

IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION  
**WRIT PETITION (C) No..... of 2015**

**IN THE MATTER OF:**

1. SUPREME COURT ADVOCATES-ON-RECORD  
ASSOCIATION  
Through Secretary  
Mr. Vipin Nair  
Office of the Association is located at  
Golden Jubilee Bar Room  
Ground Floor, Supreme Court of India  
New Delhi.  
residing at: C-73, Neeti Bagh,  
New Delhi.  
nairvipin73@gmail.com
  
2. Mr. Vipin Nair,  
Advocate-on-record,  
Secretary of Petitioner No.1  
residing at: C-73, Neeti Bagh,  
New Delhi. .. Petitioners

**VERSUS**

3. Union of India  
Ministry of Law and Justice  
Shastri Bhawan  
New Delhi  
Through Secretary, Ministry of Law, Contesting  
...Respondents

**PETITION UNDER ARTICLE 32 OF THE  
CONSTITUTION OF INDIA**

TO

THE HON'BLE THE CHIEF JUSTICE OF INDIA AND  
HIS COMPANION JUDGES OF THE SUPREME COURT OF  
INDIA

THE HUMBLE PETITION OF  
THE PETITIONER ABOVE NAMED

MOST RESPECTFULLY SHOWETH:

1. The First Petitioner is an Association of Advocates-on-Record; and the Second Petitioners is its Secretary. The members of the 1<sup>st</sup> Petitioners are Advocates-on-Record who have become Advocates on Record after having appeared in and successfully passed the qualifying examination prescribed and who act as Advocates on Record and are also entitled to file Petitions before this Hon'ble Court to ventilate grievances of its members. The Petitioners have in the past filed Petitions before this Hon'ble Court inter-alia, for upholding the independence of the Judiciary.

The aims and objects of the Supreme Court Advocate-on-record- Association – a registered society under the Societies Registration Act, 1860 bearing Registration No. 17962 of 1987 dated 31.7.1987 is inter-alia is to take action for promotion and improvement in law and its administration of justice; and for the purpose aforesaid, to submit necessary recommendations before the Legislature, the Government of India, State Governments, the Judges of High Courts and of the Supreme Court and the Law Commission and other authorities.

2. In this Petition the Petitioners above named – inter-alia, challenge as unconstitutional and invalid the purported amendment of the Constitution which had been initiated by the introduction in the Lok Sabha of the Constitution (One Hundred Twenty First Amendment) Bill No: 97 of 2014, and which had been passed in each of the Houses of Parliament and now ratified by sixteen State Legislatures and assented to by the President of India on 31.12.2014 as the Constitution 99<sup>th</sup> Amendment Act of 2014. (The Bill – was passed with the majority stipulated in Article 368(2) – by each Houses of Parliament and having sought to make changes in: Chapter IV of Part V of the Constitution (“the Union Judiciary”) as well as in Chapter V of Part VI of the Constitution (“the High Courts in States”) had been submitted to the States Legislatures for ratification.
- In addition to the above, the petitioners also challenges the constitutionality and validity of the National Judicial Commission Act, 2014, which though passed by Parliament in August, 2014 has been assented to by the President of India on 31.12.2014.

The background to, the reasons for, and the grounds of challenge to, the Constitution 99<sup>th</sup> (Amendment) Act No.of 2014 passed by both Houses of Parliament (with the requisite majority stipulated for in Article 368(2) of the Constitution has now been ratified by 16 State Legislatures has now been assented to by the President of India.

3. Article 368 of the Constitution, as it validly stood in August 2014, and as it stands today, reads as follows:

**“368. [Power of Parliament to amend the Constitution and procedure therefore]**

(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, [it shall be presented to the President who shall give his assent to the Bill and thereupon] the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in –

- (a) Article 54, Article 55, Article 73, Article 162 or article 241, or
- (b) Chapter-IV of Part-V, Chapter-V of Part-VI, or Chapter-I of Part-XI, or
- (c) Any of the Lists in the Seventh Schedule, or
- (d) The representation of States in Parliament, or
- (e) The provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

(3) Nothing in article 13 shall apply to any amendment made under this article.”

Clauses (4) and (5) of Article 368 have been (deliberately) omitted since they have been declared by the Supreme Court of India as ultra vires the Constitution because these clauses had sought to exclude judicial review: a basic feature of the Constitution of India 1950 (*Minerva Mills vs. Union of India* – 1980 2 SCC 591).

- The purport of Article 368 – as it stands today – as interpreted by the Supreme Court provides:

- (i) that an *amendment*, by way of addition, variation or repeal of any provision of the Constitution, can only be in exercise of Parliament's constituent power, not in exercise of its legislative power. After the decision of the Supreme Court of India in *Golaknath's Case* 1967 (2) SCR 109 delivered by a Bench of 11 Judges (6:5) was overruled (on this point) in *Keshvananda Bharti's Case* 1973 Supp. (1) SCR at page 1001 - 11:2, and after the Constitution 24<sup>th</sup> Amendment Act - 1971 adding clause (3) to Article 368 and adding clause (4) to Article 13, - (which was held to be valid by this Hon'ble Court), an *amendment of the Constitution* has been no longer regarded as, nor equated with "law" or law-made;
- (ii) such an amendment of the Constitution (in exercise of the Constituent power of Parliament) can be *initiated* only by the introduction of a Bill for the purpose in either House of Parliament;
- (iii) where such an amendment (initiated by the introduction of a Bill) seeks to make a change in Chapter IV of Part V and/or of Chapter V of Part VI of the Constitution the *amendment* when

passed by each of the two Houses of Parliament (with the requisite majority stipulated in Article 368 (2)); it requires to be ratified by Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures *before* the Bill making provision for such amendment is presented to the President for his assent;

- (iv) it is only after such ratification by State Legislatures - as mentioned in the latter portion of the proviso to Article 368(2) - that the Bill (as passed by both Houses of Parliament) can be presented to the President, who - as is stated in the said provision "*shall give his assent to the Bill*";
- (v) it is thereupon (and only then) that the Constitution "*shall stand amended in accordance with the terms of the Bill.*"

**4. A recital of events: relevant for purposes of the present Writ Petition.**

(A) - Bill No. 97 / 97C of 2014 - The Constitution One Hundred and Twenty-First Amendment Bill 2014 - - after its introduction in the Lok Sabha on 11<sup>th</sup> August

2014; - was passed by that House with the requisite majority prescribed in Article 368 (2) on 13<sup>th</sup> August, 2014, it was thereafter transmitted to the Rajya Sabha. The Bill as passed by the Lok Sabha was then introduced in the Rajya Sabha on the evening of 13<sup>th</sup> August, 2014 and after some discussion and debate on 13<sup>th</sup> August, 2014 and again on 14<sup>th</sup> August, 2014, the Constitution Amendment Bill was passed by the Rajya Sabha with the requisite majority as prescribed in Article 368 (2) on 14<sup>th</sup> August 2014 (without any amendment) - as the **Constitution 121<sup>st</sup> Amendment Bill No. 97C of 2014**. On 14<sup>th</sup> August, 2014 the Secretary-General of the Lok Sabha reported that the following message had been received from the Secretary-General of the Rajya Sabha viz.

“In accordance with the provisions of rule 127 of Procedure and Conduct of Business in the Rajya Sabha, I am directed to inform the Lok Sabha that the Rajya Sabha, at its sitting held on the 14<sup>th</sup> August, 2014, passed, in accordance with the provisions of article 368 of the Constitution of India, without any amendment, the Constitution (One Hundred and Twenty-first Amendment), Bill, 2014 which was passed by the Lok Sabha at its sitting held on the 13<sup>th</sup> August, 2014”.



