IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. OF 2018

In the matter of Article 226 of the Constitution of India;

AND

In the matter of Articles 14, 19 and 21 of the Constitution of India;

AND

In the matter of Articles 124 and 217 of the Constitution of India.

AND

In the matter of appointment of Judges to the Hon'ble High Court of Judicature at Bombay.

1. Rohini M. Amin,
Advocate and General Secretary of
National Lawyers' Campaign for
Judicial Transparency and Reforms,
adult, Indian inhabitant,
having her address at
304, Hari Chambers, 3rd Floor,
54/68 SBS Marg,
Near Old Custom House, Fort,
Mumbai- 400 023.

2. Ghyamshyam Upadhyay,
Advocate, High Court of Bombay,

3. Sunil Shantisarup Gupta,
Flat No.1, 3rd. Floor, Mitra Kunj,
16, Pedder Road,
Mumbai – 400 026. … Petitioners

Versus

1. The Hon'ble Chief Justice of India,
Supreme Court of India,
Tilak Marg,
New Delhi 110 001.

2. Hon'ble Members of the Collegium,
Supreme Court of India,
Tilak Marg,
New Delhi 110 001.

3. Hon'ble Acting Chief Justice,
High Court of Judicature at Bombay,
Mumbai-400 032.

4. Union of India,
represented by the Secretary,
Department of Law & Justice,
Jaisalmer House,
26, Man Singh Road,
New Delhi 110 011.

5. Hon'ble Shri Ravi Shankar Prasad,
Union Law Minister,
Shastri Bahvan,
New Delhi.

6. The Chairman,
Parliamentary Committee on Law & Justice,
Parliament House Annexe Ext. Building,
New Delhi-110001,

7 The State of Maharashtra,
represented by its Chief Secretary,
Mantralaya, Mumbai-400 032.

8. The Chairman,
Bar Council of India,
21, Rouse Avenue,
Institutional Area, New Delhi-110 002.

9. The Bar Council of Maharashtra and Goa,
High Court Extension Building, Fort,
Mumbai-400 032.

10. The President,
Bombay Bar Association,
High Court of Judicature at Bombay,
Original Side,
Mumbai-400 032.

11. The President,
Advocates' Association of Bombay,
High Court of Judicature at Bombay,
Appellate Side,
Mumbai 400 032. … Respondents

TO

THE HONOURABLE THE CHIEF JUSTICE

AND THE OTHER HONOURABLE PUISNE

JUDGES OF THIS HONOURABLE COURT

HUMBLE PETITION OF THE PETITIONERS ABOVENAMED

MOST RESPECTFULLY SHEWETH:

1. The Petitioners intend to keep this Writ Petition extremely brief, for, they believe that had the judgments of the Supreme Court in Kesavananda Bharati v. the State of Kerala (1973) Supp. SCR 1, S.P. Gupta v. Union of India, AIR 1982 SC 149 and Supreme Court Advocates-on-Record Association and another v. Union of India & Ors. (2016) 5 SCC 1 (popularly known as the Judges-1, Judges-2 and the NJAC Cases), each running into hundreds of pages, not been not so rendered but in a few pages and the supposed principle of law laid down therein been able to be read and understood by the common man, a situation of instituting a Writ Petition as the instant one by the Petitioners, ordinary lawyers and lay people, invoking the jurisdiction of this Hon'ble Court would not have arisen.

2. The Constitution of India is not a complex law as it is made out to be today by the so-called legal luminaries, but a simple one, the fundamentals of which are taught in schools. Its essence is that in a Federal State with the Parliament as the Central legislature and the Union Government as the federal Government vested with the legislative and executive functions on subjects referred to in Part I of the Seventh Schedule to the Constitution and the States invested with the legislative and executive powers to enact laws and enforce the same in respect of matters provided for in the State List and a Concurrent List where the Central and the State legislatures, both, are empowered to enact laws subject to the federal laws having an overriding effect where there is a conflict. The Parliament consists of the President of India who is the head of the executive. Ours is not a Federal Constitution stricto sensu, but it retains all the essential features of a Federal Constitution. The concept of separation of powers, namely, of the legislature, executive and judiciary, is the very foundation of the Constitution of India, but the same is not rigid or watertight. Stated in simple words, the executive function of the State is to be discharged by the Council of Ministers who are responsible for its day to day functioning to the legislature and through them to the people of the country and a judiciary to decide the disputes between citizen and citizen, citizen and State, State and citizen and between State and State.

