

Baisil Attipetty
@ Basil A.G.

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Vs.

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Respondent

Independent Judiciary free from the clutches and control of Legislature and Executive is a constitutional right of every citizen of India. Rule of Law and Judicial review of Executive action are the Basic Features of the Constitution of India. The procedure for appointments of Judges in the High Courts and the Supreme Court is on the basis of the recommendation of the collegium in the High Courts and the Supreme Court. The collegium system has been approved and affirmed by the judgment of the Hon'ble Supreme Court reported in *Supreme Court Advocates on record Association and another Vs. Union of India* reported in 1993 (4) SCC 441 as well as *In Re : Presidential Reference* reported in 1998 (7) SCC 739.

Article 50 of the Constitution of India postulates separation of powers between Legislature, Executive and Judiciary. The Constitution of India has been framed by the Constituent Assembly not by the Parliament. Parliament has only a limited mandate for 5 years cannot alter the Basic Structure of the Constitution. Union of India being a litigant before the High Courts and Supreme Court of India may not appoint Judges in Higher Judiciary for an independent judiciary. The basic feature of the Constitution cannot be amended, modified or tilted [*Kesavananda Bharati (73 SCC (4) 225 and I.R. Coelho Vs. State of TN (2007 2 SCC (1))*]. The law declared by Supreme Court is the law of the land (Article 141) and all authorities in India civil as well as Legislature and Executive should act in aid of the Supreme Court (Article 144).

The long settled position of procedure of appointment of Judges of Higher Judiciary by the Collegium has been modified by Exhibit P1 The National Judicial Appointments Commission Act, 2014 (Act No. 40 of 2014). Exhibit P1 Act infringes the fundamental right of citizens to have an independent Judiciary free from the clutches and control of Executive and Legislature. The Parliament and Executive has usurped the domain of judiciary by Exhibit P1 Act. Judge made laws are part of constitution (2009 (7) SCC 1). Judicial review Executive action is the Basic Feature of the Constitution of India. The Honourable Supreme has held that Article 226 is wider in horizon than Article 32 (2005(4) SCC 649). Hence this Writ Petition under Article 226 of the Constitution of India.

Dated this the 14th day of January, 2015.

Baisil Attipety
@ Basil A.G.
Petitioner
Party-in-Person

BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM
(Special Writ Jurisdiction)

W.P.(C) No. of 2015

PETITIONER

Baisil Attipety
@ Basil A.G.,
Attipety House,
Nayarambalam P.O., Vypin Island, Cochin,
Ernakulam District, Kerala-682 509. (PARTY-IN-PERSON)

Vs.

RESPONDENT

Union of India,
Represented by its Secretary to Government of India,
Ministry of Law and Justice,
New Delhi-100 001.

All notices and processes to the petitioner may be served in the above address and that of the respondents in their addresses shown above.

WRIT PETITION (CIVIL) FILED UNDER ARTICLE 226 OF THE
CONSTITUTION OF INDIA

STATEMENT OF FACTS

1. The petitioner is a citizen of India and an Advocate practicing before Hon'ble High Court of Kerala begs leave of this Hon'ble Court to file the petition under public interest.
2. An independent judiciary free from the clutches and control of legislature and executive is a constitutional right and independent judiciary is one of the Basic Structure of the Constitution of India. The appointment of Judges in the Higher Judiciary in different High Courts and in the Supreme Court of India is done by the recommendation of the respective collegium of High Courts and Supreme Court. The appointment of Chief Justice of the Supreme Court of India is done on the basis of seniority. The issue of appointment of Judges of High Courts was a subject matter of judgments reported in *Supreme Court Advocates on record Association and another Vs. Union of India* reported in 1993 (4) SCC 441. Further the issue of appointment of

Judges by the method of collegium was a subject matter in *Re : Presidential Reference* which has been reported in 1998 (7) SCC 739. The appointment of Judges of High Courts and Supreme Court is in a settled position as per the judgments of the Hon'ble Supreme Court in *Supreme Court Advocates on record Association and another Vs. Union of India* reported in 1993 (4) SCC 441 as well as judgment of the Hon'ble Supreme Court in 1998 (7) SC 739. The law declared by the Supreme Court is the law of the land, which has to be followed by all civil authorities in India including the Legislature and Executive. Article 141 and Article 144 of the Constitution of India mandate to do so.