- In accordance with current practice in such matters, the Constitution (One Hundred Twenty First Amendment) Bill No. 97 of 2014 as passed by both Houses of Parliament was forwarded to all State Legislatures in the country for them to act under the second part of the proviso to Article 368 (2) for the passing of Resolutions ratifying the Constitution Amendment Bill as passed by both Houses of Parliament. Accordingly, the Rajya Sabha Secretariat circulated a copy of the Constitution (One Hundred Twenty First Amendment) Bill, 2014 to all the States with a request that the Bill be presented before the respective State Legislatures for ratification. It was reported on December 31, 2014 that "official sources had said that 16 of the 29 States had ratified the Bill and that the Bill had received the Presidential nod". (i.e. the assent of the President of India).

- (B) - As a matter of historical record it must be added that almost simultaneously with the introduction of the Constitution (One Hundred Twenty First Amendment) Bill No. 97C of 2014, in the Lok Sabha there was also introduced (in the Lok Sabha) on 11<sup>th</sup> August, 2014 the National Judicial Appointments Commission Bill No. 96 of 2014: (as a matter of fact the Legislative Bill No.96

of 2014 was introduced even prior to the introduction of the Constitution 121<sup>st</sup> Amendment Bill No. 97C of 2014) - a fatal infirmity which could not be cured by it being passed by both Houses of Parliament August 2014 nor by having received Presidential Assent on 31.12.2014)

The said Legislative Bill was got passed in both Houses of Parliament by a voice vote taken but there was at the time no Presidential assent to the Legislative Bill – the purported introduction, consideration and passing of the Legislative Bill (the National Judicial Appointments Commission Bill No.96 of 2014) was not only an exercise in futility but was a total nullity since Article 124(2) as originally enacted (in the Constitution) remained intact: The introduction of and the passing by both Houses of Parliament of the Legislative Bill known as the National Judicial Appointments Commission Bill 2014 was (in any case) plainly ultra vires since it was not warranted by the provisions of Article 124(2) as originally enacted.

- A true copy of the National Judicial Appointments Commission Act, 2014 passed by both Houses of Parliament in August 2014 and (assented to by the

President on 31.12.2014) is annexed herewith and marked as **ANNEXURE P-1, Page Nos.**

- A True Copy of the Constitution (One Hundred Twenty First Amendment) Bill No. 97 of 2014 as introduced in the Lok Sabha is annexed herewith and marked as **ANNEXURE P-2, Page Nos.**
- A True Copy of the Constitution (One Hundred Twenty First Amendment) Bill No. 97C of 2014 as passed in the Lok Sabha and also subsequently in the Rajya Sabha is annexed herewith and marked as **ANNEXURE P-3, Page Nos.**
- A True Copy of the Constitution (99<sup>th</sup> Amendment Act of 2014) – after being as ratified by 16 State Legislatures - and assented by the President on 31.12.2014 is annexed and marked as **ANNEXURE P-4, Page Nos.**
- During the debates in the two Houses of Parliament it was stated, on behalf of the Government, that the National Judicial Appointments Commission Bill 96 of 2014 (a Legislative Bill) was to be read in tandem with the provisions of the Constitution (One Hundred Twenty First Amendment) Bill No. 97 of 2014 and as a

“guideline” so that Members of the State Legislative Assemblies were made “aware of what the Government is going to do”.

- The Constitution 99<sup>th</sup> Amendment Act 2014 makes changes in Articles 124(2) (as well as Article 217(1)) of the Constitution relating to provisions for appointment of Judges of the Supreme Court and of the High Courts, and also makes some other changes in Chapter IV of Part V of the Constitution (Union Judiciary) as well as Chapter V of Part VI of the Constitution (High Courts in the States) – as stated below:

**(a)** Article 124 (2) as it stood, as enacted in the Constitution of India 1950, reads as follows:

“(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:

Provided further that –

- (a) a Judge may, by writing under his hand addressed to the President, resign his office;
- (b) a Judge may be removed from his office in the manner provided in clause (4)."

**(b)** Clause 2 of the Constitution 99<sup>th</sup> Amendment Act 2014 amending Clause (2) of Article 124 as it originally stood purports to read as follows:

**"124. Establishment and constitution of Supreme Court**

(1)..

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal on the recommendation of the National Judicial Appointments Commission referred to Article 124A, and shall hold office until he attains the age of sixty-five years:

Provided that –

- (a) a Judge may, by writing under his hand addressed to the President, resign his office;
- (b) a Judge may be removed from his office in the manner provided in clause (4).

**(c)** Clause 3 of the Constitution 99<sup>th</sup> Amending Act provides for the following additional articles to be inserted in the Constitution viz.

(i) Article 124A – provision is made for appointment of a “National Judicial Appointments Commission”; consisting of six members: three of whom are to be the three seniormost Judges of the Supreme Court including the Chief Justice of India (as Chairman) *but with no additional vote for the CJI as Chairman*); the remaining three members are the Union Minister of Law and Justice and two “eminent persons” to be nominated – not by the Chief Justice of India – but by a panel (consisting of the Prime Minister, the Chief Justice of India and Leader of Opposition or leader of the single largest Opposition Party in the Lok Sabha: *with no additional vote for the CJI*); *who can be outvoted in the nomination of eminent persons.*

(ii) Article 124B – prescribes the “Functions of the National Judicial Appointments Commission”; viz. that it shall be the duty of the National Judicial Appointments Commission to recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts; and to recommend transfers of Chief Justices and other Judges of High Courts from one High Court to any other High Court and to ensure that the person recommended is of ability and integrity; *but it has not been prescribed as a duty of the National Judicial Appointments Commission to ensure that in the matter of appointing Judges in the Higher Judiciary the independence of the judiciary shall always be maintained and secured.*

(iii) Article 124C – provides that “Parliament may by law regulate the procedure for the appointment of the Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and empower the Commission (the National Judicial Appointment Commission) to lay down by *regulations* the procedure for discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it”; *but in the matter of laying down by regulations the manner of selection of persons for appointment there is no requirement for weightage to be given to the collective views of the three seniormost judges of the Supreme Court of India, nor is any weightage to be given to the views of the Chief Justice of India;*

**(d)** Clause 4 of the Act provided for an amendment to Article 127 of the Constitution (Appointment of ad hoc Judges) in that in clause (1) of Article 127 for the words “the Chief Justice of India may, with the previous consent of the President” the following words are substituted viz. “the National Judicial Appointments Commission on a reference made to it by the Chief Justice of India, may with the previous consent of the President”.

**(e)** Clause 5 of the Act provides that in Article 128 of the Constitution (Attendance of retired judges of the Supreme Court may be required by the Chief Justice of India with the previous

consent of the President) for the words "the Chief Justice of India" the following words are to be substituted: "the National Judicial Appointments Commission".

**(f)** Clause 6 of the Act provides for an amendment of Article 217 of the Constitution (Appointment and conditions of the office of a Judge of a High Court) – viz. for the portion "after consultation with the Chief Justice of India, the Governor of the State, and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court" the following words, figures and letter are to be substituted viz. "on the recommendation of the National Judicial Appointments Commission referred to in Article 124A"; *here again there is no stipulation about weightage being given or of special consideration being given as ought to be given to the views expressed by the Chief Justice of the High Court in the State.*

**(g)** Clause 7 of the Act provides that in Article 222 of the Constitution (Transfer of a Judge from one High Court to another) - for the words "after consultation with the Chief Justice of India" the following words, figures and letter are to be substituted viz. "on the recommendation of the National Judicial Appointments Commission referred to in Article 124A"; *here again, the over-all control of the Chief Justice of India (who is under the Constitution more than being the Chief Justice of the Supreme Court of India) over*



*the Judiciary under the Constitution has been totally ignored and disregarded.*

**(h)** Clause 8 of the Act provides for an amendment of Article 224 of the Constitution (Appointment of additional and acting Judges) viz. in clause (1) and Clause 2 of Article 224 for the words "the President may appoint", the following words are to be substituted viz. "the President may in consultation with the National Judicial Appointments Commission appoint"; *here again, the need for additional or acting Judges which is a matter almost solely for determination by the Chief Justice of India as Head of the Indian Judiciary are not required to be given any weightage or special consideration.*

**(i)** Clause 9 of the Act provides that in Article 224A of the Constitution (Appointment of retired Judges at sittings of the High Courts) for the words "the Chief Justice of a High Court for any State may at any time, with the previous consent of the President" the following words are to be substituted viz. "the National Judicial Appointments Commission on a reference made to it by the Chief Justice of a High Court for any State may with the previous consent of the President".

