payment of costs,¹⁶⁶ which affect the fundamental right to trade and occupation guaranteed under Article 19(1)(g) of the Constitution. Determining “reasonableness” of an Order that curtails a right guaranteed under the Constitution is purely a question of “law.”¹⁶⁷ Where a statutory authority is performing functions which affect rights of individuals, it must necessarily be just, fair and reasonable.¹⁶⁸ This standard was established in the context of the *Central Government*. Therefore, the threshold would be even higher when the function is being performed by the CCI, which is vested with ‘judicial’ functions. Therefore, §§8, 53C and 53D of the 2002 Act are liable to be struck down, since they allow for a situation where an order or judgment could be passed by a majority of the members manning the CCI and the COMPAT, who do not possess any legal qualification.

The manner of appointments too was unconstitutional. §9 of the 2002 Act, which relates to the composition of the Selection Committee – constituted for the appointment of the Chairperson and members of the CCI – provides for four executive members, besides the Chief Justice or his nominee, to be part of the Selection Committee. Therefore, there is a dominance of

¹⁶³ *Id.*

¹⁶⁴ The Competition Act, 2002, §3.

¹⁶⁵ While reaching a determination on voidability of a Contract, an adjudicator will necessarily have to apply principles emanating from contract law – to determine for instance, the existence of a contract or the meeting of minds between the parties involved.

¹⁶⁶ The Competition Act, 2002, §27.

¹⁶⁷ *See City and Industrial Development Corpn. v. Dosu Aardeshir Bhiwandiwalla*, (2009) 1 SCC 168, ¶30.

¹⁶⁸ *See Rustom Cavasjee Cooper v. Union of India*, (1970) 1 SCC 248 : AIR 1970 SC 564.

executive members on the Selection Committee, regarding which the law has been settled that such a procedure for appointments is unconstitutional, since it would impinge on judicial independence.¹⁶⁹ Similar provisions relating to the National Company Law Tribunal and the NTT were struck down on the ground that judicial members on the Selection Committee were in minority.¹⁷⁰

The provision relating to the Selection Committee, which is envisaged to make appointments to the COMPAT, also allows for a majority of members of the executive.¹⁷¹ It is important to reiterate here that the COMPAT was contemplated to be an appellate body, exercising jurisdiction equivalent to a High Court, and was therefore vested with not *primarily*, but *only* judicial functions.¹⁷² Only a direct appeal to the SC is permissible under the 2002 Act.¹⁷³ A similar provision (compared to §53E of the 2002 Act) with regard to qualifications and appointments of members of the NTT (which was also contemplated to be a body at the appellate stage exercising functions previously vested in High Courts) was struck down on the ground that such a situation would amount to transferring the State's judicial powers to the executive, thus compromising on the independence of the judiciary.¹⁷⁴

Judicial independence is a fundamental condition that ensures that the judiciary delivers justice without being influenced by any extraneous considerations; and this ideal is intrinsic to the preservation of the rule of law.¹⁷⁵ By allowing for appointments to the CCI and the COMPAT to be made by a majority of executive members, these bodies cannot function as independent bodies insulated from any political influence, as was contemplated by the Raghavan Committee Report, and as is necessitated by the rule of law.¹⁷⁶ Judicial independence has been recognized to be a part of the basic structure of the Constitution, and cannot be compromised by way of a constitutional amendment or legislation.¹⁷⁷ The SC has used this basic structure doctrine specifically in the case of tribunals to uphold the ideal of judicial independence, by striking down provisions which vested egregious power to make appointments

¹⁶⁹ Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441; Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1.

¹⁷⁰ See Union of India v. R. Gandhi, (2010) 11 SCC 1, ¶113-120; Madras Bar Assn. v. Union of India, (2014) 10 SCC 1, ¶126,127.

¹⁷¹ The Competition Act, 2002, §53E.

¹⁷² See Parts III.B and III.C.

¹⁷³ The Competition Act, 2002, §53T.

¹⁷⁴ See Madras Bar Assn. v. Union of India, (2014) 10 SCC 1.

¹⁷⁵ See generally Boies, *supra* note 59; See also MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 17-27 (1986) (which describes judicial independence at the individual level. It relates to the notion of conflict resolution by a “neutral third”, that is, someone who can be trusted to settle controversies after considering only the facts and their relation to relevant laws free from corrupting influences.).