3. The Constitution of India, by virtue of Articles 124(2), 217, 233 and 234, in unmistakable terms provides for the appointment of Judges to the Supreme Court, High Courts, District Courts and subordinate Courts. The Constitution also, by virtue of Articles 218 and

221, guarantees the independence of the judiciary inasmuch as a Judge of the Supreme Court or High Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-third of the members of the House present and voting has been presented to the President in the same session; so too that "neither the privileges nor the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment". As aforesaid, the President is the head of the Union executive and he is bound to act on the aid and advice of the Council of Ministers. So far as State Governments are concerned, the Governor, who is the executive head of the State, in the like manner is bound to act on the aid and advice of the Council of Ministers. Article 124(2) makes it obligatory on the part of the President to consult such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the appointment of Judges of the Supreme Court and High Courts. The proviso to Article 124(2) adds that "in the case of appointment of a Judge other than the chief Justice, the chief Justice of India shall always be consulted". Article 217 makes it obligatory on the part of the President to consult 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 concerned, in the matter of appointment of a Judge of the High Court.

4. What is stated above, in brief, is the very essence of the constitutional law in so far as the Union and State judiciary is concerned, namely – the appointment to the office of the Chief Justice of India, Judges of the Supreme Court, High Courts, District Courts and subordinate Courts. This is what Petitioner Nos 3 & 4 , who are in their 60s and 70s, have learnt in their Social Studies Classes. However, the judgments of the Supreme Court mentioned above have rendered the aforestated fundamental principles of constitutional law redundant. Why? Because the said judgments made white as black, black as white, straight to crook and crook to straight.

5. Having briefly stated the essence of the constitutional law, as aforesaid, the Petitioners beg to state who they are, what the reliefs they seek are and their locus standi. Petitioner Nos.1 & 2 are citizens of India; they are lawyers practicing in the Hon'ble High Court of Judicature at Bombay and other Courts and Tribunals. They all are eligible to be considered for appointment as a High Court Judge in terms of Article 217. They, however, hasten to add that they do not have any right to be so selected or appointed. What they assert, in all humility is their right to be considered along with others who are eligible to be selected and appointed if they are more meritorious and deserving.

6. Petitioner Nos.6 to 10 are also citizens of India. They assert in all humility that the institution of judiciary is not concerning lawyers and Judges alone. The common man too is an equal stakeholder. They consider that their right to have a judiciary manned by the most meritorious men and women, appointed in terms of Articles 124 and 217 of the Constitution as amended by virtue of the Constitution (Ninety-ninth Amendment) Act, 2014 and the National Judicial Appointment Commission Act, 2014 (the Acts, for short), is a fundamental right. The

said Acts, which received assent of both Houses of the Parliament and ratification by majority of States, is the will of the people and the Constitution as amended by the Constitution (Ninety-ninth Amendment) Act, 2014 is the law of the land. The judgment of the Supreme Court in Supreme Court Advocates-on-Record Association and another v. Union of India & Ors. (2016) 5 SCC 1 (popularly known as the NJAC case) is not binding on the Petitioners because they were not parties to the said case; the said judgment does not constitute any res judicata and there can be no res judicata unless there is a cause of action estoppel. The judgment in the NJAC case does not constitute to be a 'res judicata' and thus final and binding so far as the petitioners are concerned, because the petitioners were not party to the said judgment. In so far as the Petitioners are concerned, if the said judgment contains any declaration of law within the meaning of Article 141, the law so declared could be applied as a precedent in determining any litigation instituted subsequent to the pronouncement of the said judgment, provided the said judgment is rendered per curiam. The Petitioners in all humility assert that the judgment in the NJAC case is rendered per incuriam and it does not constitute a declaration of law within the meaning of Article 141 to be binding on this Hon'ble Court. It is only appropriate to add that the correctness of the said judgment is being sought to be reviewed by some of the instant Petitioners in Review Petition (D) No. 6578/2017 in the Supreme Court, which is pending.

7. The legal status of the Respondents is manifest from the very cause title itself. They are necessary parties; without their presence the reliefs sought for cannot be granted; their presence is also necessary for a just and proper adjudication of the instant Writ Petition.

8. As aforesaid, Petitioner Nos. 1 & 2 are Advocates practicing in this Hon'ble Court and other Courts and Tribunals. They were enrolled with the Bar Council of Maharashtra and Goa in the years _____, respectively. All of them have been for more than ten years an Advocate of a Hon'ble High Court and thus they satisfy the requirement of Article 217(2) for appointment as a Hon'ble High Court Judge. The grievance of Petitioner Nos. 1 & 2 is that the collegium system of selection and appointment of Judges where the Judges appoint themselves denies them the protection under Article 14 inasmuch as they, who are first generation lawyers who have no Godfathers, none of them has their father, uncle, brother or any immediate relative as a Sitting or former Judge of the High Court or the Supreme Court or a Cabinet Minister, Chief Minister, Governor, and gives them no chance of being considered even while they are eligible and meritorious.

