IN THE SUPREME COURT OF INDIA

CIVIL WRIT JURISDICTION

WRIT PETITION (c) NO.13 OF 2015

Supreme Court Advocates on Record Association … Petitioner

v.

Union of India ... Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE UNION OF INDIA DATED 08.06.2015

PART I

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A. <u>PREFACE</u>

1. In the instant case, the lead petitioners the Supreme Court Advocates-on-Record Association, other petitioners and several interveners have submitted that the Constitution (99th Amendment) Act, 2014 (hereinafter "99th Amendment") and the National Judicial Appointments Commission Act, 2014 (hereinafter "NJAC Act") are violative of the independence of the judiciary and hence unconstitutional for abrogating the basic structure of the Constitution. The key basis for this argument is that the 99th Amendment and NJAC Act take away from the primacy of the judiciary in the matter of appointments, held in *Supreme Court Advocates-on-Record Association v. Union of India* (1993) 4 SCC 441 (hereinafter "*the Second Judges' case*") and clarified in *In Re: Presidential Reference* (1998) 7 SCC 739 (hereinafter "*the Third Judges' case*") as a constitutional requirement for all appointments to the higher judiciary. The *sequitur* of this proposition is the submission that the presence of non-judicial members, as well as their power to prevent a candidate recommended by the judicial members of the NJAC from being recommended to the President for appointment affect the independence of the judiciary and are hence unconstitutional.

2. In substance this case can thus be distilled into two questions: *first,* whether not having an absolute majority of judges (3 out of 6 as opposed to 3 out of 5) on the NJAC, and *secondly,* whether not

allowing the judiciary to insist on a candidate of its choice (owing to the requirement of special majority, i.e. 5 out of 6 positive votes in favour of a candidate recommended for appointment) are violative of the independence of the judiciary and consequently abrogate the basic structure of the Constitution.

3. In order to meet these contentions, it is necessary to advance certain key legal propositions pertaining to the power of the judiciary to strike down constitutional amendments, the scope of the basic structure doctrine, the understanding of the independence of the judiciary in theory and in our Constitutional framework, the idea of checks and balances as a necessary corollary of separation of powers, the comparative law in other jurisdictions pertaining to appointment of judges and the constitutional imperative for the Supreme Court to consider all provisions of the Constitution and values forming part of the basic structure holistically.

4. The following propositions will thus be advanced:

a. Parliament’s power to amend the Constitution is plenary, subject to only one restriction, i.e. it cannot abrogate the basic structure of the Constitution, which has to be culled out from specific articles of the Constitution as originally enacted.

b. The 99th Amendment is entitled to a presumption of constitutionality. The burden is on the petitioners to rebut such

presumption of the basis of concrete facts to be brought on record and not surmises and speculation.

c. Parliament is best equipped to assess the needs of the people and the changing times and the wisdom of Parliament is not subject to judicial review.

d. Independence of the judiciary, checks and balances and democracy are all part of the basic structure of the Constitution which must be considered holistically.

e. *The Second Judges' Case* and *The Third Judges' Case* require reconsideration (see Note on Reference on behalf of Union of India).

f. If not reconsidered, then the aforementioned cases have no relevance to the assessment of the constitutionality of the 99th Amendment since the basis for these judgments has been removed, which Parliament is competent to do.

g. In any event, the *Second Judges' Case/ Third Judges' Case,* evolved a new system of a collegium-based appointment in response to particular exigencies at that time, a system which did not exist in the Constitution.

h. Primacy of the judiciary in the matter of appointment of judges to the higher judiciary is not a basic feature of the Constitution and has no necessary connection with judicial independence.

i. Assuming that there is primacy, even under the new dispensation, no appointment will be made unless at least 2 out of 3 judges concur in the same (see conclusions 5, 6 and 7 of *the Second Judges' Case*).

5. Each specific contention made by the petitioners will be rebutted by applying these legal propositions mentioned above to the 99th Amendment and NJAC Act on the whole, as well as to the specific provisions that have been challenged. In particular the following points will be advanced:

<u>99th Amendment</u>

a. Composition- why is the NJAC a body of six members

b. Role of eminent persons

c. Role of executive/ Law Minister

d. The pre-eminent position of the judiciary in the NJAC and how NJAC dilutes the role of the executive

<u>The NJAC Act:</u>

e. Rationale for special majority/ super majority requirement, loosely referred to as veto by petitioners

f. Procedure of enactment

g. No delegation of essential legislative function or uncanalised power to make regulations

6. On this basis, it will be demonstrated that the 99th Amendment and NJAC Act are entirely consonant with the principle of the independence of the judiciary, strengthen its foundations and do not in any manner abrogate the basic structure of the Constitution or any other provision of law as contended by the petitioners. Hence their constitutionality must be upheld by this Hon'ble Court.

B. PARLIAMENT'S POWER TO AMEND THE CONSTITUTION AND SCOPE OF JUDICIAL REVIEW

I. The power of amendment under Article 368 is plenary subject to the sole restriction that no constitutional amendment can violate the basic structure of the Constitution

7. An amendment to the Constitution, unlike an ordinary legislation, can only be tested on the touchstone of the basic structure. Consequently the heads available to challenge an ordinary legislation i.e. lack of legislative competence, and violation of fundamental rights cannot be invoked in the case of a constitutional amendment. Parliamentary power to amend the Constitution under Article 368 is plenary subject to only one limitation: such amendment cannot abrogate the basic structure or the basic features of the Constitution. This is a proposition well-established in ***Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225** (hereinafter "***Kesavananda Bharati***"*)* and accepted in a catena of decisions thereafter.

8. A Constitution Bench of this Hon'ble Court in ***Kuldip Nayar v. Union of India* (2006) 7 SCC 1** explained the difference in the grounds for challenging an ordinary legislation and a constitutional amendment as follows (at p. 67)**:**

> *"**106**.The doctrine of "basic feature" in the context of our Constitution, thus, does not apply to ordinary legislation which has only a dual criteria to meet, namely:*
>
> *(i) it should relate to a matter within its competence;*

(ii) it should not be void under Article 13 as being an unreasonable restriction on a fundamental right or as being repugnant to an express constitutional prohibition."

***107.** The basic structure theory imposes limitation on the power of Parliament to amend the Constitution. An amendment to the Constitution under Article 368 could be challenged on the ground of violation of the basic structure of the Constitution. An ordinary legislation cannot be so challenged. The challenge to a law made, within its legislative competence, by Parliament on the ground of violation of the basic structure of the Constitution is thus not available to the petitioners."*

Hence, it is humbly submitted that the 99th Amendment can only be challenged on the touchstone of the basic structure. The violation complained of thus has to be relatable to a basic feature of the Constitution.

II. There is a presumption of constitutionality in the case of constitutional amendments

9. Presumption of constitutionality for legislative enactments has been a long accepted principle in our constitutional jurisprudence. A Constitution Bench of this Hon'ble Court in ***Charanjit Lal Chowdhury v. Union of India* AIR 1951 SC 41**, speaking through Fazl Ali J. stated as follows:

*"**11.** Prima facie, the argument appears to be a plausible one, but it requires a careful examination, and, while examining it, two principles have to be borne in mind: (1) that a law may be constitutional even though it relates to a single individual, in those cases where on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself; (2) that it is the accepted doctrine of the American Courts, which I consider to be well-founded on principle, that the presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who*

attacks it to show that there has been a clear transgression of the constitutional principles. A clear enunciation of this latter doctrine is to be found in Middleton v. Texas Power and Light Company [248 US 152, 157] in which the relevant passage runs as follows:

"It must be presumed that a legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds."

10. Thereafter, in ***Ram Krishna Dalmia v. Justice S.R. Tendolkar*** **AIR 1958 SC 538** the law on the subject was summarised as follows by Das CJI:

*"**11**.....The decisions of this Court further establish—*

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be

regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and un-known reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

The above principles will have to be constantly borne in mind by the court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws."