3. It is humbly submitted that Article 144 of the Constitution of India specifically states that all authorities, civil and judicial in the territory of India shall act in aid of the Supreme Court of India. It is pertinent here to note that the authority of the collegium with regard to the appointment of Judges of Higher Judiciary is no more res integra. The Supreme Court and High Courts are the guardians of Indian Constitution. Article 50 of the Constitution of India postulates separation of powers among executive, legislature and judiciary. The Constitution of India is the supreme law in the democratic fabric of India. The Judges are accountable only to the Constitution of India. Article 121 of the Constitution of India restricts even the discussion of the conduct of the judiciary in the parliament.

4. In India under the democratic set up, the judiciary has pivotal and vital role in the maintenance of the Rule of law. Judicial review of executive action by the judiciary is one of the facet of basic structure of the Constitution of India. The Union of India as well as different states are litigants before the High Courts and Supreme Court. The concept of independent judiciary from the clutches and control of executive and legislature is another facet of the basic feature of the Constitution of India. In order to protect and preserve an independent judiciary, the Hon'ble Supreme Court has evolved the collegium system with regard to the appointment of Judges in Higher Judiciary and the same has been affirmed and re-affirmed by judgments of Hon'ble Supreme Court in *Supreme Court Advocates on record Association and another Vs. Union of India* reported in 1993 (4) SCC 441 and *In Re : Presidential Reference* reported in 1998 (7) SCC 739. Without overruling or modifying those judgments, the Parliament and Executive are incapacitated to frame any act or rule to control and supervise the appointments of Judges in the Higher Judiciary in India.

The law declared by the Hon'ble Supreme Court is the law of the land. The Hon'ble Supreme Court has held that ***judge made laws are part of the constitution*** [*N. Kannadasan vs. Ajayghosh* reported in 2009 (7) SCC 1]. Therefore the dictum laid down by the Honourable Supreme Court in *Supreme Court Advocates on record Association and another Vs. Union of India* reported in 1993 (4) SCC 441 and *In Re : Presidential Reference* reported in 1998 (7) SCC 739 have become part of the Constitution and reached a finality in the issue of appointments of Judges in Higher Judiciary.

5. It is further humbly submitted that the Union of India has gazetted on 31.12.2014, the National Judicial Appointments Commission Act, 2014, which is against the dictum laid down by the Honourable Supreme Court in *Supreme Court Advocates on record Association and another Vs. Union of India* reported in 1993 (4) SCC 441 and *In Re : Presidential Reference* reported in 1998 (7) SCC 739. A true copy of the National Judicial Appointments Commission Act, 2014 (Act No. 40 of 2014) is produced herewith and marked as **Exhibit P1**.

6. It is further humbly submitted that the preamble of the National Judicial Appointments Commission Act, 2014 states as follows:-

“An Act to regulate the procedure to be followed by the National Judicial Appointments Commission for recommending persons for appointment as the Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and for their transfers and for matters connected therewith or incidental thereto.

7. It is submitted that at present, there is already a procedure adopted and approved by the Hon'ble Supreme Court for the appointment of the Judges of the High Courts and Supreme Court. The very naming of Exhibit P1 Act is a violation of the dictum laid down by the Honourable Supreme Court in *Supreme Court Advocates on record Association and another Vs. Union of India* reported in 1993 (4) SCC 441 and *In Re : Presidential Reference* reported in 1998 (7) SCC 739. The domain of Declaration of Law by the Supreme Court is the basic feature of the Constitution of India. The basic structure of the Constitution cannot be tilted, altered, modified or cannot be amended even by the Parliament. The Parliament has only a limited mandate for 5 years which cannot alter the long settled position through an

amendment in the Constitution. There is a difference between parliamentary and constitutional sovereignty. Our Constitution was framed by a Constitutional Assembly, which was not Parliament. It is in the exercise of law making power by the Constituent Assembly that the petitioner and the general public have a controlled constitution. The Constitution of India is the Supreme Law of the Nation.