¹⁷⁶ See, *supra*, I.D

¹⁷⁷ Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1, ¶295-300, 380.

in the hands of the executive.¹⁷⁸ §§9 and 52E of the 2002 Act are similarly placed, and are therefore liable to be struck down as unconstitutional, so that judicial independence may be preserved, and the rule of law, upheld.

3. Practical Implications of 2007 Amendment Act

The attempt of the parliament to interfere with the judicial domain in the field of competition law through the COMPAT and the CCI, has, besides rendering various provisions of the 2002 Act unconstitutional, also manifested in the day-to-day functioning of the two bodies. The procedure adopted by the CCI in hearing the case relating to automobile manufacturers, for instance, was premised on the belief that since the CCI was not a judicial body, norms or rules against adopting such procedures did not exist¹⁷⁹ This case resulted in a challenge to the constitutionality of various provisions of the 2002 Act before the Delhi High Court.¹⁸⁰ But in a number of other cases, such procedural lapses are assailed along with the merits of the case decided by the CCI, before the COMPAT.¹⁸¹ These appeals have resulted in the matters being remanded back to the CCI, to consider them afresh by following due procedure, as is required to be followed by a body performing judicial functions.¹⁸² The appellate body constituted after the 2007 Amendment Act has itself acknowledged that the judicial nature of functions devolved on the CCI was consciously envisaged to remain vested with the CCI even after the 2007 Amendment Act, and has expressed serious disapproval of the manner of functioning of the CCI on the belief that it is only an expert/regulatory body.¹⁸³

Since the CCI is primarily performing functions that are curial in nature,¹⁸⁴ if it can be demonstrated that there has been non-application of mind, or that the matter has been decided or signed by one who has not heard the matter, the entire order is rendered *non est*.¹⁸⁵ Therefore, in such cases, the entire

¹⁷⁸ *Id.*; Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441.

¹⁷⁹ Mahindra and Mahindra v. Competition Commission of India, WP (C) No. 6610 of 2014 (Del) (Pending).

¹⁸⁰ *Id.*

¹⁸¹ See Competition Appellate Tribunal (New Delhi), Board of Control for Cricket in India, In re, 2015 SCC OnLine Comp AT 238 ¶38 (where the Order of the CCI was assailed amongst other grounds, on the ground that the requirement of *audi alteram partem* was not complied with by the CCI before recording an adverse finding); See also Competition Appellate Tribunal (New Delhi), Lafarge India Ltd., In re, 2015 SCC OnLine Comp AT 1120 (where the Order of the CCI was assailed amongst other grounds, on the ground that the Chairman of the CCI who was not present during a few hearings was a signatory to the final Order).

Id.

¹⁸² Competition Appellate Tribunal (New Delhi), Lafarge India Ltd., In re, 2015 SCC OnLine Comp AT 1120, ¶48.

¹⁸³ *Id.*

¹⁸⁴ See Part III.D.1.

¹⁸⁵ This is in light of settled law relating to the application of principles of natural justice, as *sine qua non* of the adjudicatory process.

exercise of the examination of the merits of the matter, undertaken by the CCI, is put into cold storage and the process has to be started afresh.

This not only leads to delay in delivery of justice, and the redundancy of a regime to protect and promote competition, but it also results in a considerable waste of the aggrieved parties' (including the state exchequer) and the CCI's money, efforts, and time. In *Lafarge India Ltd., In re*, for instance, the case appealed before the COMPAT related to a finding against certain cement companies indulging in cartelisation, and a fine amounting to over INR 6000 crores was imposed on them by the CCI.¹⁸⁶ However, this imposition of penalty was struck down by the COMPAT, not for finding fault with the reasoning of the CCI in its finding, but for violation of principles of natural justice that were required to be followed by the CCI while finding adversely against the cement companies.¹⁸⁷ Even in the case against the automobile manufactures, which heralded the writ petition challenging the constitutionality of various provisions of the 2002 Act, as discussed above,¹⁸⁸ the final Order of the CCI imposing a penalty of over INR 2500 crores, had been stayed by the High Court till the disposal of the writ petition.¹⁸⁹

The Central Government attempted to distance the CCI from being subject to the standards applicable to judicial tribunals, under the guise of following the SC's decision in *Brahm Dutt*.¹⁹⁰ But, the fact remains that since the powers vested in the CCI remained primarily judicial in nature, the decisions rendered by the CCI would be necessarily subject to scrutiny as a decision rendered by a court of equivalent stature. The above paragraphs go on to show how the Government's attempt has been counterproductive, both to the fulfilment of the CCI's function of prohibiting trade practices – thus causing an appreciable adverse effect – and to rendering speedy justice, which formed the very purpose of enacting the 2002 Act. Therefore, besides the provisions of the 2002 Act being unconstitutional, their operation has failed to fulfil even the objects and purposes for which the 2002 Act was brought into force.