9. The Petitioners submit that the Constitution as originally enacted, which has given a free hand to the political executive to appoint the Chief Justice and Judges of the Supreme Court and of the High Courts; so too transfer of Judges from one Hon'ble High Court to another, was considered to be needing change and that a time has come for an independent Judicial Appointments Commission. Accordingly, during the tenure of Shri V.P. Singh as Prime Minister, the Constitution (Sixty-seventh) Amendment Bill, 1990 was introduced to amend Articles 124(2), 217(1), 222(1) and 231(2)(a). However, the said Bill got lapsed consequent upon the dissolution of the 9th Lok Sabha. The purpose of the said amendment was to provide for a transparent system of selection and appointment of Judges to the higher judiciary, the Supreme Court and High Courts. The said Amendment Bill was proposed to avert political

considerations in judicial appointments; so too to secure the representations of the sons and daughters of the common man, for, even then it was felt that the higher judiciary is the exclusive province of the elite class, the legal and judicial dynasties. The said Bill was introduced in the Lok Sabha on 18th May, 1990. The Lok Sabha was dissolved in March.1991.

10. As lamented by late Dinesh Goswami, the then Union Law Minister who piloted the Constitution (Sixty-seventh) Amendment Bill, 1990, so too legendary Justice Krishna Iyer, the Supreme Court is the exclusive province of the elite dynasties of lawyers and Judges; it is literally controlled by them. The elite class of lawyers, using the Supreme Court Advocates on Record Association, over which they exercise enormous influence, went ahead to jeopardize the reform which late Dinesh Goswami and Justice Krishna Iyer and noble souls like them contemplated, namely, a transparent judiciary. They also succeeded in sabotaging the NJAC Act and to retain their control over selection and appointment of Judges to the higher judiciary. They made the Supreme Court to rewrite the Constitution in the NJAC case. Thus took rebirth of the collegium system of appointment of Judges where the Judges appoint themselves which is ex facie undemocratic and contrary to the express constitutional provisions. It is difficult to fathom how the Supreme Court could be persuaded to rewrite Articles 124 and 217 of the Constitution. They could do so because of the judgments in Kesavananda Bharati and S.P. Gupta (cited supra) running into millions of words, creating a mysticism about our Constitution.

11. A citizen could invoke the jurisdiction of the Supreme Court under Article 32 of the Constitution where his fundamental right is infringed and the said right is guaranteed as a fundamental right. It was in consonance with the first principle of jurisprudence – rights, remedies and forums. But Kesavananda Bharati held that every Article of the Constitution, even those guaranteeing fundamental rights, could be amended, but not the basic structure of the Constitution. In Minerva Mills v. Union of India, (1980) 2 SCC 591, the Supreme Court held that the constitutional validity of a statute since 24th April, 1973, the date of the judgment in Kesavananda Bharati, has to be tested not from the touchstone of fundamental rights, but the basic structure. Since then Article 32 is invoked on the plea that the basic structure is violated, complaining no violation of one's fundamental right. Nothing could have been more fallacious than the said proposition.

12. In Kesavananda Bharati, independence of the judiciary was held to be one of the basic structures of the Constitution. In Supreme Court Advocates-on-Record v. Union of India, (1993) 4 SCC 441, popularly known as the Judges-2 case, the elite class of lawyers pleaded that the core of the independence of the Indian judiciary is not about the independence in post appointment decision making, in the discharge of judicial function, but is about the very appointment itself! The core of the Indian judiciary is who appoints the Judges, nay, who has primacy! They said independence of judiciary means Judges appointing themselves. In other words, Judges appointing themselves is the 'basic structure' of the Constitution. The common man, nay, the political class, failed to notice this absurd proposition because the judgment in Judges-2 case ran into 537 paragraphs, about 50,000 words.

13. The judgment in Judges-2 case happened to be delivered in the manner it was because neither the then Attorney General nor Shri Parasaran representing the Union of India raised the question of the non-maintainability of the petition. How a petition with no cause of action or without violation of one's fundamental rights could be entertained under Article 32? It was the duty of the Government to seek a review of the said judgment, but instead, as is manifest from the very judgment of the Supreme Court in In re Special Reference 1 of 1998, AIR 1999 SC 1 (popularly known as the Judges-3 case) the elite class of lawyers, including the then Attorney General, advised the Government against such a review. In Judges-3 case, the Attorney General even expressly said that the Government is not seeking a review of the judgment in Judges-2 case.