11. In ***Kesavananda Bharati***, Hegde and Mukherjea JJ. agreed that the aforesaid presumption will equally apply to constitutional amendments and stated that (at p. 484):

> *"**661**. The presumption of the constitutional validity of a statute will also apply to constitutional amendments."*

12. Further, it is humbly submitted that the burden on he who attacks the constitutionality of the statute cannot simply be met by apprehensions of unconstitutionality. The presumption of constitutionality can only be rebutted on the basis of concrete facts. In ***B Banerjee v. Anita Pan*, (1975) 1 SCC 166,** it was held by Krishna Iyer J. (at p. 175):

> "***12.*** *Law is a social science and constitutionality turns not on abstract principles or rigid legal canons but concrete realities and given conditions; for the rule of law stems from the rule of life. We emphasize this facet of sociological jurisprudence only because the High Court has struck down Section 13 of the Amendment Act on surmises, possibilities and maybes rather than on study of actualities and proof of the nature, number and age of pending litigations caught in the net of the retrospective clause. Judges act not by hunch but on hard facts properly brought on record and sufficiently strong to rebuff the initial presumption of constitutionality of legislation.*"

13. In ***V.C. Shukla v. State (Delhi Administration)*** **1980 Supp SCC 249,** this Hon'ble Court held *per* Fazal Ali J. (at p. 259):

> "***11.*** *....this Court has laid down that presumption is always in favour of the constitutionality of an enactment and the onus lies upon the person who attacks the statute to show that there has been an infraction of the constitutional concept of equality. It has also been held that in order to sustain the presumption of constitutionality, the court is entitled to take into consideration matters of common knowledge, common report, the history of the times and all other facts which may be existing at the time of the legislation. Similarly, it cannot be presumed that the administration of a particular law would be done with an "evil eye and an unequal hand". Finally, any person invoking Article 14 of the Constitution must show that there has been discrimination against a person who is similarly situate or equally circumstanced....*"

14. Again in ***Amrit Banaspati Co. v. Union of India*** **(1995) 3 SCC 335,** it was held *per* Paripoornan J. (at p. 340):

> "***6.*** *It is settled law that the allegations regarding the violation of constitutional provision should be specific, clear and unambiguous and should give relevant particulars, and the burden is on the person who impeaches the law as violative of constitutional guarantee to show that the particular provision is infirm for all or any of the reasons stated by him. In the recent decision of this Court Gauri Shanker v.Union of India [(1994) 6 SCC 349] to which both of us were parties, it was reiterated that—*
>
> *(a) there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;*
>
> *(b) it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;*
>
> *(c) in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation."*

15. The standard which has to be met for constitutionality of a law to be upheld was summarised in ***Government of Andhra Pradesh v. P. Laxmi Devi*** **(2008) 4 SCC 720 (at p. 747):**

> *"**66**. As observed by the Privy Council in Shell Co. of Australia v. Federal Commr. of Taxation [1931 AC 275 : 1930 All ER Rep 671 (PC)] : (All ER p. 680 G-H)*
>
> *'… unless it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will.'"*
>
> *"**67**. Hence if two views are possible, one making the provision in the statute constitutional, and the other making it unconstitutional, the former should be preferred vide Kedar Nath Singh v. State of Bihar [AIR 1962 SC 955]. Also, if it is necessary to uphold the constitutionality of a statute to construe its general words narrowly or widely, the court should do so vide G.P. Singh's Principles of Statutory Interpretation, 9th Edn., 2004, p. 497."*

16. On this basis it is humbly submitted that the aforesaid presumption of constitutionality must be applied in the instant case. Consequently, the burden of proof lies on the petitioners to demonstrate that the 99th Amendment abrogates the basic structure of the Constitution. This burden cannot be discharged by speculation, surmises and apprehensions but "hard facts" which rebut the said presumption beyond reasonable doubt.

III. Parliament is best equipped to assess the needs of the people and the changing times

17. A Constitution Bench of this Hon'ble Court has in ***Mohd. Hanif Quareshi*** **v.** ***State of Bihar*** **AIR 1958 SC 731**, followed the *dicta* in

Middleton v. Texas Power & Lighting (249 US 152 (1919)) and held as follows (at pp. 740-741):

> *"**15.** … The courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest and finally that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation."* [Emphasis supplied]

18. Thus Parliament is best positioned to assess the needs of the changing times. In this regard, it may be noted that this Court in ***Kesavananda Bharati*** held as follows per Hegde and Mukherjea JJ. (at p. 473):

> *"**634**. Every Constitution is expected to endure for a long time. Therefore, it must necessarily be elastic. It is not possible to place the society in a straitjacket. The society grows, its requirements change. The Constitution and the laws may have to be changed to suit those needs. No single generation can bind the course of the generation to come. Hence every Constitution, wisely drawn up, provides for its own amendment."*

19. Similarly, in ***State of W.B. v. Anwar Ali Sarkar* 1952 SCR 284** it was reiterated by Vivian Bose J. that:

> *"**90**…The Constitution must, in my judgment, be left elastic enough to meet from time to time the altering conditions of a changing world with its shifting emphasis and differing needs…"*

20. In this context, a very important consideration for the legislature would be that of a law being rendered unreasonable by passage of

time, a position of law acknowledged by this Hon'ble Court in a catena of decisions. In ***State of M.P. v. Bhopal Sugar Industries Ltd.*** **AIR 1964 SC 1179** it was observed as follows:

> *"**6**.…Differential treatment arising out of the application of the laws so continued in different regions of the same reorganised State, did not, therefore immediately attract the clause of the Constitution prohibiting discrimination. But by the passage of time, considerations of necessity and expediency would be obliterated, and the grounds which justified classification of geographical regions for historical reasons may cease to be valid. A purely temporary provision which because of compelling forces justified differential treatment when the Reorganisation Act was enacted cannot obviously be permitted to assume permanency, so as to perpetuate that treatment without a rational basis to support it after the initial expediency and necessity have disappeared."*

21. The position of the law on this aspect came to be summarised after relying on the aforesaid decisions in ***Malpe Vishwanath Acharya v. State of Maharashtra*** **(1998) 2 SCC 1** as follows (at p. 12):

> *"**15**. The aforesaid decisions clearly recognise and establish that a statute which when enacted was justified may, with the passage of time, become arbitrary and unreasonable."*

22. Hence it is submitted that if a law becomes unreasonable over a period of time, the legislature in its wisdom can change it in order to make it reasonable. The same principle equally applies to the Constitution which may also have to be changed over a period of time.

23. The *sequitur* of this analysis in the instant case is that there were 'compelling forces' in terms of executive over-reach in appointments, starting with the supersession of judges in 1973, mass transfer of judges in the Emergency in 1976, a second supersession in 1977 and

continuing itinerant interference over the 1980s, which provided the context for the creation of the judicial collegium and vesting primacy in the judiciary in the matter of appointments in ***the Second Judges' case***. A system devised to address particular concerns cannot assume permanence for all times to come. This is especially because the collegium having operated for over two decades has meant that different issues and concerns have arisen, which Parliament has now in its wisdom decided to address. This point will be advanced in detail while dealing with ***the Second Judges' case*** and the question of primacy.

IV. The scope of judicial review does not extend to reviewing the wisdom of the Parliament or the substance of Parliamentary debates

24. It is respectfully submitted that the scope of judicial review does not extend to reviewing the wisdom of the Parliament or the substance of Parliamentary debates.

25. In ***Jalan Trading Co. (P) Ltd. v. Mill Mazdoor Sabha*** **AIR 1967 SC 691** this Court explained that invalidity of a law cannot be determined by finding faults in the scheme adopted by the legislature to achieve its objective:

> ***27.*** *...... With a view to secure a particular object <u>a scheme may be selected by the Legislature, wisdom whereof may be open to debate</u>; it may even be demonstrated that the scheme is not the best in the circumstances and the choice of the legislature may be shown to be erroneous, but unless the enactment fails to satisfy the dual test of intelligible classification and rationality of the relation with the object of the law, it will not be subject to judicial interference under Article 14. <u>Invalidity of legislation is not established by merely</u>*

finding faults with the scheme adopted by the Legislature to achieve the purpose it has in view ….”