**5. Brief background to the constitutional provisions relating to appointment of Judges of the Supreme Court and of High Courts and attempts made to amend the same.**

- (a) Article 124(2) along with Article 217(1) of the Constitution of India, 1950 – as enacted and as in force immediately prior to the Presidential assent to the Constitution 99<sup>th</sup> Amendment Act 2014 – (w.e.f. 31.12.2014) - made provisions for the appointment of Judges of the Supreme Court of India including the Chief Justice of India and for appointment of Judges of the High Courts including the Chief Justices of the High Courts - as follows:

Article 124(2) "Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:

Provided further that –

- (a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office in the manner provided in clause (4)."

(c) "Article 217. Appointment and conditions of the office of a Judge of a High Court. – (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and [shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of [sixty-two years]]:

Provided that –

- (a) a Judge may, by writing under his hand addressed to the President, resign his office;
- (b) a Judge may be removed from his office by the President in the manner provided in Clause (4) of Article 124 for the removal of a Judge of the Supreme Court;
- (c) the office of a judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being

transferred by the President to any other High Court within the territory of India.”

- (b) Although the Constitution (Article 124(2)) mentioned the requirement of “consultation” with Sitting Judges including the Chief Justice of India before a Judge in the Higher Judiciary was appointed, for a period of almost thirty years after the Constitution of India 1950 came into force no Judge of any High Court in the States, and no Judge of the Supreme Court of India was appointed whose name was not recommended for such appointment by the Chief Justice of India;
- (c) In March 1981 however a certain Circular issued by the (then) Minister of Law, Justice and Company Affairs was issued and was challenged in several Writ Petitions as impinging upon the independence of the Judiciary, and in a decision rendered on those petitions (including Writ Petitions in the High Courts transferred to the Supreme Court of India) a Bench of Seven Hon’ble Judges in the lead case of S P Gupta vs. Union of India (1981 (Supp) SCC 87) - much

later to be known as the *First Judges Case (1981)* – a Bench of Seven Judges of the Supreme Court held (by majority 4:3) – then for the first time – that the recommendations of the Chief Justice of India for Judges to be appointed in the Supreme Court of India and in the High Courts were constitutionally not binding on the Government of India. In this case however, the Court also clearly held on the question of locus standi that lawyers practising in Courts could always petition in the larger interests of the independence of the Judiciary and held that lawyers “had indisputably locus standi to maintain their writ petitions since they raised issues of great constitutional importance affecting the independence of the judiciary”.)

- (d) For the first time a Constitution Amendment Bill proposing to amend Article 124(2) and Article 217 (1) providing for appointment of Judges of the Higher Judiciary on the recommendation of a National Judicial Commission was made in Bill No. 93 of 1990 – the Constitution (Sixty-Seventh Amendment) Bill No. 93 of 1990 – which provided for the constitution of a National Judicial Commission for making

recommendations for appointment of Judges in the Supreme Court and in the High Courts; the Commission to consist of the Chief Justice of India as Chairperson and two other Judges of the Supreme Court next to the Chief Justice in seniority for making recommendations for appointment of Judges in the Supreme Court; and for making recommendations as to the appointment of a Judge of any High Court the Commission was to consist of the Chief Justice of India who was to be the chairperson of the Commission, the Chief Minister of the concerned State, one other Judge of the Supreme Court next to the Chief Justice of India in seniority, the Chief Justice of the High Court and one other Judge of that High Court next to the Chief Justice of that High Court in seniority. This Bill had been introduced to obviate the criticism of arbitrariness on the part of the Executive in appointments and transfers of Judges in the Higher Judiciary and also to make such appointments without any delay (following upon the Law Commission's recommendation in its 121<sup>st</sup> Report). This Constitution Amendment Bill

however, lapsed with the dissolution of the ninth Lok Sabha in 1991.

- (e) After some events which resulted in the Government policy of appointing only 'committed' Judges to the Higher Judiciary – committed not to the Constitution of India but committed to the policies of the Government of the time – it was decided to take a fresh look at Article 124. And in Supreme Court Advocates-on-Record vs. Union of India – reported in 1993 (4) SCC 441 - later known as the Second Judges Case – a Bench of Nine Hon'ble Judges –held (by majority 7:2) that a collegiate opinion of a collectivity of Judges was to be preferred to the opinion of the Chief Justice of India with the caveat that if the Government of the time did not accept the "recommendation" of the collegiate opinion (then consisting of three of the senior-most Judges) it would be presumed that the Government – in the matter of appointing or not appointing Judges of the Higher Judiciary – had not acted bona fide.
- (f) After the judgment rendered in the Second Judges Case (1993) it was felt – over time – that

recommendations made by a succession of Collegiums were not made in the spirit in which the new doctrine had been propounded by the Bench of nine Judges in the Second Judges Case – since the collegiate of the then three highest Constitutional functionaries (senior-most Judges on the Court), at times, could not see eye-to-eye in the matter of appointment of Judges in the Higher Judiciary.

- (g) Thereafter doubts were expressed about the interpretation of the law laid down by the Supreme Court of India in the Second Judges Case (1993) – specially relating to appointment and transfer of Judges – and a series of questions were framed and referred to the Hon'ble Supreme Court of India for being answered in Special Reference No. 1 of 1998 (under Article 143(1) of the Constitution) by a Bench of nine Hon'ble Judges (a decision reported in 1998 (7) SCC 739)

In 1998 (7) SCC 739 - it was recorded at the outset in the judgment of the Court – in what



was later known as the Third Judges Case (on 28<sup>th</sup> October, 1998);

- (i) that the Union of India was not seeking a review or reconsideration of the judgment in the *Second Judges Case*; and
- (ii) that the Union of India would accept and treat as binding the answers of the Supreme Court to the questions set out in the reference.

Thus, the Government of the day (the then NDA Government with the BJP in majority) accepted in principle the collegium system as advocated and laid down in the *Second Judges Case*.

In paragraph 44 of the judgment in the *Third Judges Case* (Special Reference No. 1 of 1998) the questions raised were duly answered and were to be regarded and were accepted as binding on the Government of India.

In the Third Judges Case (Reference Case 1998 (7) SCC 739) it was held that the Chief Justice of India must make a recommendation to appoint a Judge of the Supreme Court and or to transfer a Chief Justice or Puisne Judge of a High Court in

consultation with the four senior-most Puisne Judges of the Supreme Court (and not only with the two senior most Judges as previously held). But in so far as an appointment to the High Court was concerned it was held that the recommendation must be made in consultation with the Chief Justice of India and two senior-most Puisne Judges of the Supreme Court.