14. In a system where Judges appoint themselves in secrecy, all sorts of considerations other than merit, nepotism, favouritism, oligarchy, to name a few, creep in. The collegium appoints the kith and kin, nephews and juniors of sitting and former Judges of the Supreme Court and High Courts, so too of celebrated lawyers, Chief Ministers, Governors et al, and a few first generation lawyers who are all politically connected or are close to big industrial houses, leaving no room for the other eligible and deserving candidates – the ordinary class of first generation lawyers, the sons and daughters of taxi drivers, farmers, fishermen, rickshaw pullers, daily wagers, teachers et al. All the future Chief Justices of India, except for Hon'ble Shri Justice N.V. Ramana, whom Shri Justice Chelameswar had said is close to Shri N. Chandrababu Naidu, will be from the elite class. It was in the above background that there was unanimity of opinion that the Constitution be amended to bring into existence a National Judicial Appointment Commission where the civil society/executive Government will have a better say in the appointment of Judges, a transparent system where sons and daughters of common man too will have an opportunity to become a Judge of the higher judiciary. Thus came into existence the Constitution (Ninety-ninth Amendment) Act, 2014 and the National Judicial Appointment Commission Act, 2014. The said Acts were struck down as unconstitutional at the behest of the elite class of lawyers on the premise that Judges appointing themselves is the basic structure of the Constitution and any system where the Judges do not have absolute primacy in the matter of appointment of Judges would violate the basic structure of the Constitution. The said judgment in the NJAC case runs into 1036 pages. The common man cannot be expected to read such a voluminous judgment. The people of this country, therefore, do not know what exactly is the principle based on which the will of the people as reflected through the said Acts was throttled.

15. The people of this country, including majority of lawyers, who very unlikely would have gone through the judgment in the NJAC case, the Petitioners believe, are not aware of the fact that the aforesaid Acts, the will of we, the people, were struck down for the only reason that in the matter of appointment of Judges of the higher judiciary, the said Acts deny the senior Judges supremacy. They held that judicial supremacy is the basic structure of the Constitution; it was so held in Judges-2 case and reaffirmed in Judges-3 case. The argument of the elite class of lawyers was that a constitution amendment has to be tested on the

touchstone of judges-2 case because in Indira Gandhi v. Raj Narain, AIR 1975 SC 2299, while upholding the challenge to the Constitution (Thirty-ninth) Amendment Act; so too in Minerva Mills v. Union of India (1980) 2 SCC 591, the Supreme Court had held that since the judgment in Kesavananda Bharati, the constitutional validity of a constitution amendment has to be decided not on the touchstone of fundamental rights, but on the basic structure, and the said argument was accepted in the NJAC case, as well. Justice Khehar, who wrote the leading judgment in the NJAC case held that presence of the Law Minister and the possibility of the two eminent members contemplated in the NJAC or one of them along with the Law Minister vetoing the proposal for appointment by the CJI and two other members of the NJAC destroys the concept of 'judicial supremacy', judicial supremacy being the basic structure of the Constitution, the aforesaid Acts were held to be unconstitutional. To repeat, the NJAC is unconstitutional because it is against Judges-2 case! It may appear to be stranger than fiction, but it is the truth.

16. The entire controversy in the NJAC case and the arguments advanced for and against could have been well summarized in 10 to 20 pages, in which case the common man of this country could have read and understood why the said Acts were declared as unconstitutional. The doctrine of 'basic structure' of the Constitution is absurd; to say so is a sacrilege because it was hailed by the so-called legal luminaries. In the rest of the world, what matters is the reason behind a principle of law, but here in India, what matters is who has said it, howsoever absurd it could be on its very face. If great legal luminaries have said so, the whole world would hail it. It happens every day in the Supreme Court. When A.R. Antulay made a grievance that the judgment of the Five-Judge Constitution Bench in A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602, is a nullity, it was accepted. The Petitioners do not think that it has happened before the said judgment or after that.

17. The judgment in the NJAC case is one rendered void ab initio, not merely because the fundamental rights of the citizens of this country to have a judiciary manned by the most eligible and meritorious persons selected and appointed through an open and transparent process, which would have meant an end to the judicial dynasty, are infringed, but also because the Bench which heard the said case was disqualified on account of conflict of interest. All the Hon'ble Judges on the said Bench, except for Hon'ble Shri Justice A.K. Goel, were to be part of the collegium if the NJAC is to be struck down and the collegium were to be revived. So far as Shri Justice Khehar is concerned, the question whether His Lordship ought to be appointed as the 44th CJI would have been decided by the NJAC. The Petitioners are not even remotely suggesting that the NJAC would not have appointed Shri Justice Khehar as the CJI, but to do so was within its powers, had the NJAC became a reality. There were at least 11 Hon'ble Judges in the Supreme Court, who would not have been part of either the NJAC or the collegium, out of whom a Bench could have been formed to hear the NJAC case in which case no conflict of interest would have attracted.