26. In the context of constitutional amendments, this Hon'ble Court, in ***Kesavananda Bharati*** held *per* Sikri CJI (at p. 365):

> ***"288.** It is of course for Parliament to decide whether an amendment is necessary. The Courts will not be concerned with the wisdom of the amendment."*

27. Further, Khanna J. held in ***Kesavananda Bharati*** (at p. 821):

> *"**1535**. In exercising the power of judicial review, the courts cannot be oblivious of the practical needs of the Government. The door has to be left open for trial and error. Constitutional law like other mortal contrivances has to take some chances. Opportunity must be allowed for vindicating reasonable belief by experience. Judicial review is not intended to create what is sometimes called judicial oligarchy, the aristocracy of the robe, covert legislation, or Judge-made law. The proper forum to fight for the wise use of the legislative authority is that of public opinion and legislative assemblies. Such contest cannot be transferred to the judicial arena."* [Emphasis supplied]

28. Again, in ***Sanjeev Coke Manufacturing Company v. M/s. Bharat Coking Coal Limited* (1983) 1 SCC 147**, this Hon'ble Court was categorical about matters which fall beyond the scope of judicial review. It held through Chinnappa Reddy J. (at p. 170):

> "***20**. The learned counsel submitted that Article 39(b) would be attracted if the industry as a whole was nationalised and not if only a part of the industry was nationalised. According to him, all the coke oven plants wherever they existed had to be nationalised and no privately owned coke oven plants could be allowed to be set up in the future, if Article 39(b) was to be applied. We are unable to see any force in this submission. The distribution between public, private and joint sectors and the extent and range of any scheme of nationalisation are essentially matters of state policy which are*

inherently inappropriate subjects for judicial review. Scales of justice are just not designed to weigh competing social and economic factors. In such matters legislative wisdom must prevail and judicial review must abstain.”

29. More recently, in ***Karnataka Bank Ltd. v. State of A.P.*(2008) 2 SCC 254**, it was held *per* Sudershan Reddy J. (at p. 262):

> *“**19.**The rules that guide the constitutional courts in discharging their solemn duty to declare laws passed by a legislature unconstitutional are well known. There is always a presumption in favour of constitutionality, and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt; “to doubt the constitutionality of a law is to resolve it in favour of its validity”. Where the validity of a statute is questioned and there are two interpretations, one of which would make the law valid and the other void, the former must be preferred and the validity of law upheld. In pronouncing on the constitutional validity of a statute, the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law. If that which is passed into law is within the scope of the power conferred on a legislature and violates no restrictions on that power, the law must be upheld whatever a court may think of it. ..”*

30. The petitioners have also contended that Parliament, while passing the bills establishing the National Judicial Appointments Commission (hereinafter “NJAC”) did not take into account even once the proposal made by the National Commission to Review the Working of the Constitution (hereinafter, “NCRWC”) headed by former Chief Justice of India, Justice M.N. Venkatachaliah. The NCRWC proposed a commission which contained a majority of judges. It is humbly submitted that validity of parliamentary proceedings cannot be the subject of judicial review. This is clearly provided for under Article 122 of the Constitution.

31. Further, as a factual matter, the petitioners are incorrect. The views of the NCRWC as well as several other views on reforming the judicial appointments process were taken into consideration by the Parliament for the enactment of the 99th Amendment. The same is evident from the speech made by Minister of Law and Justice, Mr. Ravi Shankar Prasad in the Rajya Sabha on the Constitution (One Hundred and Twenty-First Amendment) Bill, 2014:

> "*Sir, this whole re-writing of the Constitution and the resultant collegium system have been there for twenty years. But is the Government today making the only effort? No. Let me just tell the House very quickly and very briefly about the past efforts. There was the Constitution (Sixty Seventh Amendment) Bill, 1990. The Bill lapsed. Then there was the Constitution (Eighty Second Amendment) Bill, 1997. It could not be passed. Then there was the National Judicial Commission, 1998.Thereafter, there was the Constitution (Ninety Ninth Amendment) Bill, 2003 when Mr. Arun Jaitley, the present Leader of the House, wash on. Law Minister. Then there was the National Commission to Review the Working of the Constitution, 2003. Then there was the Second Administrative Reform Commission, 2007. And many other efforts were made. Then there was the Law Commission Report.*"

Mr. Ravi Shankar Prasad also noted:

> "*The Government had the widest consultations possible, and just to allay the apprehension that something is being done in a hurry, I must say, no, it has been going on for the last 20 years. The former Chief Justice of India, Mr. Venkatachaliah who headed the National Commission on review of the working of the Constitution also recommended that. He has held the wide consultations. Similarly, the Law Commission had the widest consultations. Many other political processes also gave their feedback. Therefore, it is nothing new. Therefore, this Government has taken cognizance of the efforts of 20 years by eminent jurists, leaders of all political parties, who have in principle stated that.*"

32. Mr. Sukhendu Sekhar Roy (MP) also said in the Rajya Sabha:

"Sir, even the National Commission to Review the Working of the Indian Constitution said, "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. The Commission, accordingly, recommends the establishment of a National Judicial Commission under the Constitution". Sir, this recommendation was of 2002 and we are in 2014 now, and still discussing it."

33. The views of the NCRWC were also taken note of in the Lok Sabha. In the Lok Sabha debate on the Constitution (One Hundred and Twenty-First Amendment) Bill, 2014 of 12th August 2014, Mr. Ravi Shankar Prasad noted:

"Madam Speaker, Justice Venkatachaliah, a distinguished Chief Justice, was heading the Constitution Review Commission formed by the Government headed by Shri Vajpayee. I would like to assure my friends from the Opposition that we in the BJP have been supportive of the National Judicial Commission right from day one. There have been views of some political parties to go to pre-1993 position but even during Vajpayee Government our commitment was that. Even in 2009 our commitment was that. Even during 2014 LokSabha election our manifesto clearly stated that we wanted a National Judicial Commission. Therefore, we have been quite consistent as far as this is concerned."

"The National Commission to Review the Constitution of Justice Venkatachaliah in 2002 proposed 5 members. The National Judicial Commission – 98th Amendment Bill, 2003 – proposed 7 members, the Administrative Reforms Commission headed by Veerappa Moilyji proposed 8 Members headed by the Vice-President, the Prime Minister, the Speaker, the CJI, the Law Minister and the two leaders of Opposition. And the last year's Bill proposed 6 members. <u>Therefore, taking into account all these developments, we have kept 6 members.</u> Therefore, that has to be considered. Two eminent persons are to be appointed by the Prime Minister, by the Chief Justice of India, the Leader of Opposition, the Leader of the largest Political Party in Opposition. Therefore, high-ranked people are going to appoint two eminent persons. I am sure, the two eminent persons will be the best available and in the collective judgement

they will take a call. Regulations also give that right under the Constitution. It can also be framed. But as a Parliamentarian, as a Law Minister, I think, I will trust the collective judgement of the three eminent persons more."

The text of the debates of the Rajya Sabha and Lok Sabha may be found in Annexures I and II respectively. It is thus clear that Parliament in its wisdom considered previous reform proposals and passed the 99th Amendment being fully apprised of the facts and the changing needs of the time.

V. The Statement of Objects and Reasons cannot be dispositive of the validity of a constitutional amendment

34. The Petitioners have further contended that the impugned amendment is bad on the ground that there was no proper consultation/consideration by the Parliament, and that proper facts were not put on record before deliberating and passing it, which is explicit from the Statement of Objects and Reasons. The above contention of the Petitioners is not sustainable in law and deserves to be rejected. This Court has consistently held that Statement of Objects and Reasons cannot be regarded as a benchmark for testing the validity of an amendment. Statement of Objects and Reasons can only be used as external aids in interpreting the provisions of the statute.