8. It is further humbly submitted that The National Judicial Appointments Commission Act, 2014 Section 6 Sub Section 4 stipulate that the Chief Justice of the High Courts shall consult two eminent Advocates of the High Courts before making recommendation of appointment of Judges of High Court. After the selection of High Court Judges, the two eminent Advocates of the High Court who recommended the names can appear before the Judges and argue cases. This is arbitrary and seems to be a personal bias which may affect the impartiality and independent judiciary enunciated under the basic structure of the Constitution of India. Thus, the Advocates can make recommendation for the appointment of Judges in High Courts by Section 6 of Sub Section 4 of Act 40 of 2014 and the same advocate can argue cases before them.

9. It is further humbly stated that in Section 5 Sub section 1 of Act 2014, it has been stated that the commission shall recommend for appointment, the Senior most Judge of the Supreme Court as the Chief Justice of India, if he is considered fit to hold the office. The very Section 5 is unconstitutional and ultra vires to the basic structure doctrine of the Constitution of India. At present the appointment of Chief Justice of Supreme Court of India is done based on the seniority alone, which is the settled position, which cannot be tilted, altered, modified in the guise of Act 40 of 2014. Further, Section 6 of Sub Section 1 of the Act, 2014 says that Chief Justice of a High Court would be appointed on the recommendation of the Commission on the basis of inter say seniority of High Court Judges with ability, merit and any other criteria of suitability as may be specified by the regulation. The term “any other criteria of suitability” mentioned in Sub Section 1 of Section 6 of the Act is vague which may lead to shake the independence of the judiciary. Section 6 Sub Section 4 stipulates that consultation of eminent Advocates of that High Court is to be taken before selection. The law is trite that an Advocate cannot be consulted for appointment of Judges of High Court. If it is allowed, the same Advocate who recommended for the selection of High Court Judge can appear before the High Court Judge for arguing

cases by none other than one of the Advocates who had recommended the name of that Judge. Thus Sub Section 4 of Section 6 is also arbitrary, and biased and will destroy the basic structure of the Constitution of India and an independent judiciary. Sub Section 6 of Section 6 states that if any two members of the Commission do not agree for the recommendation of a member to be appointed as Judge of the High Court, the recommendation will fail leading to a futile effort. If there is no valid recommendation, no appointment of Judges of the High Court can be done, which is against the provisions of the Constitution of India with regard to the appointment of Judges in the Higher Judiciary. Thus, at any rate Sub section 6 of Section 6 is arbitrary and violative of the provisions of the Constitution of India, with regard to the selection and appointment of High Court Judges.

10. It is further humbly submitted that the issue of procedure of appointment of High Court Judges and Supreme Court Judges have been settled by the pronouncement of the judgments of the Hon'ble Supreme Court of India in *Supreme Court Advocates on record Association and another Vs. Union of India* reported in 1993 (4) SCC 441 and *In Re : Presidential Reference* reported in 1998 (7) SCC 739. A true copy of the judgment of the Hon'ble Supreme Court of India in *Supreme Court Advocates on record Association and another Vs. Union of India* reported in 1993 (4) SCC 441 is produced herewith and marked as **Exhibit P2**. A true copy of the judgment of the Hon'ble Supreme Court of India in *In Re : Presidential Reference* reported in 1998 (7) SCC 739 is produced herewith and marked as **Exhibit P3**.

11. It is further humbly submitted that when there was an attempt of the legislature and the executive to control the conduct of the judiciary in 2010 by framing the Judges Standards and Accountability Bill 2010, this petitioner had approached this Honourable Court challenging the very framing of the Judges Standards and Accountability Bill 2010 by filing W.P.(C) No. 5201/2011 and this Honourable Court on 18.2.2011 had permitted the petitioner to challenge the Act, if it came into existence as an Act. A true copy of the judgment of this Honourable Court in W.P.(C) No. 5201/2011 reported in 2011 (1) KHC 731 is produced herewith and marked as **Exhibit P4**.

12. It is further humbly submitted that similarly when there was an attempt to make Judges Standards and Accountability Bill 2012, this petitioner had filed W.P.(C) No. 22411/2012 challenging the very Bill in the year 2012 before this Honourable Court

and this Honourable Court vide judgment dated 5 October 2012 permitted the petitioner to challenge the Act when it came into existence. A true copy of the judgment of this Honourable Court dated 5 October 2012 in W.P.(C) No. 22411/2012 is produced herewith and marked as **Exhibit P5**.