18. Shri Mathews J. Nedumpara, Advocate, representing the National Lawyers' Campaign for Judicial Transparency and Reforms, accordingly sought the recusal of Justices

Khehar and Dave in writing and of the remaining four members on the Bench hearing the NJAC case, orally. Shri Justice Chelameswar wrote the leading judgment on the issue of recusal. However, His Lordship did not at all make any reference to the plea of disqualification of the members on the Bench due to conflict of interest raised by Shri Nedumpara. To be fair to Shri Justice Khehar, His Lordship was pleased to quote in his judgment the entire application of Shri Nedumpara seeking recusal. Justice Chelameswar in His Lordship's lead judgment did not even record the plea of paramount importance raised by Shri Nedumpara, namely, the disqualification of Justice Khehar and three other members of the bench including Justice Chelameshwar because of conflict of interest. The SCAORA through Shri Fali Nariman made a plea, the Petitioners are afraid to say, ex facie absurd that Shri Justice Khehar is all likely to quash the NJAC and, therefore, His Lordship was disqualified from heading the Bench. Shri Justice Chelameswar repelled the said contention saying that nobody could be heard to raise a plea of bias on the premise that the Judge whose recusal is sought is inclined to decide the matter in favour of the litigant who seeks the Judge's recusal. Why Justice Chelameswar failed to address the plea of even his Lordship's own disqualification due to conflict of interest, raised by Shri. Nedumpara, is a 'riddle wrapped in a mystery inside an enigma', to quote Winton Churchil. The Petitioners beg to submit that to the common man of this country, who has not read the said judgment, the truth as aforesaid would appear to be unbelievable, a fiction; but sometimes as in the instant case, truth is stranger than fiction. The Petitioners beg to quote from paragraphs of the judgment in the NJAC case for ready reference as infra:-

"The implication of Shri Nariman's submission is that Justice Khehar would be pre-determined to hold the impugned legislation to be invalid. We fail to understand the stand of the petitioners. If such apprehension of the petitioners comes true, the beneficiaries would be the petitioners only. The grievance, if any, on this ground should be on the part of the respondents."

……..

…….

"No precedent has been brought to our notice, where courts ruled at the instance of the beneficiary of bias on the part of the adjudicator, that a judgment or an administrative decision is either voidable or void on the ground of bias……..."

It is a travesty of justice that Justice J.Chelameswar failed to even record the plea of disqualification, including that of J.J.Chelameshwar, raised by Shri Nedumpara, on the principle of 'Nemo debut esse judex in propria sua causa', namely, that nobody could be a judge of his own cause.

19. For the elite class of lawyers, who use SCAORA as a pawn, the Judges-2 case and the NJAC case were all about their power; their influence in the matter of selection and appointment of Judges to the higher judiciary. The incident involving Shri Abhishek Manu Singhvi, one of the leading lawyers and a prominent Congress leader, is well known. That the so-called legal luminaries enjoy enormous power, extra-constitutional though, in the matter of

appointment of Judges is a truth which cannot be denied. In the entire hearing of Judges-2 and NJAC cases there was no reference at all about how to provide for equal opportunity to ordinary lawyers, the sons and daughters of common man, who are equally competent, eligible and meritorious as the elite class, except that they do not have Godfathers. In short, what was most important, namely, who is to be appointed, the democratic legitimacy and diversity in selection was completely forgotten. The entire discussion was who has the ultimate power of appointment; nobody was worried about who deserves to be appointed.

20. With the judgment in the NJAC case, 20 years of constitutional reform to bring into existence a mechanism for open and transparent selection and appointment of Judges was aborted before it could even take birth. The Petitioners are reminded of the words of Horace, parturient montes, nascetur ridiculus mus – mountains will be in labour, and an absurd mouse will be born (all that work and nothing to show for it), namely, a Memorandum of Procedure for appointment of Judges, which is yet to be finalized. As a result thereof, 40% of the vacancies of High Court Judges remain to be filled up. The Sunday Times dated 16th September, 2018, Cochin Edition, on its very front page carried a news item that it will take 15 years to fill up the existing Judges posts in the High Courts and laments the backlog of cases in the High Courts, 22% of which are of more than 10 years old.