- (h) Later, since there was dissatisfaction expressed by various individuals and bodies with respect to the manner in which, and with the lack of transparency with which, some of the collegiums had acted, (in some cases), the NDA Government passed a resolution on 2<sup>nd</sup> February, 2000 constituting The National Commission to Review the Working of the Constitution, to make suitable recommendations. It had as its members Hon'ble Mr. Justice M. N. Venkatachalia, former Chief Justice of India as the Chairperson of the Commission with the following eminent persons as members: Justice Shri B.P. Jeevan Reddy, Chairman, Law Commission of India; Justice Shri R.S. Sarkaria, Former Judge, Supreme Court of India; Justice

ShriKottapalliPunnayya, former Judge, Andhra Pradesh High Court; Shri P.A. Sangma, Former Speaker, LokSabha; and Member of Parliament; Shri Soli J. Sorabjee, Attorney General for India; Shri K. Parasaran, Senior Advocate and former Attorney General for India; Dr.Subhash C. Kashyap, Former Secretary General, LokSabha; Shri C.R. Irani, Chief Editor and Managing Director, The Statesman; Dr.AbidHussain, Former Ambassador of India in the USA; Smt. Sumitra G. Kulkarni, Former Member of Parliament (RajyaSabha)”

The terms of the reference of the Commission was: (1.3.1)

“The Commission shall examine, in the light of the experience of the past 50 years, as to how best the Constitution can respond to the changing needs of efficient, smooth and effective system of governance and socio-economic development of modern India within the framework of parliamentary democracy and to recommend changes, if any, that are required in the provisions of the Constitution without interfering with its basic structure or features.” (Emphasis added).

- (i) In the Report of the National Commission to review of the Working of the Constitution (2002) the Commission ("the Venkatachaliah Commission") came to the following conclusion in the matter of appointment of Judges of the Supreme/Higher Judiciary:

"7.3.7 The matter relating to manner of appointment of judges had been debated over a decade. The Constitution (Sixty-seventh Amendment) Bill, 1990 was introduced on 18<sup>th</sup> May, 1990 (9<sup>th</sup> Lok Sabha) providing for the institutional frame work of National Judicial Commission for recommending the appointment of judges to the Supreme Court and the various High Courts. Further, it appears that latterly there is a movement throughout the world to move this function away from the exclusive fiat of the executive and involving some institutional frame work whereunder consultation with the judiciary at some level is provided for before making such appointments. The system of consultation in some form is already available in Japan, Israel and the UK. The Constitution (Sixty-seventh Amendment) Bill, 1990 provided for a collegium of the Chief Justice of India and two other judges of the Supreme Court for making appointment to the Supreme Court. **However, it would be**

worthwhile to have a participatory mode with the participation of both the executive and the judiciary in making such recommendations. The Commission proposes the composition of the Collegium which gives due importance to and provides for the effective participation of both the executive and the judicial wings of the State as an integrated scheme for the machinery for appointment of judges. This Commission, accordingly, recommends the establishment of a National Judicial Commission under the Constitution.

The National Judicial Commission for appointment of judges of the Supreme Court shall comprise of:

- (1) The Chief Justice of India: Chairman
- (2) Two senior most judges of the Supreme Court: Member
- (3) The Union Minister for Law and Justice: Member
- (4) One eminent person nominated by the President after consulting the Chief Justice of India: Member

The recommendation for the establishment of a National Judicial Commission and its composition are to

**be treated as integral in view of the need to preserve the independence of the judiciary.”**

(The above portion in bold is as highlighted in the Report of the Venkatachaliah Commission itself: to emphasize the crucial importance of the last word (in the event of a difference of opinion) being with the three seniormost sitting judges of the Supreme Court of India.

- (j) It is to be noted that the Venkatachaliah Commission keeping in view the concept of the Independence of the Judiciary and the need to always uphold this concept, had recommended that the Appointments Commission recommended by it should comprise of an uneven number: five – with three Members of the Commission (out of the 5) being the seniormost sitting Judges of the Supreme Court of India, with the sitting Chief Justice of India as its Chairman.
- (k) The Council of Ministers of the then NDA government at its meeting held on 6<sup>th</sup> May, 2003 thereafter examined the recommendations of the National Commission to Review the Working of the Constitution (“the Venkatachaliah

Commission") and substantially approved the same, endorsing the Department of Justice's proposal for the Constitution of a National Judicial Commission;

- (l) In accordance with the recommendations of the Venkatachaliah Commission (2002) – as slightly altered by the Council of Ministers of the NDA Government on 6<sup>th</sup> May, 2003 – the Constitution (Ninety Eighth Amendment) Bill No. 41 of 2003 was prepared and introduced in Parliament on 9<sup>th</sup> May, 2003 – The Bill however could not be passed only because of the dissolution of the 13<sup>th</sup> Lok Sabha on May 2004. A copy of the Constitution 98<sup>th</sup> Amendment Bill No. 41 of 2003 is annexed as **ANNEXURE-P-5 Page Nos.**

The Constitution 98<sup>th</sup> Amendment Bill 41 of 2003 provided:

**2.** *In article 124 of the Constitution, in clause (2), for the portion beginning with the words "after consultation" and ending with the words "Provided further that –", the following shall be substituted namely :-*

*"on the recommendation of the National Judicial Commission and shall hold office*

*until he attains the age of sixty-five years;*

*Provided that;"*

**3.** In Part V of the Constitution, after Chapter IV, the following Chapter shall be inserted, namely –

**"CHAPTER IVA – NATIONAL JUDICIAL COMMISSION**

*147A. (1) The President shall by order constitute a Commission, referred to in this Constitution as the National Judicial Commission.*

***(2) without prejudice to the provisions of clause (3), the National Judicial Commission shall consist of the following:-***

***(a) the Chief Justice of India, who shall be the chairperson of the Commission:***

***(b) two other Judges of the Supreme Court next to the Chief Justice of India in seniority;***

***(c) the Union Minister in-charge of Law and Justice; and***

***(d) one eminent citizen to be nominated by the President in consultation with the Prime Minister;***



***Provided that the eminent citizen nominated under sub-clause (d) shall hold office for a period of three years.***

*(3) In the case of appointment or transfer of a Judge of a High Court, the Chief Justice of that High Court and the Chief Minister of that State or, when a proclamation under article 356 is in operation in that State, the Governor of that State, shall be associated with the Commission.*

*(4) It shall be duty of the Commission-*

*(a) to make recommendation of persons for appointment of Judges of the Supreme Court, Chief Justices of High Courts and the Judges of the High Courts.*

*(b) to make recommendation for the transfer of the Chief Justices of High Courts and the Judges of High Courts from one High Court to any other High Court;*

*(c) to draw up a code of ethics for Judges of the Supreme Court, Chief Justices of High Courts and the Judges of the High Courts;*

*(d) to inquire into, suomotu or on a complaint or reference, cases of misconduct or such deviant behaviour of a Judge other than those calling for his removal and advise the Chief Justice of India or the Chief Justice of a High Court appropriately after such inquiry.*

*(5) The recommendation made by the Commission under clause (4) shall be binding.*

*(6) No person, who is not recommended for appointment as a Judge by the Commission, shall be so appointed by the President.*

*(7) The Commission shall have the power to regulate its own procedure including the procedure to be followed under sub-clause (d) of clause (4)"*

**6.** It is submitted that:

(i) the Constitution 121<sup>st</sup> Amendment Bill 2014 passed by both Houses of Parliament as the Constitution 99<sup>th</sup> Amendment Act, 2014 and after ratification by legislatures 16 States out of 29 – assented to by the President on 31<sup>st</sup> December 2014 severely affects and damages the basic structure of the Constitution viz. the independence of the judiciary in the context of appointment of judges of the higher judiciary as aforesaid and for the grounds following.

(ii) It is further submitted that the National Judicial Appointments Commission Bill 96 of 2014 passed

by both Houses of Parliament in August 2014 when Articles 124(2) and 217(1) stood as enacted in the Constitution of India 1950 assented to by the President on 31<sup>st</sup> December 2014 as the National Judicial Commission Act, 2014 was also totally ultra vires and void for the grounds mentioned herein below.

