IN THE SUPREMECOURT OF INDIA
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1018 OF 2021

IN THE MATTER OF:-

MADRAS BAR ASSOCIATION ....PETITONER

-versus-

UOI & ANR. ... RESPONDENTS

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Filed by:

MR. RAJ BAHADUR YADAV
Advocate

IN THE SUPREME COURT OF INDIA
Civil Original Jurisdiction
WRIT PETITION (CIVIL) NO. 1018 / 2021

IN THE MATTER OF:

Madras Bar Association ...Petitioner

Versus

Union of India and Anr. ...Respondents

COUNTER AFFIDAVIT ON BEHALF OF THE UNION OF INDIA

I, Arvind Saran, aged about 45 years, S/o. Shri Amarnath Saran Shrivastav, presently working as Director, Department of Revenue and having office at Room No. 48A, North Block, New Delhi 01, do hereby solemnly affirm and state as under:-

1. I am appointed as Director in the Department of Revenue, Ministry of Finance, i.e. the Respondent No. 2 herein and am authorized to file the present Counter Affidavit in reply to the Writ Petition. At the outset, I state that the contents of the Writ Petition, to the extent that they are inconsistent with the submissions made hereinafter, are incorrect and denied.

2. The Tribunal Reforms Act, 2021 ["hereinafter the **Reforms Act**"] is a culmination of a series of decisions of the Supreme Court and an equal number of statutes and rules in regard to the same matter, which is unprecedented in the history of the Supreme Court.

3. The Government of India is distressed by the fact that both laws and statutory rules made by Parliament and the Executive in areas of pure policy are being held to be void by invoking independence of the

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judiciary, when such laws and rules do not violate fundamental rights or any provision of the Constitution and is wholly within competency.

4. The Government equally believes that the Court striking down these pure matters of policy violates the separation of powers by the judicial wing of the State.

5. The four issues which are held to violate the independence of the judiciary, that is the independence of the Members and Chairperson of the Tribunals are the following:

(i) The prescription of a term of 4 years, though combined with the preferential right of reappointment, as a result of which the individual could continue up to the age of 67 years, if a Member, or 70 years in the case of a Chairperson, such recommendation for reappointment is by the Search-cum-Selection Committee ("**SCSC**") dominated by the judiciary.

(ii) The fixing of a minimum age of 50 years for appointment which would be applicable across the board for all members, including advocates, as well as for the Chairpersons. This prescription of 50 years was contrary to the direction that advocates need to have only ten years' experience for being eligible for appointment because the Constitution provides for advocates with 10 years' experience being appointed as High Court judges. The fact is that no single appointment of an advocate with 10 years practice has ever been made to a High Court in the last 75 years. The practice as set out in the judgment in ***Lok Prahari v. Union of India and Ors.*** (Judgement dated 20.04.2021 in WP (C) No. 1236/2019 at para. 22, reported in 2021 SCC Online SC 333) was that the incumbent should be between 45 to 55 years to be appointed a judge of the Supreme Court. This minimum age requirement of 50 years, across the board, was upheld by Justice Hemant Gupta in his dissenting opinion in ***Madras Bar Association v. Union of India and Anr.*** [passed in WP Civil No. 502 / 2021] (hereinafter referred to as "**MBA-IV**").

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(iii) In ***Madras Bar Association v. Union of India*** ("**MBA-III**") [(2020) SCC Online SC 962], one of the directions was that appointments were to be made by the Government within 3 months of the receipt of the recommendation from the Search-cum-Selection Committee. The 2021 Ordinance stated that the Central Government shall take a decision on the recommendation of the SCSC '*preferably*' within 3 months. Though this was struck down by the majority in **MBA-IV**, Justice Hemant Gupta found that this was a perfectly legitimate provision. A similar provision in the Reforms Act, 2021 is now under challenge.

(iv) Last is the direction that the recommendations of the SCSC to the Government, that is the Appointments Committee of the Cabinet, should be of only one single name per vacant post with a waitlist available in case of exhaustion of the main list. Instead, the 2021 Ordinance required a panel of two names to be recommended, but this Hon'ble Court, in **MBA-IV**, was not prepared to accept this contention. Nevertheless, the Reforms Act provides in Section 3(7), for the same, i.e. the SCSC shall recommend a panel of two names.

6. Each one of the above matters is an issue of policy. The justification for the Parliament and the Executive to repeatedly assert its right to make laws relating to policy is that even if this right is denied to Parliament, as it has been done by invoking the principle of independence of the judiciary, a vital concomitant of legislative power would be lost to Parliament, violating the constitutional separation of powers.

7. The Government of India will be placing before the Court the authorities declaring the exclusive right of the Parliament and Executive to frame policy and execute the same. The Government will also demonstrate that the concept of independence of the judiciary has no relevance to the four issues of policy set out earlier. On the other hand, it is settled law that legislative policy can be invalidated only if

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it violates fundamental rights or any provision of the Constitution or is beyond legislative competence.