35. The effect of absence of any reasoning for an enactment in its Statement of Objects and Reasons was dealt by the court in ***Kuldip Nayar v. Union of India*** **(2006) 7 SCC 1** (at p. 97):

*"**256.** Another submission urged is that the Statement of Objects and Reasons for the Bill which brought about the amendment itself shows the absence of justification for doing away with the will of Parliament as earlier reflected in original Section 3 of the RP Act, 1951, which was in consonance with the scheme of the Constitution. The Statement of Objects and Reasons for the Bill mentioned that "a precise definition for 'ordinarily resident' was very difficult" and that after the matter was "examined in depth by the Government" it had been decided to do away with the requirement of residence in a particular State or Union Territory for contesting election to the Council of States from that State or Union Territory, and further that there were numerous instances where persons who were not normally residing in the State had got themselves registered as voters in such State simply to contest the elections to the Council of States.*

***258.** It has been argued that the reasons given in the Statement of Objects and Reasons for the Amendment Act do not provide any rational justification for the impugned amendment…*

***261.** The petitioners also lament that the well-considered view expressed by an eminent body like the National Commission on Working of the Constitution has been unreasonably brushed aside. The Commission in para 5.11.5 of its report did express its view that the parliamentary legislation that had been initiated seeking to do away with the domiciliary qualification for being chosen as a representative of any State or Union Territory in the Council of States would affect "the basic federal character of the Council of States" and that in order to maintain the said basic federal character of the said House, "the domiciliary requirement for eligibility to contest elections to the Rajya Sabha from the State concerned is essential". The Union of India has stated that it respectfully differs from the views expressed by the Commission.*

***280.** As regards the criticism that the reasons given in the counter-affidavit of the Union of India are distinct from those set out in the Statement of Objects and Reasons of the Bill that became the impugned law, we may only state that the Statement of Objects and Reasons of a proposed legislation is not the compendium of all possible reasons or justification. We do not find any contradiction in the stand taken by the Union of India in these proceedings in relation to the Statement of Objects and Reasons of the impugned amendment."*

36. In ***Bakhtawar Trust v. M.D. Narayan* (2003) 5 SCC 298**, this Court observed *per* Khare CJI (at p. 313):

*"**31**. It was then urged on behalf of the respondents that a perusal of the Statement of Objects and Reasons for the Validation Act shows that the intention of the legislature was rather to render the decision of the High Court infructuous than to correct any infirmity in the legal position. For this, reliance was sought to be placed on the Statement of Objects and Reasons of the impugned enactment. It is well settled by the decisions of this Court that when a validity of a particular statute is brought into question, a limited reference, but not reliance, may be made to the Statement of Objects and Reasons. The Statement of Objects and Reasons may, therefore, be employed for the purposes of comprehending the factual background, the prior state of legal affairs, the surrounding circumstances in respect of the statute and the evil which the statute has sought to remedy. It is manifest that the Statement of Objects and Reasons cannot, therefore, be the exclusive footing upon which a statute is made a nullity through the decision of a court of law."*

VI. In any event, circumstances with respect to appointments to the higher judiciary warranted the need for enactment of the 99th Amendment

37. It is humbly submitted that the 99th Amendment is a response to the need for a change in the process of appointing judges to the higher judiciary. The need for a new appointments system manifested itself in the criticisms of the collegium system of appointment of judges. Criticisms of the collegium system have been made by eminent jurists and former judges of this Hon'ble Court. The Late Justice VR Krishna Iyer has said:

"Another great deficiency is that a collegium that is untrained in the task, selects judges in secret and bizarre fashion. There could be room for nepotism, communalism and favouritism in the absence of guidelines. The selection process excludes the Executive. Nowhere in the world do we have judges alone selecting other judges. The collegium is a disaster: the P.D. Dinakaran episode is an example." ("The Syndrome of Judicial Arrears, The Hindu, December 2, 2009)

38. Justice AP Shah, Retd. Chief Justice of the Delhi High Court voiced the same fears about the functioning of the Collegium in a speech he delivered:

> *"The new dispensation of appointments and transfers has been criticized by the Bar. Mr. T.R Andhyarujina wrote ("Judicial Accountability": India's methods and experience, Judges and Judicial Accountability, edited by Cyrus Das and K. Chandra, published by Universal Law Co. Pvt. Ltd) that a Judiciary which assumes complete control over its own composition would have a conformist or a club like attitude. Judges tend to find virtues in others who display the same outlook. It is most unlikely that a Denning or a Kirby, or Boar Laskin or a Krishna Iyer would be appointed under this system. A Collegium which decides the matter in secrecy lacks transparency and is likely to be considered a group or faction. Therefore, prejudice and favour of one or the other member of the Collegium for an incumbent cannot be ruled out." (Mr. Justice AjitPrakash Shah, Judges' Appointments and Accountability, (2012) 2 LW (JS) 21, 28*)

39. Justice Ruma Pal, who herself served on the Collegium in her time as a Judge of the Supreme Court of India, criticised the process in a speech as follows:

> *"...the very secrecy of the process leads to an inadequate input of information as to the abilities and suitability of a possible candidate for appointment as a judge. A chance remark, a rumour or even third-hand information may be sufficient to damn a judge's prospects. Contrariwise a personal friendship or unspoken obligation may colour a recommendation. Consensus within the Collegiums is sometimes resolved through a trade-off resulting in dubious appointments with disastrous consequences for the litigants and the credibility of the judicial system. Besides, institutional independence has also been compromised by growing sycophancy and 'lobbying' within the system." (Ruma Pal J., An Independent Judiciary, 5th VM Tarkunde Lecture, 5th November, 2011)*

It is humbly submitted that these criticisms as well as several others by eminent persons demonstrate the need for changing the collegium

system and introducing a new system for appointment of judges to the higher judiciary.

40. It is also submitted that the 99th Amendment is not the first attempt at creating an independent commission for appointments to the higher judiciary. As already contended, Parliament in its wisdom considered various previous reform proposals, such as the NCRWC Report and the Report of the Second Administrative Reforms Commission, 2007 while passing the 99th Amendment, as is evident from the texts of the debates of the Lok Sabha and Rajya Sabha on the Constitution (121st Amendment) Bill, 2014. Thus, it cannot be contended that the 99th Amendment has been passed without proper consultation by the Parliament.

41. The idea of an independent appointments commission, by whatever name called, was mooted by Bhagwati J. (as he then was) in ***SP Gupta v. Union of India*** **1981 Supp SCC 87** (hereinafter "***the First Judges' case***") (at p. 231):

> *"**31.** …We would rather suggest that there must be a collegium to make recommendation to the President in regard to appointment of a Supreme Court or High Court Judge. The recommending authority should be more broad based and there should be consultation with wider interests. If the collegium is composed of persons who are expected to have knowledge of the persons who may be fit for appointment on the Bench and of qualities required for appointment and this last requirement is absolutely essential — it would go a long way towards securing the right kind of Judges, who would be truly independent in the sense we have indicated above and who would invest the judicial process with significance and meaning for the deprived and exploited sections of humanity. We may point out that even countries like Australia and New Zealand have veered round to the view that there should be a Judicial Commission for appointment of the higher judiciary. As recently as July 1977 the Chief Justice of*

Australia publicly stated that the time had come for such a commission to be appointed in Australia. So also in New Zealand, the Royal Commission on the Courts chaired by Mr Justice Beattle, who has now become the Governor-General of New Zealand, recommended that a Judicial Commission should consider all judicial appointments including appointments of High Court Judges. This is a matter which may well receive serious attention of the Government of India."