**GROUND OF CHALLENGE IN RESPECT OF THE CONSTITUTION 99<sup>TH</sup> AMENDMENT ACT, 2014**

**GROUND (A) to (K) below:**

**(A)** It is submitted that as held by the majority in the Full Bench decision of 13 Hon'ble Judges in *Keshvananda Bharati vs. State of Kerala*: 1973 (4) SCC 225 at 1007 – and reiterated and reaffirmed in the case of *I. R. Coelho vs. State of Tamil Nadu* (9 Judges) 2007 (2) SCC 1 at page 111 that Article 368 does not enable Parliament to alter the basic structure of the Constitution.

**(B)** It has also been held in *Kihoto Hollohan vs. Zachillhu* 1992 (Supp.2) SCC 651 at 692-693

(paras 63 to 65) that basic structure of the Constitution cannot be altered nor can basic features of the Constitution be destroyed – which imposes a fetter on the competence of Parliament to amend the Constitution and any amendment made in disregard of this limitation goes beyond the amending power. It has further been held by this Hon'ble Court in a series of judgments some of which are mentioned below that the independence of the judiciary is part of the basic structure of the Constitution and hence unamendable by Parliament even in exercise of its constituent power.

**(C)** In the context of the appointment of Judges of the Higher Judiciary the expression 'independence of the Judiciary' as a constitutional concept and one that has been consistently regarded as a basic feature of the Constitution means (and has been consistently held to mean):

(i) "insulating the Judiciary from executive or legislative control" (e.g. Union Of India vs. Sankal Chand HimatlalSheth&Anr: 1977 (4)

- SCC 193 at page 236-237 para 50) (5 Judges);
- (ii) "inextricably linked and connected with the constitutional process of appointment of Judges of the Higher Judiciary. Independence of the Judiciary is a basic feature of our constitution...." (e.g. Supreme Court Advocates-on-Record Association vs. Union of India: 1993 (4) SCC 441 at page 649 para 335); (Bench of nine Judges);
- (iii) 'in the matter of appointment of Judges to the High Courts and the Supreme Court 'primacy of the Higher Judiciary must be secured and protected' (first affirmed in Supreme Court Advocates-on-Record Association vs. Union of India: 1993 (4) SCC 441 at page 522 para 56); (Bench of Nine Judges); re-affirmed in Special Reference No.1 of 1998 (Nine Judges) reported in 1998 (7) SCC 739) (unanimous);
- (iv) the conditions for appointment of Judges to the Supreme Court and the High Courts may not be amendable even by a constitutional amendment as the same *is likely to tamper with* the independence of the judiciary and

thereby adversely affect the basic features of the Constitution (e.g. *State of Bihar vs. Balmukund Shah*: 2000 (4) SCC 640 para 97 at page 747); (Bench of five Judges);

- (v) the '*executive element in the appointment of Judges must be reduced to a minimum*' (e.g. *Union of India vs. Madras Bar Association*: 2010 (11) SCC 1 at page 37 paras 50-52); (Bench of five Judges); Justice Raveendran speaking for the Court said:

"50. The Framers of the Constitution stated in a memorandum (see *The Framing of India's Constitution*, B. Shiva Rao, Vol. I-B, p. 196):

"We have assumed that it is recognized on all hands that the independence and integrity of the judiciary in a democratic system of government is of the highest importance and interest not only to the Judges but to the citizens at large who may have to seek redress in the last resort in the courts of law against any illegal acts or the high-handed exercise of

power by the executive.... in making the following proposals and suggestions, the paramount importance of securing the fearless functioning of an independent and efficient the judiciary has been steadily kept in view.”

51. In *L. Chandra Kumar*<sup>1</sup>, the seven-Judge Bench of this Court held: (SCC p. 262d-e)

“The Constitution of India while conferring power of judicial review of legislative action upon the higher judiciary, incorporated important safeguards. An analysis of the manner in which the framers of our Constitution incorporated provisions relating to the judiciary would indicate that they were very greatly concerned with securing the independence of the judiciary.”

52. Independence of the judiciary has always been recognized as a part of the basic structure of the Constitution (see *Supreme Court Advocates-on-Record Assn. v. Union of India*<sup>2</sup>, *State of Bihar v. BalMukundSah*<sup>3</sup>, *Kumar Padma*

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<sup>1</sup> *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261: 1997 SCC (L&S) 577.

<sup>2</sup>(1993) 4 SCC 441.

<sup>3</sup>(2000) 4 SCC 640: 2000 (L&S) 489.

Prasad v. Union of India<sup>4</sup>, and All India Judges Assn. (3) v. Union of India<sup>5</sup>.”

In ‘the choice of judges the opinion of the Chief Justice of India or a group of Judges of the Higher Judiciary should have weight’ (e.g. 2010 (11) SCC 1 at page 37 para 51 (Bench of five Judges));

- (D)** The Independence of the Judiciary is an integral part of the Basic Structure of the Constitution of India and Independence of the Judiciary, and inter alia, includes the necessity to eliminate political influence even at the stage of appointment of a Judge, the executive element in the appointment process being minimal. The Constitution (99<sup>th</sup> Amendment) Act of 2014 as passed by the two houses of Parliament, by providing for a National Judicial Appointments Commission consisting of the Chief Justice of India; and two other senior Judges of the Supreme Court next to the Chief Justice of India; the Union Minister in charge of Law and Justice; and two eminent persons to be nominated by a committee (consisting of the Prime Minister, Leader of Opposition or leader of single

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<sup>4</sup>(1992) 2 SCC 428; 1992 SCC (L&S) 561; (1992) 20 ATC 239.

<sup>5</sup>(2002) 4 SCC 247; 2002 SCC (L&S) 508.



largest party in Lok Sabha and the Chief Justice of India), takes away the primacy of the collective opinion of the Chief Justice of India and the two senior most Judges of the Supreme Court of India next to the Chief Justice of India i.e. even if all three senior most judges of the Supreme Court of India collectively recommend an appointee, the appointment is enabled to be a suspended by majority of three non-Judge members.

**(E)** Clause 3 of the Constitution 99<sup>th</sup> Amendment Act of 2014 as passed by the two Houses of Parliament and ratified by 16 State Legislatures and assented to by the President on 31.12.2014 introduces Article 124C in the Constitution of India as an integral part of the mode and manner of appointment of Judges – this confers unbridled power to Parliament to regulate by ordinary law, (purported to be already regulated by the National Judicial Appointments Commission Bill passed by both Houses of Parliament in August 2014 and assented by the President on 31.12.2014) inter alia, 'the manner of selection of persons for appointment' to the Higher Judiciary " - without any safeguards whatsoever and in particular without requiring Parliament to ensure at all times the

Independence of the Judiciary – a corner stone of the Constitution. It has been held repeatedly by this Hon'ble Court that the doctrine of Basic Structure cannot be used to challenge ordinary legislation (1975 Supp SCC 1; 1996 (3) SCR 721; 2006 (7) SCC 1; 2010 (11) SCC 1;). Therefore as per the law laid down by this Court, it may not be possible to challenge any law made under the proposed Article 124C on the ground that it results in the erosion of the Independence of the Judiciary thereby damaging the Basic Structure of the Constitution. Besides, the law purported to be made viz. the National Judicial Appointments Commission Act 2014 was not made by Parliament under the provision of Article 124(2) and 217(1) as purported to be enacted by the Constitution 99<sup>th</sup> Amendment Act 2014 – since the National Judicial Appointments Commission Bill 2014 had been passed both Houses of Parliament in August 2014 when Article 124(2) and 217(1) as enacted were in force. In addition, Article 124C leaves open enormous scope for the Parliament, by ordinary legislation, to give primacy to the Executive or Veto powers to the Executive or other unchecked powers to the Executive for the appointment of Judges to the higher Judiciary. Thus for instance, the second proviso to Sub-section 2

of Section5 and Sub-Section6 of Section6 of the National Judicial Appointments Commission Act, 2014, which has been purported to be passed by both Houses of Parliament as an ordinary Bill (and not as a Constitution Amendment Bill), provides that 'the Commission shall not recommend a person for appointment if any two members of the Commission do not agree for such recommendation'. Not only does this very provision open possibilities for erosion of Independence of the Judiciary but such an ordinary law can be also amended to substitute for the words 'two members' the words 'one member' - thus completely negating any effective role of the three senior most members of the Higher Judiciary in appointment of Judges to the Supreme Court and the High Courts, and thus wholly transferring the power of appointment of Judge, of the Higher Judiciary to the Executive.