13. It is further humbly submitted that, the basic feature of the Constitution cannot be amended, altered, tilted or modified even by the Parliament. It is pertinent here to note that in the year 1975, when there was an attempt to modify the basic structure of the Constitution, the renowned Lawyer Nani A. Palkiwala had written a letter on 9.11.1975 to the then Prime Minister Smt.Indira Gandhi requesting her not to initiate any attempt to tilt, alter or modify the basic structure of the Constitution of India. A true copy of the letter dated 9.11.1975 written by Nani A. Palkiwala to the then Prime Minister, Smt. Indira Gandhi, is produced herewith and marked as **Exhibit P6**.

14. It is further humbly submitted that the basic structure of the Constitution is the back bone of Indian Judiciary. Independent Judiciary free from the clutches and control and supervision of legislature and executive is the constitutional right of the citizens of this nation. The petitioner as well as the general public at large have a fundamental right to have an independent judiciary free from the control and clutches of the legislature and the executive. High Courts and Supreme Court are the guardians of the Constitution of India. At present Judges of higher Judiciary are accountable only to the Constitution. If Exhibit P1 Act is implemented, the Constitutional goal of an independent judiciary and the basic structure of the Constitution of India would be jeopardized. The Collegium system propounded by the judiciary for appointment of Judges in the Higher Judiciary is to be sustained for an independent judiciary. The Hon'ble Supreme Court has held that Article 226 is wider than Article 32 of the Constitution (2005 (4) SCC 649). The dictum laid down by the Honourable Supreme Court and Judge made laws are parts of the Constitution. (*N. Kannadasan Vs. Ajayghosh* 2009 (7) SCC 1). Act 40 of 2014 is unconstitutional and violative of Article 50 of the Constitution of India - separation of powers - and is against the concept of the Basic Structure of the Constitution of India. Therefore Exhibit P1 Act is to be strucked off on the touch stone of the basic structure of the Constitution of India also. Only on overruling or reviewing of Exhibit P2 and P3 judgment of the Hon'ble Supreme Court, collegium system can be taken away. Act

40 of 2014 is ultra vires and unconstitutional and void ab-initio. Hence this writ petition.

In the above circumstances, the petitioner has no other equally effective remedy than to approach this Hon'ble Court under Article 226 of the Constitution of India for redressal of the grievance and this Writ Petition is filed on the following among other:

GROUND S

- A) Exhibit P1 (The National Judicial Appointments Commission Act, 2014 (Act 40 of 2014) is violation of Article 50 of the Constitution of India.
- B) Exhibit P1 (The National Judicial Appointments Commission Act, 2014 (Act 40 of 2014) will infringe the constitutional right to have an independent judiciary free from the clutches of Legislature and Executive.
- C) Union of India being a litigant before the High Courts and Supreme Court may not appoint Judges in the higher Judiciary against the long settled collegium system. The Constitutional provisions of appointments of Judges of the Higher Judiciary cannot be amended by the Parliament because of the basic feature of the Constitution of India. Parliament has only a limited mandate for 5 years. Constitution of India with the basic features was framed by the Constituent Assembly.
- D) Exhibit P1 (The National Judicial Appointments Commission Act, 2014 (Act 40 of 2014) will destroy the basic structure of the Constitution of India.
- E) The Parliament has no authority to amend, alter, tilter or modify the Constitution to destroy the basic structure of the Constitution by introducing Exhibit P1 Act 2014. The Indian Constitution framed by constituent Assembly cannot be amended by the present Parliament to destroy the Basic Structure of the Constitution.
- F) The Parliament has only a limited mandate of 5 years cannot alter, tilter or modify the long settled privileges of Higher Judiciary the Collegium system to appoint Judges in the Higher Judiciary.
- G) The collegium system in the High Courts and Supreme Court is the well settled procedure for an independent and impartial judiciary in India.

H) Judge made laws are part of the Constitution (*Kannadasan vs. Ajayghosh 2009 (7) SCC 1*).

I) Without overruling the judgment of the Honourable Supreme Court (Exhibits P2 and P3) no Act like Exhibit P1 can be framed by the Parliament to modify the procedure for appointment of Judges in Higher Judiciary.