42. This matter also received due consideration in ***Subhash Sharma v. Union of India*** **1991 Supp (1) SCC 574** (at p. 599):

> "***50.*** *We are aware of the position that the setting up of the National Judicial Commission through a Constitutional Amendment is in contemplation. In the event of the amendment being carried and a National Judicial Commission being set up, the correctness of the ratio in S.P. Gupta case [1981 Supp SCC 87: (1982) 2 SCR 365] of the status of the Chief Justice of India may not be necessary to be examined in view of the fact that by the amendment the Chief Justice of India would become the Chairman of the Commission…*"

Evidently, a broad-based consultative mechanism was in contemplation for a considerable period of time. The establishment of an appointments commission, consisting of members of other branches of government as well as independent members, was not viewed as a dilution of the independence of the judiciary.

43. It is humbly submitted that the petitioners have themselves argued in favour of the model of an appointment commission along the lines proposed by the NCRWC Report. The National Judicial Commission proposed by the NCRWC Report was to consist of the Chief Justice of India (as the Chairperson), and two senior most judges of the Supreme Court, the Union Minister for Law and Justice and one eminent person

(nominated by the President after consulting the Chief Justice of India) as members.

44. Several other proposals have been made for establishing an appointments commission for judges to the higher judiciary. Some of these reform proposals are as follows:

i. The **121st Report of the Law Commission (1987) titled 'A New Forum for Judicial Appointments'** recommended a broad-based National Judicial Service Commission representing various interests with pre-eminent position in favour of the judiciary. This proposed Commission was to consist of the Chief Justice of India as Chairperson with three judges of the Supreme Court next to the Chief Justice in seniority, the immediate predecessor of the Chief Justice, three senior most Chief Justices of the High Courts, the Union Minister of Law and Justice, the Attorney General of India and one law academic. For matters relating to appointment of judges to the High Court, the Commission was to also include the Chief Justice of the concerned High Court and the Chief Minister of the concerned State.

ii. The **Constitution (Sixty Seventh Amendment) Bill, 1990** sought to create the National Judicial Commission to make recommendations to the President as to the appointment of a Judge of the Supreme Court (other than the Chief Justice of India), a Judge of a High Court and as to the transfer of a Judge from one High Court to any other High Court. This Commission was to consist of the Chief

Justice of India and two other Judges of the Supreme Court next to the Chief Justice in seniority, for recommendation as to the appointment of a Judge of the Supreme Court, a Chief Justice of a High Court and for transfer of a judge from one High Court to another. For making recommendation as to the appointment of judge of a High Court, the Commission was to consist of the Chief Justice of India, the Chief Minister of the concerned State, one other judge of the Supreme Court next to the Chief Justice in seniority, the Chief Justice of the High Court and one other Judge of the High Court next to the Chief Justice of that High Court in seniority.

iii. The **Constitution (Ninety-eighth Amendment) Bill, 2003** sought to create a National Judicial Commission headed by the Chief Justice of India with two Judges of the Supreme Court next to the Chief Justice in seniority; the Union Minister for Law and Justice; and one eminent citizen to be nominated by the President in consultation with the Prime Minister, as members.

iv. The **Second Administrative Reforms Commission** in its Report on Ethics in Governance (January 2007) proposed the creation of the National Judicial Council headed by the Vice-President of India and comprising the Prime Minister, the Speaker of the Lok Sabha, the Chief Justice of India, the Law Minister, the Leader of the Opposition in the Lok Sabha, and the Leader of the Opposition in the Rajya Sabha, in matters relating to appointment of judges to

the Supreme Court. In matters relating to appointment of judges to the High Courts, the council would also consist of the Chief Minister of the concerned State and the Chief Justice of the concerned High Court. The council was to have power to make recommendations to the President for appointment of judges to the Supreme Court as well as the High Courts.

v. The **Judicial Appointments Commission Bill, 2013** provided for the composition of the Judicial Appointments Commission. This Commission was to consist of the Chief Justice of India (as Chairperson), two other Judges of the Supreme Court next to the Chief Justice in seniority, the Union Minister of Law and Justice, two eminent persons to be nominated by the collegium consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the Lok Sabha.

45. In addition to the above, Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice has also, on various occasions emphasized the need for a broad-based method for appointment of judges to the higher judiciary. Some of the Parliamentary Standing Committee Reports which have made significant observations in this regard are:

i. **21st Report on the Judges (Inquiry) Bill, 2006 (August 2007)**:

"21.8. ...There was a consensus among Committee members that pre-1993 position was a better option as it was in consonance with the provision of the Constitution wherein the executive and the judiciary both were involved in the consultative process and the

executive had the primacy. The Committee favours the restoration of pre-1993 position."

"21.9. The Committee further suggests that the appointments could also be entrusted to wider a body other than the collegium with representation from both the judiciary and the executive. The Committee is of the considered opinion that it could be entrusted to the proposed "Empowered Committee" which could initially screen the names and thereafter, refer the same to the National Judicial Council for final recommendations."

ii. **28th Report on the Supreme Court (Number of Judges) Amendment Bill, 2008 (August 2008):**

"3(iii) The appointment of the Supreme Court and High Court judges is based on a collegium which consists of Judges alone. As the higher judiciary and for that matter the judiciary itself requires highly integrated, qualified worthful, unbiased and humane personnel with full sense of devotion to the profession, the new law should have a provision for constitution of a collegium consisting of the professionals having the above qualities and the political element should be eliminated from it in future appointments. The said amendment should have a provision for constitution of such a collegium."

iii. **44th Report on the Constitution (One Hundred and Fourteenth Amendment) Bill, 2010 (December 2010):**

"13(i). The collegium system of appointment of Judges should be replaced by a National Judicial Commission and National Judicial Services so that vacancies in the High Courts could be fulfilled timely and in a transparent and accountable manner."

"20. The Committee takes a serious note of the concerns expressed by the witnesses. Integrity, honesty and the output of Judges are issues that need to be addressed by Government with all seriousness. The appointment and continuance of the judges is regulated under the Constitution, but there is an urgent need on the part of the Government to review the procedure for appointment of the judges in the higher judiciary and also to put in place some mechanism so as to optimize the output of their performance. Towards this objective, Government may consider creation of a National Judicial Commission having representation

from the judiciary, executive, Bar and the Parliament. The Committee hopes that Government would take urgent steps in this direction. The concerns of the people that the proposed action might extend benefit in terms of extended years of service in certain non deserving cases too are appreciated, but, in the Committee's view, the solution to this lies in putting in place a well considered mechanism to see that the judiciary rises above from such allegations and the public perception changes.

iv. **64th Report on the Judicial Appointments Commission 2013 (December 2013):**

"11. The Constitution (One Hundred and Twentieth Amendment) Bill, 2013, provides for setting up of Judicial Appointments Commission by inserting Article 124(A) to Constitution of India and also amending Articles 124(2), 217(1) and 222(1). The structure and functions of the proposed Commission are provided in the Judicial Appointments Commission Bill, 2013 which is under examination of this Committee. The proposed legislation is an ordinary legislation and amendable by simple majority."

"38. The Committee appreciates the attempt of Government to set up Judicial Appointments Commission in place of present collegium which has inherent deficiencies and problems of opacity and non-accountability and reducing the Executive to a secondary position in the process of appointment of judges to the higher judiciary. It feels that the proposed Commission would ensure equal and active participation of both the Executive and the Judiciary in collaborative and participatory manner to find best and brightest persons with impeccable integrity to the Bench of higher Judiciary for the purpose of securing independent and impartial judiciary which is a Basic Structure of the Constitution, as per judicial pronouncement, whether one agrees or not."

"41. The Committee observes that the present Judicial Appointments Commission is broad based having representation from Judiciary, Executive and civil society which would facilitate wider consultation for assessing the suitability and integrity of the persons to be appointed as judges to the Bench of higher judiciary. In that context, the Committee suggests that there should be three eminent persons in the Commission instead of two as provided for in the Bill and at least one out of the three members should be from SC/ST/OBC/Women/minority preferably by rotation. The Committee also suggests that the fields of eminence may be specified in the Bill."