- (F)** The existing "guideline" (so stated by the Minister in Parliament) in the form of the National Judicial Appointments Commission Bill 2014 got passed by both Houses of Parliament in August 2014 which was unconstitutional and void and could not be cured by any assent of the President (on 31.12.2014) - indicates quite plainly that if *any two* Members of the

Commission (a Commission consisting of six Members – three sitting Judges and three non-Judge Members) do not agree to the recommendations of the three seniormost Judges of the Supreme Court of India for appointment, the appointment is not to be made (see second Proviso to Section 5 and Sub-Section (6) to Section 6 of the National Judicial Appointments Commission Act, 2014): another infringement of the of basic structure.

- (G)** No explanation has been forthcoming as to why the recommendations of the expert body (the Venkatachaliah Commission) set up by the predecessor of the present NDA government, whose recommendations had been also accepted by the Government in power have been now materially altered to the detriment of the constitutional concept of maintaining the independence of the Judiciary.
  
- (H)** Similarly there is no explanation why the provisions of the Constitution (Ninety Eighth Amendment) Bill, 2003 has been materially departed from: that Bill not only negated any possibility of Judges on the National Judicial Commission being outvoted by reason of its composition viz. that of five Members, and also

specifically provided that no person who is not recommended for appointment as a Judge 'by the Commission' shall be so appointed by the President: which is to be contrasted with 'the guideline' (so-called) - in the present case in the form of the National Judicial Appointments Commission Bill, 2014 (unconstitutionally passed by both Houses of Parliament) which indicates and actually envisages judicial members (the three seniormost Judges in the Courts) being outvoted in the matter of appointment of Judges in the Higher Judiciary. That is to say, where three seniormost judges of the Supreme Court of India (Members of the Commission) in a Commission of six Members recommend a particular person (as meritorious and with integrity) to be appointed as a Judge, (either of the Supreme Court of India or of a High Court) any two other Members (not Judges) can outvote them and therefore the selection of members of the Higher Judiciary would in essence be dependent upon the negative vote of two members who are not Judges -not on the concurrent opinion and vote of the three seniormost judges of the Supreme Court of India.

- (I)** Apart from the above, Parliament has not purported to set aside or nullify all or any of the larger Constitution Bench orders and judgments viz. (i) Bench of 13 Judges (majority judgment) in *Keshavanada Bharti* – 1973 (4) SCC 225 at 1007 (order followed by a Bench of 5 Judges in *Raghunathrao Ganpatrao vs. UOI* – 1994 (Supp.1) SCC 191 at para 48); (ii) A Bench of nine-Judges in *Supreme Court Advocates on Record Association vs. UOI* - 1993 (4) SCC 441 and re-affirmed again by a Bench of Nine Judges - in Special Reference No: 1 of 1008 - 1998 (7) SCC 739); and the said judgments themselves preclude – from effectively nullifying or removing the basis of any judgment of the Supreme Court affecting or dealing with a basic feature of the Constitution: in this case the independence of the Judiciary.
- (J)** The criteria of suitability for appointment of Judges in the Higher Judiciary not been provided for in the impugned Constitution 99<sup>th</sup> Amendment Act, 2014 is another ground for impugning its validity as a Constitutional amendment since it changes the Constitution's basic feature. It was said in Parliament that provisions of Legislative –

National Judicial Appointments Commission Bill No. 96C of 2014 purported to be passed by both the Houses of Parliament contrary to Article 124(2) as it stood, was to inform the States of what the Central Government was purporting to do, namely to specify by regulations, the criteria of suitability for appointment of Judges in Higher Judiciary to be specified by National Judicial Appointments Commission - a body, which does not envisage the three senior most Judges of the Supreme Court having a predominant voice and clearly contemplates that they could be outvoted. This affects the basic structure of the Constitution.

**(K)** That the Constitution 99<sup>th</sup> Amendment Act, 2014 and its provisions damage the basic structure and essential feature of Constitution, since it removes, in matter of appointment of Judges in Higher Judiciary, the primacy of Higher Judiciary and makes the executive element in the appointment of Judges predominant and thus adversely affects independence of Judiciary, which is a part of essential feature of Constitution of India.

**(L)** That the Constitution 99<sup>th</sup> Amendment Act, 2014 fails to protect and secure, the primacy of the Higher Judiciary in the matter of appointment of Judges in the Higher Judiciary and thus damages the basic feature, a cornerstone of Constitution.

**(M) GROUNDS of challenge to the National Judicial Appointments Commission Bill No. 96 of 2014 passed by both Houses of Parliament in August 2014 and assented by the President on 31.12.2014 (as the National Judicial Appointments Commission Act 2014).**

M(i) The National Judicial Appointments Commission Bill No.96C of 2014 was passed by both Houses of Parliament when Parliament had no power, authority or jurisdiction to pass such a Bill in the teeth of Articles 124(2) and 217(1) as enacted in the Constitution of India, 1950. The passing of the said Bill was itself unconstitutional, ultra vires and void and neither the purported ratification by State Legislatures nor the assent of the President could give it any validity.



M(ii) Without prejudice to the above: the National Judicial Appointments Commission Act, 2014 (assuming it is to be treated as validly passed – which is denied) purport to provide unfettered regulatory power in matters pertaining to the functioning and appointment of Judges in the higher judiciary. **Not only does it empowers the National Judicial Appointments Commission to formulate regulations in respect of criteria of suitability, other procedure & conditions for selection and appointment of Judges to the Higher Judiciary, but also provides that any such regulation made by the Commission shall be subject matter of approval by both the Houses of the Parliament. That is to say, Section 13 of the National Judicial Appointments Commission Act, 2014 provides that any regulation made by the Commission, shall be placed before both the Houses of the Parliament, and subject to both the Houses of Parliament amending the regulations or agreeing that such regulation should not be made, such regulations would either be amended accordingly, or shall be annulled, without prejudice to the validity of**

**anything done under the rule or regulation. This is impermissible and ultra vires.**

**M(iii) It is also submitted that the 'Primacy' of the Opinion of Chief Justice of India is sought to be done away with by passing the National Judicial Appointments Commission Act of 2014, by giving 'Veto' powers to any two members of the National Judicial Appointments Committee (being either the Eminent Person or the Law Minister) thereby overruling the recommendation of the Chief Justice of India and other two Senior Most Judges of Hon'ble Supreme Court of India. Such provision is contrary to the observation of this Hon'ble Court in decision reported as (1993) 4 SCC 441, wherein the Bench of 9 Judges of this Hon'ble Court (by Majority of 5:4) has observed that (Para 432):-**

***"The question of primacy of the role of the Chief Justice of India in the context of appointment of Judges in the Supreme Court and the High Courts must be considered to achieve the Constitutional purpose of selecting the best available for composition of the Supreme Court and the High Courts, so essential to ensure the***

***independence of Judiciary, and thereby, to preserve democracy. A fortiori any construction of the Constitutional provisions which conflicts with this Constitutional purpose or negates the avowed object has to be eschewed, being opposed to the true meaning and spirit of the Constitution and therefore, an alien concept.***

**M(iv)** The criteria of suitability for appointment as a Judge is to be specified by "regulations" and these Regulations are to be made by "the Commission" where the three seniormost judges do not have a predominate vote. This delegation of legislative power is ordinary in nature. This should have been in the Constitution. Till now it resides with the Chief Justice of India. This regulation can be annulled or modified by Parliament in its ordinary course of business.