J) The Parliament and Executive cannot frame an Act to circumvent the judgments of the Honourable Supreme Court. Law declared by Supreme Court is the law of the land and become part of Constitution.

Exhibit P2 and P3 judgments of the Hon'ble Supreme Court of India in the issue of appointment of Judges in Higher Judiciary reached a finality which cannot be circumvent by Exhibit P1 Act.

P R A Y E R S

For these and other grounds to be urged at the time of hearing, it is humbly prayed that this Hon'ble Court may be pleased to:

- i) Issue a writ of certiorari or any other appropriate writ, order or direction, and call for records leading to Exhibit P1 (The National Judicial Appointments Commission Act, 2014 (Act 40 of 2014) and declare the same as unconstitutional;
- ii) Declare Exhibit P1 (The National Judicial Appointments Commission Act, 2014 (Act 40 of 2014) as non-est and void ab-initio as the same is against Article 50 of the Constitution of India;
- iii) Declare Exhibit P1 (The National Judicial Appointments Commission Act, 2014 (Act 40 of 2014) as void ab-initio since Exhibit P1 infringes the Constitutional right of citizens to have an independent judiciary free from the clutches and control of Legislature and Executive;
- iv) Declare Exhibit P1 (The National Judicial Appointments Commission Act, 2014 (Act 40 of 2014) as null and void since it infringes the Basic Structure of the Constitution of India;

- v) grant such other reliefs as are deem just and necessary in the facts and circumstances of the case.

Dated this the 14th day of January, 2015.

Baisil Attipety
@ Basil A.G.
Petitioner
Party-in-Person

INTERIM RELIEF

For the reasons stated in the Memorandum of Writ Petition, it is humbly prayed that this Honourable Court may be pleased to stay the operation of Exhibit P1 (The National Judicial Appointments Commission Act, 2014 (Act 40 of 2014), pending final decision in the writ petition.

Dated this the 14th day of January, 2015.

Baisil Attipety
@ Basil A.G.
Petitioner
Party-in-Person

Baisil Attipetty
@ Basil A.G.



Vs.

Respondent

I, Baisil Attipetty @ Basil A.G. (Advocate), aged 54 years, S/o. George, permanently residing at Attipetty House, Nayarambalam P.O., Ernakulam District, do hereby solemnly affirm and state as follows:

- 1) I am the petitioner in the above Writ Petition and I am conversant with the facts of the case.
- 2) The facts and grounds stated in the W.P (C) are true and correct to the best of my knowledge, information and belief. The Exhibits produced are the true copies of its original and are supplied by me.
- 3) I have not filed any other Writ Petitions before this Hon'ble Court earlier seeking the similar or identical reliefs.

Dated this the 14th day of January, 2015.

Solemnly affirmed and signed before me by the deponent who is personally known to me on this the 14th day of January, 2015 in my office at Ernakulam.

Advocate

Presented on: 15.01.2015

Sub: **PUBLIC INTEREST LITIGATION – THE NATIONAL JUDICIAL APPOINTMENTS COMMISSION ACT, 2014 IS CHALLENGED - ARTICLE 50 SEPARATION OF POWERS - LEGISLATURE AND EXECUTIVE USURPED THE DOMAIN OF JUDICIARY – BASIC STRUCTURE OF THE CONSTITUTION OF INDIA**

BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

W.P.(C) No. **of 2015**

Baisil Attipetty
@ Basil A.G.



Petitioner (Party-in-Person)

 $V_S.$

Union of India



Respondent

**MEMORANDUM OF WRIT PETITION (CIVIL) FILED UNDER ARTICLE
226 OF THE CONSTITUTION OF INDIA**

BAISIL ATTIPETTY, B.Sc., M.A., LL.B., LL.M, M.B.A, G.th, DCL (B-666)
Attipetty Chambers,
Near High Court of Kerala,
Ernakulam, Pin-682 031
Mob: 9447875366
(Petitioner-in-Person)

BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

W.P.(C) No. **of 2015**

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Petitioner (Party-in-Person)

Vs.

Union of India

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Respondent

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Dated this the 14th day of January, 2015.

Baisil Attipety
@ Basil A.G.
Petitioner
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