46. It is unclear as to how the petitioners insist on choosing the model proposed by the NCRWC Report for judicial appointments over all other models. As demonstrated, Parliament took into account previous reform proposals and passed the 99th Amendment. It is not for the petitioners to insist on one model over others.

47. This is especially so since the 99th Amendment is a response to the need of the times. Due regard must be had to the fact that the Constitution (121st Amendment) Bill, 2014 (which was ultimately passed as the 99th Amendment) was passed by both Houses of the Parliament with an overwhelming majority. It was passed in the Lok Sabha with 367 members voting in favour and none voting against it. In the Rajya Sabha, it was passed by 179 members voting in its favour, while one member abstained from voting. The numbers with which the 121st Amendment Bill was passed in both Houses of Parliament symbolises the will of the people, whose representatives voted in favour of the said Bill. Hence, the 99th Amendment which is a culmination of the various reform proposals for ushering in a new appointments process for the higher judiciary is symbolic of the will of the people of this country.

48. It deserves mention that within our federal structure, it is not only the Parliament but also the State legislatures which represent the will of the people. Till now, 20states have ratified the 99th Amendment. This is indicative of the fact that the 99th Amendment has been approved by

the will of the people twice over, once in the Parliament and also in the State legislatures.

49. The citizens of this nation, who, according to the Preamble, have given the Constitution unto themselves have desired that such a law be brought into force. It is humbly submitted that the will of the people unerringly points in one direction, which is the need for a system for judicial appointments which is more attuned with the changing needs of time. The Constitution is answerable to the aspirations of the people, and being a dynamic document, it is expected to adapt to their needs. In this context, the Parliament in its wisdom would be the best judge of when the Constitution would require to be amended to answer to the needs of the citizenry. This Hon'ble Court pertinently observed in ***Pannalal Bansilal Pitti v. State of Andhra Pradesh*** **(1996) 2 SCC 498** *per* Ramaswamy J. (at p. 510):

> *"**12.**...In a democracy governed by rule of law, gradual progressive change and order should be brought about. Making law or amendment to a law is a slow process and the legislature attempts to remedy where the need is felt most acute..."*

50. The overwhelming majority with which the 99th Amendment as well as the NJAC Act was passed in both Houses of Parliament makes it obvious that the will of the people points towards replacing the existing system of appointing judges with a new one. The Statement of Objects and Reasons of the 99th Amendment also indicate the same:

> *"3. After review of the relevant constitutional provisions, the pronouncements of the Supreme Court and consultations with*

eminent Jurists, it is felt that a broad based National Judicial Appointments Commission should be established for making recommendations for appointment of Judges of the Supreme Court and High Courts. The said Commission would provide a meaningful role to the judiciary, the executive and eminent persons to present their view points and make the participants accountable, while also introducing transparency in the selection process."

51. On this basis it is clear that Parliament was responding to the deficiencies of the collegium system of appointment of judges and what it perceived as a rewriting of the Constitution in order to establish it. This was not done on a whim, but rather taking into careful account of the reform proposals to this effect, all of which proposed a judicial appointments commission as well as the widely perceived criticisms of the collegium system both from within and outside the judicial fraternity. It was on this basis that Parliament in its wisdom felt the need for a new, integrated participatory system of appointment of judges and passed the 99thAmendment and the NJAC Act. These are factors that must be borne in mind by this Hon'ble Court while exercising the power of judicial review in this case.

52. It is also significant to note that the challenge before this Court is only by advocates or a body of advocates, whether it be the Supreme Court Advocates-on-Record Association or Bar Association of India etc. Though the petitioners may have *locus standi* but ultimately advocates are not primary consumers of the system of dispensation of justice. The consumers are the ordinary public which is the ultimate sovereign in our constitutional framework. The consumers, i.e. the public are represented through Parliament and State Assemblies. It is the duty of

Parliament and other legislative bodies to take note of the wishes of its sovereign and change or make laws consistent with their desire. This is what has been done in the instant case.

53. On the basis of the aforesaid analysis, the following propositions of law pertaining to the scope of judicial review of constitutional amendments are advanced for the consideration of this Hon'ble Court:

a. The power of Parliament to amend the Constitution is plenary subject to only one restriction: It must not abrogate the basic structure of the Constitution.

b. There is a presumption of constitutionality for all constitutional amendments; the burden of proof is on the petitioner to demonstrate that it is unconstitutional on the basis of hard facts and not mere surmises and apprehensions.

c. Parliament is best equipped to assess the needs of the people and the changing times.

d. The scope of judicial review does not extend to reviewing the wisdom of Parliament or the substance of Parliamentary debates.

e. The Statement of Objects and Reasons cannot be dispositive of the validity of a constitutional amendment.

f. In any case, the 99th Amendment as well as the NJAC Act are Parliament's response to the need for change in the appointments

process, a need felt widely by distinguished jurists and several reform proposals made in the past.

C. <u>BASIC STRUCTURE DOCTRINE</u>

I. What is the basic structure doctrine?

54. The basic structure doctrine was conceived of in the judgment of the Supreme Court in ***Kesavananda Bharati.*** The doctrine in turn is based on the jurisprudential work of Prof. Dieter Conrad, a professor from Heidelberg University, Germany.

55. Khanna J. in his judgment in ***Kesavananda Bharati*** explained the genesis of the theory and made an express reference to the work of Prof. Conrad (at p. 768):

> *"**1431.** Although there are some observations in <u>Limitations of Amendment Procedure and the Constituent Power by Conrad</u> to which it is not possible to subscribe, <u>the following observations, in my opinion, represent the position in a substantially correct manner:</u>*
>
> *"<u>Any amending body organized within the statutory scheme, howsoever verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority.</u>"*

56. As to what comprises the basic structure, Sikri CJI explained (at p. 365) that an amendment had to be *"within the broad contours of the preamble"* (para 287) and went on to enumerate the following as basic features (at p. 366):

> *"**292.** The basic structure may be said to consist of the following features:*
>
> *(1) Supremacy of the Constitution;*
>
> *(2) Republican and Democratic form of Government;*
>
> *(3) Secular character of the Constitution;*

(4) Separation of powers between the legislature, the executive and the judiciary;

(5) Federal character of the Constitution."

57. Shelat and Grover JJ. enlisted the following as an illustrative list (at p. 454):

> *"582. If the historical background, the preamble, the entire scheme of the Constitution, relevant provisions thereof including Article 368 are kept in mind there can be no difficulty in discerning that the following can be regarded as the basic elements of the constitutional structure. (These cannot be catalogued but can only be illustrated):*
>
> *(1) The supremacy of the Constitution.*
>
> *(2) Republican and Democratic form of government and sovereignty of the country.*
>
> *(3) Secular and federal character of the Constitution.*
>
> *(4) Demarcation of power between the Legislature, the executive and the judiciary.*
>
> *(5) The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.*
>
> *(6) The unity and the integrity of the Nation."*

58. Reddy J. likened the basic features to props on which the edifice of the Constitution stands and held as follows (at p. 637):

> *"**1159**. The elements of the basic structure are indicated in the Preamble and translated in the various provisions of the Constitution. The edifice of our Constitution is built upon and stands on several props, remove any of them, the Constitution collapses. These are: (1) Sovereign Democratic Republic; (2) Justice, social, economic and political; (3) Liberty of thought, expression, belief, faith and worship; (4) Equality of status and of opportunity."*

59. Thus, it is humbly submitted that the basic structure comprises many features like several pillars in a foundation, some of which were enumerated in the opinions rendered in ***Kesavananda Bharati***, as cited above. The significance of these pillars is that if one of them is removed the entire edifice of the constitution will fall. Hence, in judging a constitutional amendment, the question to be addressed is whether the said amendment would lead to a collapse of the edifice of the Constitution.