21. If there is a will, there is a way. What is lacking today is the political will of the Government in power. Still worse, is the stand of the Congress party which is literally under the control of lawyer politicians who charge lakhs of rupees for an appearance and for whom the legal practice is a money mill. The less said the better. This Hon'ble Court exercising jurisdiction under Article 226 or even in exercise of its Original Civil Jurisdiction has all the powers which are vested in the Supreme Court under Article 32. Today, the folly of the basic structure theory is at least acknowledged privately and, though, not in so many words, in judicial decisions as well. In S. Nagaraj v. State of Karnataka, 1993 Supp.(4) SCC 595, and I.R. Coelho (Dead) by LR v. State of Tamil Nadu & Ors., (2007) 2 SCC 1, the Supreme Court held that equality before law is the 'basic structure'. With that the Himalayan blunder, namely the 'basic structure' theory of Kesavananda Bharati has been judicially taken notice of, though, to repeat, in not so many words.

22. The Judges-2 case, which held that the administrative decision of the collegium is not amenable to judicial review, is void; it will not bind the Petitioners because they were not parties to the said judgment; it is against Article 13(2) of the Constitution; so too Part III thereof; the said judgment is rendered per incuriam and will not bind this Hon'ble Court. The Petitioners in all humility assert that the judgments in Judges-2, Judges-3 and the NJAC cases are rendered per incuriam and contrary to the Constitution and will not, therefore, amount to a law declared by the Supreme Court which is binding on all Courts, including this Hon'ble Court, within the meaning of Article 141. Judges-2 case is not a declaration of law; it is a judicial legislation, nay, rewriting of the Constitution.

23. Article 124(2) provides that "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 ..." Therefore, if a Judge of this Hon'ble Court is to be elevated to the Supreme Court, the President is duty bound to consult such of the Judges of the Hon'ble High Court of Bombay as the President may deem necessary. The judgments in the Judges-2 and NJAC cases meant destruction of the independence of the Hon'ble High Court as the highest Court of the State concerned in a federal structure. Today the elevation of a High Court Judge to the Supreme Court is at the mercy of the five seniormost Judges of the Supreme Court, including the CJI. "Such of the Judges of the Supreme Court" would mean any of the Judges of the Supreme Court, even junior in terms of seniority, and the President is free to seek the opinion and act upon it. The eleven Judges of the Supreme Court, referred to earlier, who could have formed a Bench to hear the NJAC case for none of them would have been ever part of the collegium or the NJAC, and thus suffered no disqualification because of conflict of interest, now stand completely ousted in the process of consultation. If the NJAC case were to be heard by a Bench to be consisted of any of the said eleven Judges, then they would not have certainly restored the collegium system of appointment of Judges which has taken away their right to be consulted,namely, "such of the Judges of the Supreme Court and of the High Courts" as in Article 124(2). It is not thus, merely, the ordinary class of lawyers, like the petitioners, who have no godfathers to secure their elevation as judges, but the so called junior judges of the supreme court, so too the judges of the High Courts, who are part of the constitutional scheme of consultation are hit by the judges-2 and the NJAC case.

24. As aforesaid, the institution of judiciary is at crossroads, but it is not as if there is no solution. The need of the hour is to accept and acknowledge the great error which the Judges-2, Judges-3 and NJAC judgments constitute to be. After all, to err is human; 'errarae est humanum'. It is not the end of the road. It is time for the country to accept that the Hon'ble Judges have erred because the elite class of lawyers misled them to subscribe to their vested interests, the Petitioners are afraid to say, and to take corrective steps. The least that could be done without any difficulty is to notify the vacancies of Judges in the august office of the Judges of the Supreme Court and High Courts, invite applications from those who are eligible and desirous to be appointed, invite recommendations and references from members of the Bar, Bar Associations, sitting and retired Judges, political parties and other stakeholders, scrutinize and shortlist candidates found eligible, invite objections, if any, from the public at large and then make the appointments.

25. It is an undeniable fact that the quality of judgments since the collegium system came into existence has deteriorated. For a Judge, the ability to write a judgment is paramount. Therefore written tests to write a judgment could be introduced; a means to eliminate the not so deserving – a filter. It is a fundamental principle of law that whatever is not expressly prohibited is permitted in law, though sometimes the Court does not accept it, for instance, while there is no law which prohibits recording of the proceedings in an open Court by a litigant in his mobile phone, litigants are punished and proceeded in contempt. All that is required is the courage of conviction to accept that a time has come that the vacancies of Judges need to

be advertised, applications ought to be invited, an open and transparent selection is to be made and that the era of privileges, invitation and elevation all are to be abandoned. To do so is of paramount importance because in this Hon'ble Court, as against the total strength of 95 Judges, as of date only 68 are functioning.