**7.** It is submitted that the Constitution 99<sup>th</sup> Amendment Act, 2014 is beyond the amending power of Parliament and is void since it damages the basic structure and essential features of the Constitution of India, 1950 viz. the Independence of the Judiciary and violates the constitutional

principle that the primacy of the higher judiciary must be secured and protected, executive element in the appointment of Judges must be reduced to the minimum.

It is further submitted that the National Judicial Appointments Commission Bill 96 of 2014 passed by both Houses of Parliament in August 2014 was beyond the legislative competence of Parliament and was in violation of Articles 124(2) and 217(1) of the Constitution of India as enacted which provisions were then in force in August 2014 and as such the same is invalid and void; it is respectfully submitted that the assent of the President to the said National Judicial Appointments Bill No. 96 of 2014 cannot confer any validity on a Bill which Parliament was not competent to pass.

- 8.** In the circumstances aforesaid it should be declared that Articles 124(2) and 217(1) of the Constitution of India 1950 as enacted continue to remain in force and the interpretation placed upon

these articles by the larger Constitution Bench judgments of this Hon'ble Court in (a) Keshavananda Bharti vs. State of Kerala – 1973 (4) SCC 225 (13J); (b) Supreme Court Advocates-on-record Association vs UOI – 1993 (4) SCC 441 (9J); (c) Special Reference No.1 of 1998 – 1998 (7) SCC 739 (9J) re-affirmed) remain unaffected by the Constitution 99<sup>th</sup> Amendment Act, 2014 and by the purported passing of the National Judicial Appointments Commission Bill No. 96 of 2014 in August 2014 (and consequently the National Judicial Appointments Commission Act, 2014) to which presidential assent has been accorded does not in any way affect the continuance of the constitutional provisions contained in Articles 124(2) and 217(1) of the Constitution of India 1950 as enacted.

- 9.** The Petitioner states that on 21.8.2014, the Supreme Court of India Advocates-on-Record Association had filed a Writ Petition No: 775 of 2014 challenging the Constitution 121<sup>st</sup> Amendment Bill. No: 97C of 2014 as passed by both Houses of Parliament (before it was

sent to State Legislatures for ratification) on various grounds including the ground that it violated the basic structure of the Constitution and was therefore invalid, void and unconstitutional. After hearing the aforesaid writ petition (along with other Writ Petitions) a Bench of three Hon'ble Judges of this Hon'ble recorded as follows:

"Looking at the facts of these cases, we are of the view that we should not entertain these petitions at this stage as they are premature.

Needless to say that it would be open to the petitioners to approach this Court at an appropriate stage and make all submissions on merits as the petitions have been disposed of as premature.

The writ petitions are disposed of with the above observations."

A True Copy of the Order dated 25.8.2014 passed by this Hon'ble Court in Writ Petition No. 775 of 2014 is annexed herewith and marked as

**ANNEXURE P-6, Page Nos.**

- 10.** The Petitioner states submits that besides the above, no other petition or any other proceeding has been filed by the Petitioner in this Hon'ble Court or any other Court claiming similar relief and that there is no

other efficacious remedy available to the Petitioner except to approach this Hon'ble Court.

**PRAYER**

In view of the aforementioned facts and circumstances of the present case, the petitioners most respectfully pray that this Hon'ble Court may kindly be pleased to:-

- (a) That it be declared by issuance of appropriate writ, order or direction that the Constitution 99<sup>th</sup> Amendment Act, 2014 violates the basic structure of the Constitution and is invalid, void and unconstitutional;
- (b) That it be declared by issuance of appropriate writ, order or direction that the National Judicial Appointments Commission Bill No. 96C of 2014 passed by both the houses of Parliament in August 2014 was beyond the legislative competence of the Parliament and was in violation of Articles 124(2) and 217(1) of the Constitution of India as enacted and in force in August 2014 and as such is invalid and void;
- (c) That it be declared by issuance of an appropriate Writ, order or direction that the assent of the President to the National Judicial Appointments Bill

No. 96C of 2014 cannot confer any validity on the said National Judicial Appointments Bill No. 96C of 2014, since the Parliament was not competent to pass the National Judicial Appointments Bill No. 96C of 2014 in August 2014;

- (d) That it be declared by issuance of an appropriate writ, order or direction that the Article 124(2) and Article 127(1) of the Constitution of India, 1950 as enacted continue to remain in force and the interpretation placed upon these articles by the larger Constitution Bench Judgments of this Hon'ble Court in (a) Kesavananda Bharati Vs State of Kerala (1973) 4 SCC 225 (Bench of 13 Judges); (b) Supreme Court Advocates-on-Record Association vs Union of India – (1993) 4 SCC 441 (Bench of 9 Judges); (c) Special Reference No. 1 of 1998 – (1998) 7 SCC 739 (Bench of 9 Judges), remains unaffected by the Constitution 99<sup>th</sup> Amendment Act, 2014 and by the purported passing of the National Judicial Appointments Commission Bill No. 96C of 2014 (and consequently National Judicial Appointments Commission Act, 2014) to which Presidential



assent has been accorded, does not in any way affect the continuance of the Constitutional provisions contained in Article 124(2) and 217(1) of the Constitution of India, 1950 as enacted;

- (e) That appropriate writ, order or consequential directions be issued so that the Basic Structure of the Constitution is preserved;
- (f) For that such further and other order / orders be passed as may be necessary and deemed fit and proper in the facts and circumstances of the case to sub serve the interest of justice and protect the independence of the Judiciary;

AND FOR THIS ACT OF KINDESS THE PETITIONER SHALL AS IN DUTY BOUND EVER PRAY.

Drawn by :

(Subhash C. Sharma)  
(Advocate)

Settled by

(Fali S. Nariman)  
Senior Advocate

Filed by :

(Mr. Surya Kant)  
Vice President  
SCAORA

Drawn on: 1.1.2015

Filed on: 3.1.2015

Place: New Delhi

**LIST OF DATES**

- 30.12.1981 A Bench of Seven Hon'ble Judges of this Hon'ble Court in its decision dated 30.12.1981 reported in 1981 Supp SCC 87, known as first Judges case held (by majority 4:3) that the recommendations of the Chief Justice of India for Judges to be appointed in the Supreme Court of India and in the High Courts were constitutionally not binding on the Government of India. The Court also clearly held in this case on the question of locus standi that lawyers practising in Courts could always petition in the larger interests of the independence of the Judiciary and held that lawyers "had indisputably locus standi to maintain their writ petitions since they raised issues of grant constitutional importance affecting the independence of the judiciary".
- 1990 For the first time a Constitution Amendment Bill proposing to amend Article 124(2) and Article 217 (1) providing for appointment of Judges of the Higher Judiciary on the recommendation of a National Judicial Commission was made in Bill No. 93 of 1990 – the Constitution (Sixty-Seventh Amendment)

Bill No. 93 of 1990 which provided for the constitution of a National Judicial Commission for making recommendations for appointment of Judges in Supreme Court and High Courts. This Constitution Amendment Bill however, lapsed by the dissolution of the Lok Sabha in 1991.

06.10.1993 Decision of this Hon'ble Court in Supreme Court Advocates-on-Record vs. Union of India – later known as the Second Judges Case – a Bench of nine Hon'ble Judges – reported in (1993 (4) SCC 441) held by majority (7:2) that a collegiate opinion of a collectivity of Judges was to be preferred to the opinion of the Chief Justice of India with the caveat that if the Government of the time did not accept the “recommendation” of the collegiate (then consisting of three of the senior-most Judges) it would be presumed that Government – in the matter of appointing or not appointing Judges of the Higher Judiciary – had not acted bona fide.