8. These are the areas where both Parliament and the Executive stand perplexed as well settled principles are not being followed since it is only if the policy decision taken by the Parliament violates any fundamental right or any provision of law, would the Court set aside such decision.

9. As a matter of fact, this Hon'ble Court should have upheld each and every one of the four aspects mentioned earlier by accepting the position that they were issues of policy, so that there may be comity between the three organs of state and there can be no confusion in the mind of Parliament. These issues cannot be traced to independence of the judiciary.

10. The judgement with which the Parliament is faced, i.e. **MBA-IV**, elaborately goes into the laws of England and as well as the United States to come to the conclusion, set out in paragraph 17, that "*it has been said that the doctrine of the supremacy of the Supreme Court is the logical conclusion of Coke's doctrine of control of the Courts over legislation*' by quoting from Willis on Constitution Law (1936 Edn, para 76). It is submitted that Sir Edward Coke telling King James I that the Courts of Justice alone can decide causes concerning the administration of justice as his Majesty was not learned in the laws of the realm of England, had nothing to do with the Constitutional environment existing today. The Indian Parliament with 534 elected representatives, including eminent lawyers, owing accountability to their constituencies and with their collective decision representing the will of the people of the country is a far cry from the times of King James I.

11. The judgement in MBA-IV has relied upon the statements of (i) Sir Edward Coke; (ii) Baron de Montesquieu; (iii) The separation of powers in the American Constitution; (iv) Alexander Hamilton; (v) The judgments of the United States' Supreme Court in ***Marbury v. Madison*** [5 US 137 (1803)], (vi) in ***United States v. Peters*** [9 US 115 (1809)],

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(vii) ***Brown v. Board of Education of Topeka*** [347 US 483 (1954)], (viii) ***Cooper v. Aaron*** [358 US 1 (1958)], (ix) ***Miranda v. Arizona*** [384 US 436 (1966)], (x) ***Dickerson v. United States*** [530 US 428 (2000)], (xi) ***Plaut v. Spendthrift Farm, Inc.*** [514 US 211 (1995)]; and (xii) an elaborate article titled "*The Case for the Legislative Override*".

12. The Supreme Court in MBA-IV was not justified in proceeding on the basis that by reason of separation of powers and the independence of the judiciary, in the United States, the judgments of the US Supreme Court were fully implemented. On the other hand, ***Brown v. Board of Education of Topeka*** (supra) itself still remains without fulfillment as an article written on the 60th anniversary of the judgment titled "*Brown v Board at 60*" by Richard Rothstein (published on 17.04.2014 in the Report of the Economic Policy Institute) states, for example, that:

> "*But Brown was unsuccessful in its purported mission – to undo the school segregation that persists as a modal characteristic of American public education today. [.....]*
>
> *In 1967, President Lyndon Johnson appointed Marshall to the Supreme Court where he spent the next 24 years in a fruitless struggle to prevent the perpetuation of school segregation, and indeed its exacerbation, after an initial rollback.*"

13. The various authorities cited ignore the real legal position. In the United States, judgment after judgment of the Supreme Court was disobeyed. The US Supreme Court had struck down as invalid a piece of oppressive Georgian legislation on Indians, i.e. Red-Indians, to enable complete destitution of the Indians' rights. Andrew Jackson, the second American President, refused to permit the decision to be enforced and he pointedly remarked:

> "*Well, John Marshall has made his decision. Now let him enforce it.*"

14. Similarly, Thomas Jefferson had said:

> *"Nothing in the Constitution has given the Supreme Court a right to decide for the Executive more than to the Executive to decide for them."*

15. When the ***Dred Scott*** decision [***Dred Scott v. Sandford*** 60 US 393 (1857)] was given by the US Supreme Court by Chief Justice Roger B. Taney holding that Congress had no power to abolish slavery as slaves were considered as 'property' and the property rights could not be taken away, Abraham Lincoln remarked:

> *"Beyond this, none is obliged to be bound by the judicial interpretation of the Constitution, when the interpretations lack claims to the public confidence."*

16. Things came to a head when, in the 1930s, the New Deal laws were promulgated by the President, Franklin D. Roosevelt, which provided for retirement benefits to workers, price control of commodities, municipal bankruptcy laws and laws relating to the working conditions of labour. All these were struck down by the Supreme Court, one by one.

17. The people, however, were not prepared to accept the Court's decisions, but, on the other hand, voted Roosevelt back to power. He then made his famous speech:

> *"The Court in addition to the proper use of its judicial functions has improperly set itself up as a third House of the Congress—a super-legislature, as one of the justices has called it-reading into the Constitution words and implications which are not there, and which were never intended to be there.*
>
> *We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will*

> *do justice under the Constitution—not over it. In our Courts we want a government of laws and not of men*"

He later threatened,

> "*I will appoint Justices who will not undertake to override the judgment of the Congress on legislative policy, that I will appoint Justices who will act as Justices and not as legislators*".