26. Every day the litigant public and lawyers travel from Pune, Virar and beyond, which means a travel of more than 2½ hours one way by train, skipping even breakfast, just to mention a matter an early hearing. Often lawyers are disappointed when their request for emergent listing is rejected, to be told that the case will be listed as per the CMIS system which would mean that the case will be never heard. The need of the hour is to fill up the entire vacancies of Judges. There is no dearth of talent; there are so many lawyers with substantial practice and experience, who are 45 plus of age, not merely willing to accept judicial post, but desirous of the same because the office of a High Court Judge in terms of employment perspective is one of the best service the country could provide, with attractive pay, perks and other service conditions. There are many lawyers hailing from humble backgrounds who aspire to be a Judge of the High Court so that they could be an instrument for amelioration of the conditions of their unfortunate brethren, the slum dwellers, hawkers, etc. who are denied justice today.

27. The Petitioners are afraid to say that the NJAC case was lost by the Union of India because the then Attorney General did not question the very non-maintainability of the PIL because he failed to point out that PILs, despite the word "public", are in the realm for enforcement of fundamental rights of those who out of poverty, illiteracy, ignorance and other disabilities, for instance, a poor undertrial languishing in jail, are unable to approach the constitutional Courts; and that PILs did not discover any new remedies. Prior to the invention of PIL, there were only five prerogative writs, namely, writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari which could be granted under Article 32. Thereafter also the said remedies alone exist. No new remedies were discovered. The PIL by SCAORA was wholly not maintainable because the aforesaid Acts being in the realm of legislative policy in the matter of appointment of Judges were not justiciable. Even if it is to be assumed that the said Acts were justiciable, then all stakeholders, the 129 crore people of this country, ought to have been heard. It was incumbent upon the then Attorney General; so too his successor, to recommend to the Government to seek a review of the judgment in the NJAC case under Article 137 of the Constitution, because they miserably failed to defend the NJAC, the will of 'we the people'. The Petitioners are, afraid to say, that the Hon'ble Shri.Ravi Shankar Prasad, Union Minster for Law and Justice, whom the Petitioners have represented many times, so too met at least two times, has failed to take any concrete steps to bring a legislative solution to the grave constitutional crisis as aforesaid, which is the fallout of the judgment in the NJAC case. Not even a review petition till date has been filed. The Minster has failed to live upto the great constitutional responsibilities reposed on him. The Hon'ble Minister has been arraigned as Respondent No. 5, for to make allegations against him without him on the party array is improper.

25. While the Petitioners had all throughout been saluting the NDA Government for enacting the NJAC Act, they are deeply perturbed by its inaction; so too of the principal Opposition Party, the Congress. The Memorandum of Procedure is not the solution, but a legislation assuming that till the judgment in the NJAC case is reviewed or till a further constitutional amendment is enacted, which is a near impossibility considering the fact that the tenure of the current Lok Sabha is to end in a few months. It is incumbent upon the Union Government to bring in appropriate legislation to secure an open selection of Judges of the Supreme Court and High Courts by notification of the vacancies in the august office of the Judges of the Supreme Court and High Courts, invite applications from those who are eligible and desirous to be appointed, invite recommendations and references from members of the Bar, Bar Associations, sitting and retired Judges, political parties and other stakeholders, scrutinize and shortlist candidates found eligible, invite objections, if any, from the public at large and then make the appointments. The moment the relics of the colonial era, namely, appointment by 'invitation', is brought to an end, the entire controversy over the appointment of Judges will also come to an end. Hence, the instant Writ Petition under Article 226 of the Constitution on the following, amongst other, grounds:-

GROUNDS

Grounds in support of the reliefs sought are elaborated in the statement of facts and, hence, they are not repeated. The Petitioners submit that paragraphs 1 to 25 hereinabove be read and treated as the grounds in support of the instant petition.

26. The Petitioners craves leave of this Hon'ble Court to add to, alter, amend and/or modify any of the aforesaid grounds as and when required.

27. The instant petition is not barred by the doctrine of estoppels or resjudicata.

28. The Petitioners state that requisite Court-fee as per Rules has been paid.

29. The Petitioners state that there is no period of limitation for preferring this Petition and hence the same is within limitation.

30. The Petitioners state that the cause of action has arisen in Mumbai and hence this Hon'ble Court has jurisdiction to entertain this Petition.