II. Merely affecting or impinging upon an article embodying a feature that is part of the basic structure is not sufficient to declare an amendment unconstitutional

60. It is submitted that, as a matter of law, to sustain a challenge against the 99th Amendment of violating the basic structure of the Constitution, the violation must be of such a nature that the basic structure itself will collapse. In understanding what is to be avoided so as to preserve the basic structure, the words of Prof. Conrad as quoted by Khanna J. in ***Kesavananda Bharati*** are useful (at p. 769):

> *"**1431.** The amending procedure is concerned with the statutory framework of which it forms part itself. It may effect changes in detail, remould the legal expression of underlying principles, adapt the system to the needs of changing conditions, be in the words of Calhoun 'the medicatrix (Sic) of the system', but should not touch its foundations."*

61. Thus what emerges from the original theory of Prof. Conrad, as imported into India by Khanna J. is that while details and underlying

legal expressions could be changed, such a change cannot touch the very foundations of the Constitution.

62. Further, the *dicta* of Reddy J. in ***Kesavananda Bharati*** (at p. 637) is helpful in understanding the impact which is to be avoided while effecting a permissible amendment:

> *"**1159**. The edifice of our Constitution is built upon and stands on several props, remove any of them, the Constitution collapses."*

63. Hegde & Mukherjea JJ. have also explained the above proposition by stating that while abrogation and emasculation of the basic elements are impermissible, but reshaping of the constitution is permissible. They held (at p. 486):

> *"**666**. On a careful consideration of the various aspects of the case, we are convinced that the Parliament has no power to abrogate or emasculate the basic elements or fundamental features of the Constitution such as the sovereignty of India, the democratic character of our polity, the unity of the country, the essential features of the individual freedoms secured to the citizens. Nor has the Parliament the power to revoke the mandate to build a welfare State and egalitarian society. These limitations are only illustrative and not exhaustive. Despite these limitations, however, there can be no question that the amending power is a wide power and it reaches every Article and every part of the Constitution. That power can be used to reshape the Constitution to fulfil the obligation imposed on the State. It can also be used to reshape the Constitution within the limits mentioned earlier, to make it an effective instrument for social good."*

64. Giving an example, Sikri CJI said (at pp. 314-15):

> *"**48**. The articles which are included in the proviso (to Article 368) may be now considered. Part V, Chapter I, deals with "the Executive". Article 52, provides that there shall be a President of India, and Article 53 vests the executive power of the Union in the*

President and provides how it shall be exercised. These two articles are not mentioned in the proviso to Article 368 but Articles 54 and 55 are mentioned.

Article 54 provides:

The President shall be elected by the members of an electoral college consisting of-

(a) the elected members of both Houses of Parliament; and

(b) the elected members of the Legislative Assemblies of the States.

***49**. Article 55 prescribes the manner of election of the President.*

***50**. Why were Articles 52 and 53 not mentioned in the proviso to Article 368 if the intention was that the States would have a say as to the federal structure of the country? One of the inferences that can be drawn is that the Constitution-makers never contemplated, or imagined that Article 52 will be altered and there shall not be a President of India. In other words they did not contemplate a monarchy being set up in India or there being no President."*

65. This Hon'ble Court has explained that a mere amendment to an article of the Constitution, even if embodying a basic feature, will not necessarily lead to a violation of the basic feature involved. In the context of the principle of equality, this Hon'ble Court in ***Bhim Singhji v. Union of India*** **(1981) 1 SCC 166** *per* Krishna Iyer J. explained as follows (at p. 186):

*"**20**. The question of basic structure being breached cannot arise when we examine the vires of an ordinary legislation as distinguished from a constitutional amendment. Kesavananda Bharati [(1973) 4 SCC 225: 1973 Supp SCR 1] cannot be the last refuge of the proprietariat when benign legislation takes away their "excess" for societal weal. <u>Nor, indeed, can every breach of equality spell disaster as a lethal violation of the basic structure</u>. Peripheral inequality is inevitable when large-scale equalisation processes are put into action. If all the Judges of the Supreme Court in solemn session sit and deliberate for half a year to produce a legislation for reducing glaring economic inequality their genius will let them down if the essay is to avoid even peripheral inequalities. Every large cause claims some martyr, as sociologists will know. <u>Therefore, what is a betrayal of the basic</u>*

feature is not a mere violation of Article 14 but a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice. If a legislation does go that far it shakes the democratic foundation and must suffer the death penalty. But to permit the Bharati ghost to haunt the corridors of the court brandishing fatal writs for every feature of inequality is judicial paralysation of parliamentary function. Nor can the constitutional fascination for the basic structure doctrine be made a trojan horse to penetrate the entire legislative camp fighting for a new social order and to overpower the battle for abolition of basic poverty by the 'basic structure' missile." [Emphasis supplied]

66. While explaining the above proposition, in the context of federalism, this Hon'ble Court, speaking through Balakrishnan CJI, held in ***Ashoka Kumar Thakur v. Union of India*** **(2008) 6 SCC 1** as follows (at p. 482):

> *"**115**. The basic structure of the Constitution is to be taken as a larger principle on which the Constitution itself is framed and some of the illustrations given as to what constitutes the basic structure of the Constitution would show that they are not confined to the alteration or modification of any of the fundamental rights alone or any of the provisions of the Constitution. Of course, if any of the basic rights enshrined in the Constitution are completely taken out, it may be argued that it amounts to alteration of the basic structure of the Constitution. For example, the federal character of the Constitution is considered to be the basic structure of the Constitution. There are large number of provisions in the Constitution dealing with the federal character of the Constitution. If any one of the provisions is altered or modified, that does not amount to the alteration of the basic structure of the Constitution. Various fundamental rights are given in the Constitution dealing with various aspects of human life. The Constitution itself sets out principles for an expanding future and is obligated to endure for future ages to come and consequently it has to be adapted to the various changes that may take place in human affairs."* [Emphasis supplied]

67. Thus, it is humbly submitted that the mere amendment of any one article of the Constitution will not amount to a violation of the basic feature embodied in it. Abrogation or emasculation of a feature

requires something significantly more than the mere amendment of the text. The amendment must be such that one of the pillars of the Constitution, as illustrated in the aforesaid judgments must collapse thereby obliterating the foundations of the Constitution.

68. Nothing in the aforesaid argument assumes or concedes that the 99th Amendment even impinges on the basic structure of the Constitution. On the contrary, it is our view that the 99th Amendment is perfectly consonant with it and strengthens the independence of the judiciary while upholding democracy, rule of law and checks and balances. A body like NJAC is in sync with the "need of the times" and is modeled on, *inter alia,* "checks and balances" and to ensure a democratic process with "plurality of views" including that of members of the public/ civil society. In fact the NJAC results in dilution of the power of the executive, in favour of the judiciary since three out of six members are the three seniormost judges of the Supreme Court including the Chief Justice of India as Chairperson. Thus the NJAC in our view strengthens the pillars of the independence of the judiciary, democracy, checks and balances and cannot in any way be said to impinge, let alone abrogate, any of the basic features of the Constitution.

III. Whether a constitutional amendment abrogates the basic structure is to be assessed on the basis of features as culled out from the text of the original enactment of the Constitution

69. A *sequitur* from the preceding argument is that while the Constitution can be ever changing (in terms of details and legal expressions), its foundations can never change. Thus there is a constant element in the Constitution from its very inception which can never be changed which constitutes the basic structure.