IV. CONCLUSION

The 2002 Act was brought into effect by the Parliament to further the Directive Principles stated in the Constitution, and to achieve fair competition and consumer protection; the CCI, and later the COMPAT, were constituted in order to carry out the aims of the 2002 Act. Though the legislature

¹⁸⁶ Competition Appellate Tribunal (New Delhi), *Lafarge India Ltd., In re*, 2015 SCC OnLine Comp AT 1120, ¶97,98 (December 11, 2015).

¹⁸⁷ *Id.*

¹⁸⁸ Part III.D.

¹⁸⁹ *Mahindra and Mahindra v. Competition Commission of India*, WP (C) No. 6610 of 2014 (Del) (Pending), (Order dated 30-9-2014).

¹⁹⁰ Part III.C.

apparently intended to vest the CCI with a *primarily* adjudicatory role, and the COMPAT with *only* an adjudicatory role, a strong case can be made to demonstrate how the executive has attempted to secure control over the CCI's and the COMPAT's composition and functioning, resulting in the dilution of judicial independence.

Mere structural changes in the procedure for functioning have not undone the purpose for which the CCI was created, or the nature of functions that remain vested in the CCI. Instead, they have inhibited effective fulfilment of the CCI's functions under the 2002 Act. With regard to the COMPAT, it was admittedly constituted as judicial body; and since a direct appeal is preferable only to the SC from an order of the COMPAT, it has to be considered analogous to a High Court. However, the 2002 Act allows for a majority of non-judicial members to man the COMPAT.¹⁹¹

An analysis of the case law dealing with various constitutional issues related to tribunals and their exercise of judicial/quasi-judicial functions,¹⁹² demonstrates the susceptibility of the provisions concerning the functioning of the CCI and the COMPAT, to a constitutional challenge. Not only has the composition and manner of appointments directly infringed upon judicial independence, they have also had a bearing on the effective functioning of the two bodies, which has led to compromising judicial standards in the country.

While it is true that when the constitutionality of statutes is being examined, the doctrine of severability can be applied in cases where a few provisions or a single provision is found to be unconstitutional,¹⁹³ with regard to the 2002 Act, the unconstitutionality strikes at the structural and functional aspects of the bodies that were created to carry out the purposes of the 2002 Act. Therefore, the infirmity is pervasive and runs through the entire 2002 Act, and the statute should be annulled in its entirety.¹⁹⁴ With the judgment of the Delhi High Court which would decide such a challenge in the offing,¹⁹⁵ it would not

¹⁹¹ Presently, the COMPAT comprises of a retired Judge of the Supreme Court (the only judicial member), a former member of the Indian Revenue Services and a member of the Indian Administrative Services (both non-judicial members).

¹⁹² *Madras Bar Assn. v. Union of India*, (2014) 10 SCC 1; *Union of India v. R. Gandhi*, (2010) 11 SCC 1; *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261; *S.P. Sampath Kumar v. Union of India*, (1987) 1 SCC 124.

¹⁹³ *See Kihoto Hollohan v. Zachillhu*, 1992 Supp (2) SCC 651, ¶66; *R.M.D. Chamarbaugwalla v. Union of India*, AIR 1957 SC 628, ¶19-21.

¹⁹⁴ *See generally* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH RESTS UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION, Vol.1 360,361 (8th ed., 1927) (For an understanding of the origin and application of the doctrine of severability. Particularly, discussion on if the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety).

¹⁹⁵ *Mahindra and Mahindra v. Competition Commission of India*, WP (C) No. 6610 of 2014 (Del) (Pending)

be too far-fetched to suggest that the 2002 Act, and all that it seeks to achieve, are hanging by a thin thread.

The case of the CCI and the COMPAT makes for a particularly interesting study on the topic of ‘tribunalisation of justice’ in India, because it is for the second time that it is being assailed before the judiciary. Therefore, it provides a fitting illustration of the judiciary’s cautious approach towards executive interference in the name of tribunals, as well as of the executive’s disregard for the judicial mandate.