THE PETITIONERS, THEREFORE, PRAY THAT THIS HON'BLE COURT BE GRACIOUSLY PLEASED TO:

(a) issue a writ in the nature of mandamus or any other appropriate writ, order or direction, directing the Union of India to consider enacting a law or even an Ordinance considering the urgency of the matter, requiring Respondent Nos. 1 to 4 & 7 to notify the vacancies in the august office of the Judges of the Supreme Court and High Courts, invite applications from those who are eligible and desirous to be appointed, invite recommendations and references from members of the Bar, Bar Associations, sitting and retired Judges, political parties and other stakeholders, scrutinize and shortlist candidates found eligible, invite objections, if any, from the public at large and then make the appointments, which will render the finalization of the Memorandum of Procedure, a mere executive instrument, irrelevant and substitution thereof by an Act of Parliament which will mean incorporation of all the suggestions made by the Supreme Court in its judgment in the NJAC case; so too the matters which the Supreme Court in the NJAC case failed to take notice of;

(b) issue a writ in the nature of mandamus or any other appropriate writ, order or direction, directing the Union of India to file a Review Petition seeking review of the judgments in Judges-2, Judges-3 and the NJAC cases, particularly taking notice of the fact that petitions seeking review of the judgments in Judges-2 and the NJAC cases, namely, Review Petition Nos. (D) No. 6578/2017 & (D) No. 29668/2018 are pending adjudication before the Supreme Court;

(c) Declare that “equality before the law or the equal protection of the laws” as enshrined in Article 14 of the Constitution of India takes within its ambit the right to equal opportunities in all walks of life, including selection and appointment to the Constitutional office of Judges of the High Courts and Supreme Court and any system of selection and appointment of Judges, which would deny equal opportunity to all those who are eligible and deserving to be considered along with others equally placed is unconstitutional and void and the collegium system of appointment, in so far as it denies equal opportunities to the first generation lawyers, the sons and daughters of taxi drivers, farmers, fishermen, rickshaw pullers, daily wagers, teachers et al, is violative of Article 14 of the Constitution;

(d) Without prejudice to prayer (c) above and in furtherance thereof, declare that the concept of equal opportunities in the matter of selection and appointment to the august office of the Chief Justice of India and Judges of the Supreme Court and Chief Justice and Judges of the High Courts and, in particular, this Hon'ble Court, mandates advertisement/ notification of the vacancies in the august office of the Judges of the Supreme Court and High Courts, invite applications from those who are eligible and desirous to be appointed, invite recommendations and references from members of the Bar, Bar Associations, sitting and retired Judges, political parties and other stakeholders, scrutinize and shortlist candidates found eligible, invite objections, if any, from the public at large and then make the appointments, which alone will afford due representation to the first generation lawyers, who are equally qualified and eligible as that of the kith and kin, nephews and juniors of sitting and former Judges of the Supreme Court and High Courts, so too of celebrated lawyers, Chief Ministers, Governors et al, and a few first generation lawyers who are all politically connected or are close to big industrial houses;

(e) Declare that failure in the filling up of vacancies in the august office of Judges of the High Court of Bombay has not merely meant denial of opportunities to the first generation lawyers, the sons and daughters of taxi drivers, farmers, fishermen, rickshaw pullers, daily wagers, teachers et al, but has also denied right to access to justice; so too denial of speedy justice inasmuch as the __ vacancies as against the total strength of __ Judges as on today in the High Court of Bombay has meant literal shutting down of the Honorable High Court;

(f) Issue a writ in the nature of mandamus directing Respondent Nos. 1 to 6 to cause notification of the vacancies in the august office of the Judge of the High Court of Bombay and invite applications from those who are eligible and desirous to be appointed, invite recommendations and references from members of the Bar, Bar Associations, sitting and retired Judges, political parties and other stakeholders, scrutinize and shortlist candidates found eligible, invite objections, if any, from the public at large and fill up the entire vacancies, both of Permanent and Additional Judges;

(g) pass such further and other orders as the nature and circumstances of the case may require.

(R.R.Nair)

Advocates for the Petitioners

V E R I F I C A T I ON

I, Rohini M. Amin, Petitioner No.1 herein, having address at Room No.132, 2nd Floor, 23, Great Western Building, Kalaghoda, Fort, Mumbai-400 023, do hereby do hereby solemnly declare that what is stated in paragraphs 1 to _ of the foregoing Petition is true to my own knowledge, information and belief and what is stated in remaining paragraphs _ to _ is based on information which I verily believe to be true and correct.

Solemnly declared at Mumbai]

on this __ day of September, 2018.]

(R.R.Nair)

Advocates for the Petitioners Petitioners