70. To decipher these elements one would certainly have to look at the original Constitution. This is clear from the judgment of Khanna J. in ***Kesavananda Bharati*** wherein he described the basic structure to be the *"basic structure or framework of the old Constitution"* and explained how it can be discerned as follows (at p. 767):

> *"**1426**. …. The word "amendment" postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed and done away with; it is retained though in the amended form. What then is meant by the retention of the old Constitution? It means the retention of the basic structure or framework of the old Constitution. A mere retention of some provisions of the old Constitution even though the basic structure or framework of the Constitution has been destroyed would not amount to the retention of the old Constitution. Although it is permissible under the power of amendment to effect changes, howsoever important, and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern. The words "amendment of the Constitution" with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution. It would not be competent under the garb of amendment, for instance, to change the democratic Government into dictatorship or hereditary monarchy nor would it be permissible to abolish the Lok Sabha and the Rajya Sabha. The secular character of the State according to which the State shall not discriminate against any citizen on the ground of religion only cannot likewise be done away with. Provision regarding the amendment of the Constitution does not furnish a pretense for subverting the structure of the Constitution nor can Article 368 be so construed as to embody the death wish of the Constitution or provide sanction for what may perhaps be called its lawful harakiri. Such subversion or destruction*

cannot be described to be amendment of the Constitution as contemplated by Article 368." [Emphasis supplied]

71. In ***Indira Nehru Gandhi v. Raj Narain*** **1975 Supp SCC 1**, Mathew J. explained the manner in which the meaning and constituent elements of a basic feature was to be gathered as follows (at p. 137):

> ***"341.*** *Leaving aside these extravagant versions of rule of law, there is a genuine concept of rule of law and that concept implies equality before the law or equal subjection of all classes to the ordinary law. But, if rule of law is to be a basic structure of the Constitution, one must find specific provisions in the Constitution embodying the constituent elements of the concept. I cannot conceive of rule of law as a twinkling star up above the Constitution. To be a basic structure, it must be a terrestrial concept having its habitat within the four corners of the Constitution. The provisions of the Constitution were enacted with a view to ensure the rule of law. Even if I assume that rule of law is a basic structure, it seems to me that the meaning and the constituent elements of the concept must be gathered from the enacting provisions of the Constitution. The equality aspect of the rule of law and of democratic republicanism is provided in Article 14. Maybe, the other articles referred to do the same duty."* [Emphasis supplied]

72. The above view was further followed and approved in ***Minerva Mills Ltd. v. Union of India*** **(1980) 3 SCC 625** by Bhagwati J. as follows (at p. 672):

> ***"83.*** *.....But, one position of a basic and fundamental nature I may make clear at this stage, and there I agree with Mathew J., that whether a particular feature forms part of the basic structure has necessarily to be determined on the basis of the specific provisions of the Constitution."* [Emphasis supplied]

73. Thus the aforesaid judgments hold that basic features are to be determined only on the basis of the specific provisions of the Constitution as originally enacted.

74. While spelling out the test for judging an amendment of the Constitution, this Hon'ble Court in ***Waman Rao v. Union of India* (1981) 2 SCC 362** (Chandrachud CJI, speaking for himself and Krishna Iyer, Tulzapurkar and AP Sen JJ.) held as follows (at p. 382):

> *"**17.**In the work-a-day civil law, it is said that the measure of the permissibility of an amendment of a pleading is how far it is consistent with the original: you cannot by an amendment transform the original into the opposite of what it is. For that purpose, a comparison is undertaken to match the amendment with the original. Such a comparison can yield fruitful results even in the rarefied sphere of constitutional law. What were the basic postulates of the Indian Constitution when it was enacted? And does the 1st Amendment do violence to those postulates? Can the Constitution as originally conceived and the amendment introduced by the 1st Amendment Act not endure in harmony or are they so incongruous that to seek to harmonise them will be like trying to fit a square peg into a round hole? Is the concept underlying Section 4 of the 1st Amendment an alien in the house of democracy? — its invader and destroyer? Does it damage or destroy the republican framework of the Constitution as originally devised and designed?*" [Emphasis supplied]

75. Thus to decipher the basic features, the Constitution as "originally devised and designed" would have to be considered.

76. In ***M. Nagaraj v. Union of India* (2006) 8 SCC 212** this Court laid down a two-step test for a principle to qualify as a basic feature, *per* Kapadia J. (as he then was) (at p. 243):

> *"**25.** For a constitutional principle to qualify as an essential feature, it must be established that the said principle is a part of the constitutional law binding on the legislature. Only thereafter, the second step is to be taken, namely, whether the principle is so fundamental as to bind even the amending power of Parliament i.e. to form a part of the basic structure. The basic structure concept accordingly limits the amending power of Parliament. To sum up: in order to qualify as an essential feature, a principle is to be first established as part of the constitutional law and as such binding on*

the legislature. Only then, it can be examined whether it is so fundamental as to bind even the amending power of Parliament i.e. to form part of the basic structure of the Constitution. This is the standard of judicial review of constitutional amendments in the context of the doctrine of basic structure. …

Thus, from the above it is clear that, the basic structures of the Constitution are those principles and doctrines of constitutional law, which are so essential and unalienable parts of the Constitution, that the framers of the Constitution never intended them to be removed or altered from the Constitution. They form part of the constitutional identity, the abrogation of which would be to displace the constitutional scheme and framework. Such principles may or may not be identifiable to any specific provision in the Constitution but the principles may form the connecting link or the object behind various provisions of the Constitution."

77. Based on the above mentioned decisions of this Hon'ble Court, it is submitted that the basic structure of the Constitution has to be determined on the basis of the Constitution as it stood on the date of its coming into force, i.e., the features that can be culled out from the various articles of the original Constitution. Any other interpretation will be adding to the basic structure, features that were not embodied in the original Constitution.

78. There is a sound theoretical justification for this proposition. The basic structure of the Constitution is unamendable because it is seen as a particular expression of constituent power which was exercised by the Constituent Assembly. Such constituent power is neither exercised by future legislatures which work under the Constitution and make laws, and courts, which likewise work under the Constitution and interpret it. Thus the basic structure can only be culled out from the provisions of the Constitution as originally enacted.

79. Keeping this view in its consideration, this Hon'ble Court in ***Kuldip Nayar v. Union of India* (2006) 7 SCC 1** held a residence requirement for election to the Rajya Sabha and secrecy of ballot not to be basic features, *per* Sabharwal CJI (at p. 62):

> *"**88**. The Irish Constitution like the Indian Constitution does not have strict federalism. Residence is not insisted upon under the Irish Constitution (See Constitution of India by Basu, 6th Edn., Vol. F). Similarly, in the case of the Japanese Constitution, qualifications are prescribed by the statute and not by the Constitution. The various constitutions of other countries show that residence, in the matter of qualifications, becomes a constitutional requirement only if it is so expressly stated in the Constitution. Residence is not the essence of the structure of the Upper House. The Upper House will not collapse if residence as an element is removed. Therefore, it is not a prerequisite of federalism."*
>
> *"**89**. It can be safely said that as long as the State has a right to be represented in the Council of States by its chosen representatives, who are citizens of the country, it cannot be said that federalism is affected. It cannot be said that residential requirement for membership to the Upper House is an essential basic feature of all federal constitutions. Hence, if the Indian Parliament, in its wisdom has chosen not to require a residential qualification, it would definitely not violate the basic feature of federalism. Our Constitution does not cease to be a federal constitution simply because a Rajya Sabha Member does not "ordinarily reside" in the State from which he is elected."*

80. Since there does not exist an exhaustive list of basic features to date, basic features can be discovered over time. However all such features must be culled out from the specific provisions of the original Constitution. Even a judicial pronouncement cannot devise a new feature to qualify as a basic feature since something that is devised after the coming into force of the Constitution surely cannot be considered a foundation of the edifice of the Constitution, if it did not exist when the edifice was being built.

81. On the basis of the aforesaid analysis, the following propositions of law pertaining to the basic structure doctrine are advanced for the consideration of this Hon'ble Court:

a. The basic structure of the Constitution contains several values which form the foundation of the Constitution.

b. Merely impinging on one of these values does not violate the basic structure; a constitutional amendment must abrogate it in a manner that the foundation itself collapses. In any event, the 99th Amendment does not even impinge on any value that is part of the basic structure.

c. To determine whether a value is part of the basic structure, such value will have to be discerned from the provisions of the Constitution as originally enacted.