28.10.1998 Thereafter doubts were expressed about the interpretation of the law laid down by the Supreme Court of India in the Second Judges Case (1993) – specially relating to

appointment and transfer of Judges – and a series of questions were framed and referred to the Hon'ble Supreme Court of India for being answered in Special Reference No. 1 of 1998 (under Article 143(1) of the Constitution) by a Bench of nine Hon'ble Judges (reported in 1998 (7) SCC 739). In the Third Judges Case (1998 (7) SCC 739) it was held that the Chief Justice of India must make a recommendation to appoint a Judge of the Supreme Court and or to transfer a Chief Justice or Puisne Judge of a High Court in consultation with the four senior-most Puisne Judges of the Supreme Court (and not only with the two senior most Judges as previously held). But in so far as an appointment to the High Court was concerned it was held that the recommendation must be made in consultation with the two senior-most Puisne Judges of the Supreme Court.

2.2.2000

The NDA Government passed a resolution on 2<sup>nd</sup> February, 2000 constituting The National Commission to Review the Working of the Constitution, to make suitable recommendations. It had as its members Hon'ble Mr. Justice M. N. Venkatachalia, former Chief Justice of India as the Chairperson of the

Commission with the following distinguished persons as members: Justice Shri B.P. Jeevan Reddy, Chairman, Law Commission of India; Justice Shri R.S. Sarkaria, Former Judge, Supreme Court of India; Justice Shri Kottapalli Punnayya, former Judge, Andhra Pradesh High Court; Shri P.A. Sangma, Former Speaker, Lok Sabha; and Member of Parliament; Shri Soli J. Sorabjee, Attorney General for India; Shri K. Parasaran, Senior Advocate and former Attorney General for India; Dr. Subhash C. Kashyap, Former Secretary General, Lok Sabha; Shri C.R. Irani, Chief Editor and Managing Director, The Statesman; Dr. Abid Hussain, Former Ambassador of India in the USA; Smt. Sumitra G. Kulkarni, Former Member of Parliament (Rajya Sabha)". The report came to the following conclusion:

The National Judicial Commission for appointment of judges of the Supreme Court shall comprise of:

- (1) The Chief Justice of India: Chairman
- (2) Two senior most judges of the Supreme Court: Member
- (3) The Union Minister for Law and Justice: Member
- (4) One eminent person nominated by the President after consulting the Chief Justice of India: Member

The recommendation for the establishment of a National Judicial Commission and its composition are to be treated as integral in view of the need to preserve the independence of the judiciary.”

6.5.2003 The NDA Government on 6<sup>th</sup> May, 2003 – the Constitution (Ninety Eighth Amendment) Bill No. 41 of 2003 was prepared and introduced in Parliament on 9<sup>th</sup> May, 2003 – The Bill however lapsed only because of the dissolution of the 13<sup>th</sup> Lok Sabha on May 2004.

2013 The only subsequent occasion for introducing a constitutional amendment with regard to provision for appointment of Judges in the Higher Judiciary was when the Congress led-government (UPA-II) got passed in the Rajya Sabha the Constitution (One Hundred And

Twentieth Amendment) Bill LXC of 2013 in which there was provision made for Parliament by law to provide for the composition of a Commission to be known as the Judicial Appointments Commission. The said Bill however lapsed on account of dissolution of the Lok Sabha.

11.8.2014 Bill No.97 of 2014 (later altered to Bill No: 97C of 2014) - titled The Constitution (One Hundred and Twenty-First Amendment) Bill, 2014 was introduced in the Lok Sabha by the Ministry of Law and Justice on 11.8.2014. Bill No.97/97c of 2014 sought (almost exclusively) to make changes in Articles 124(2) and Articles 217(1) of the Constitution relating to provisions for appointment of Judges of the Supreme Court and of the High Courts, and also sought to make some other changes in Chapter IV of Part V of the Constitution (Union Judiciary) as well as Chapter V of Part VI of the Constitution (High Courts in the States). Prior to the said Bill No.97C of 2014, another Bill i.e. the National Judicial Appointments Commission Bill No.96 of 2014 was introduced in the Lok Sabha.

- 13.8.2014            The aforementioned Bill No: 97C of 2014) - titled The Constitution (One Hundred and Twenty-First Amendment) Bill, 2014 was passed by the Lok Sabha with requisite majority alongwith the National Judicial Appointments Commission Bill No. 96 of 2014. Pertinently, on the very same day in the evening, the said Bill No.97C of 2014 and the National Judicial Appointments Commission Bill No. 96 of 2014 was introduced in the Rajya Sabha.
- 14.8.2014            The aforementioned Bill No: 97C of 2014) - titled The Constitution (One Hundred and Twenty-First Amendment) Bill, 2014 and the National Judicial Appointments Commission Bill No. 96 of 2014 was passed by the Rajya Sabha with requisite majority.
- 21.8.2014            The petitioner association filed Writ Petition (Civil) No. 775 of 2014 before this Hon'ble Court challenging the 121<sup>st</sup> Constitutional Amendment Bill No. 97C of 2014 as unconstitutional and violative of basic structure of the Constitution vis-à-vis the independence of Judiciary.



25.8.2014 By order dated 25/8/2014, the Hon'ble Court disposed of the aforementioned Writ Petition No. 775 of 2014 observing that the same is premature with further liberty to the petitioner herein to approach the Hon'ble Supreme Court at appropriate Stage.

31.12.2014 The 121<sup>st</sup> Constitution Amendment Bill No. 97C of 2014 has been ratified by 16 State Legislatures and therefore, received the assent of the President of India on 31.12.2014, subsequent to which, it came to be numbered as Constitution 99<sup>th</sup> Amendment Act 2014. Since upon receiving the Presidential Assent and by operation of Article 368, the Constitution stands amended as on 31.12.2014, the petitioner herein has accrued the right to challenge the Constitutionality of the aforementioned Constitution 99<sup>th</sup> Amendment Act, 2014. On the very same day, the National Judicial Appointments Commission Bill No. 96C of 2014 received the assent of the President and therefore, has become a law.

3.1.2015 Hence the present Writ Petition

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

**WRIT PETITION (C) No. \_\_\_\_\_ OF 2015**

**IN THE MATTER OF:**

SUPREME COURT ADVOCATES-ON-RECORD  
ASSOCIATION & ANR.

.. PETITIONERS

**VERSUS**

UNION OF INDIA

.. RESPONDENT

**P A P E R B O O K**

(FOR INDEX KINDLY SEE INSIDE)

**ADVOCATE FOR THE PETITIONERS: MR. SURYA KANT**  
(Vice President) SCAORA

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IN THE SUPREME COURT OF INDIA

(CIVIL ORIGINAL JURISDICTION)

WRIT PETITION (CIVIL) NO. \_\_\_\_\_ OF 2015

IN THE MATTER OF :

Supreme Court Advocates-on-Record  
Association & Anr.

.. Petitioners

**Versus**

Union of India

.. Respondent

A F F I D A V I T

I, Vipin nair, Secretary of Supreme Court Advocate-on-Record Association (Regd.), Golden Jubilee Bar Room, Supreme Court of India, New Delhi – 110 001, do hereby state on solemn affirmation as under :

1. That I am the Petitioner No.2 and Secretary of the Petitioner No.1 in the aforesaid case and as such I am fully conversant with the facts and proceedings of the case.
2. That I have read and understood the contents of para 1 to 10 and pages 1 to 57 of the accompanying Writ Petition and pages B to I of the List of Dates and I say that the facts stated therein are true and correct to my knowledge and belief.
3. That the annexures filed alongwith the Writ Petition are true and correct copies of the respective originals.

4. That I have not filed any other petition in this Hon'ble Court or any other High Court seeking self same reliefs.

DEPONENT.

VERIFICATION :

I, the deponent abovenamed, do hereby state on solemn affirmation that the contents of the paras 1 to 4 are true and correct to my knowledge and I believe the same to be true and that nothing material has been concealed therefrom.

DEPONENT.