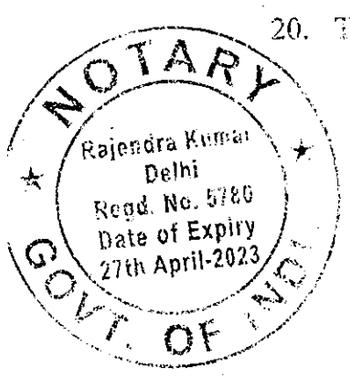
But, of course, Roosevelt had no need to carry out his threat as the judges themselves reversed their earlier views and upheld each one of the laws passed subsequently.

18. It is true that Justice Charles Evans Hughes had said, *"We are under the Constitution but the Constitution is what the Judges say it is."*. And Justice Harlan, in addressing law students said, *"I want to say to you, if we do not like an Act of Congress, we do not have much trouble to find grounds to declaring it unconstitutional."*

19. The judgment in **MBA-IV** has also relied upon, "*The Case for the Legislative Override*", an Article by Nicholas Stephanopoulos (10 UCLA Journal of International Law and Foreign Affairs 250 (2005)). The Article points out that both in Canada as well as in Israel, a number of judgments of the Supreme Court of the respective countries have been rendered inapplicable through laws made by their respective parliaments. But what is significant is that it is not stated that the Supreme Courts of the respective countries sought to re-instate the judgments by again seeking to strike down the laws which reversed the earlier judgments. Here, the author quotes (at Page 262) Janet Herbert,–

> "*any society that aspires to be democratic should resolve the most important of its social priorities through its elected legislatures rather than in courts*".

20. The Article relied upon further states that:



> *"The final value implicated by the choice among judicial review arrangements is the quality of relations between the different branches of government. Judicial supremacy on constitutional issues may foster anger by the other branches at having their policies nullified, and provoke retaliation through constitutional amendment, court-packing, or outright disobedience. But greater legislative involvement in constitutional decision-making soothes this frustration and 'recognizes the need for dialogue and joint responsibility between legislatures and courts in protecting fundamental liberties'."*

21. If there is one single principle on which the exclusive jurisdiction of Parliament and Executive rests, it is in the realm of policy making. To this extent, because of the separation of powers, the Judiciary is excluded from this area of policy. It has to be recognised that for this purpose, the question of framing of a Bill to be presented to Parliament itself involves deep discussion and research, at different levels of the bureaucracy, the Minister and thereafter the Cabinet. Then comes the debates in the Upper House and the Lower House, when clause by clause is read and put to the house for debate by the elected representatives, and, finally, the Bill, if passed, becomes law. All this would be set at nought if a bench of the Supreme Court decides that the policy affects the independence of the judiciary and strikes it down, not because the policy violates any fundamental right or constitutional provision or is beyond legislative competence, but because, the Court's concept of 'independence' is violated.

22. By applying one's mind to either the provisions relating to tenure of 4 years, or minimum age of 50 years, or to the panel of 2 names to be recommended, or for the Central Government to take a decision on the recommendations '*preferably*' within 3 months, one is confused if one were told that all this relates to independence of the judiciary. It would be mere semantics if, in fact, it has no relationship to independence of the Members or the Chairperson of the Tribunals. Independence would be affected, only if the tenure, or terms and conditions, are such that

the Executive is able to control the will of the Member or the Chairperson of the Tribunal. With judicial dominance in the SCSC which recommends the continuance or re-appointment of members, whether for four years or five years, these fears are unfounded. In cases where the candidate should be at least fifty years of age as upheld by Justice Hemant Gupta (and for instance, the Companies Act, 2013 itself requires the members to be appointed to the NCLT must be atleast fifty years), the same is compared to the eligibility in the Constitution for High Court judges, where an advocate with 10 years' experience is eligible. This, however, fails to consider the judgment in ***Lok Prahari v. Union of India*** (2021 SCC Online SC 333), which expressly notes that the age profile for elevation to the High Courts is 45 to 55 years. It is difficult to understand as to how independence comes into the picture.

23. It is submitted that all these aspects relate to policy, and nothing but policy. To quote the dissenting opinion of Justice Frankfurter in ***Trop v. Dulles*** [356 US 86 (1958)], which was quoted with approval by the Supreme Court in ***Asif Hameed and Ors. v. State of Jammu and Kashmir and Ors.*** [1989 Supp (2) SCC 362]:

> *"It is not easy to stand aloof and allow want of wisdom to prevail, to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do."*

24. Equally, in the Connecticut Birth Control Case [***Griswold v. Connecticut*** 381 US 479 (1965)], the US Supreme Court held:

> *"...we do not sit [in rendering this decision] as a super legislature to determine the wisdom, need and propriety of laws that touch economic problems, business affairs or social conditions...*
>
> *... a jurist is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles."*

25. Justice Harman in the case of ***Clean Air Foundation ltd. v. Government of KHSAR*** [Hong Kong] [(2007) HKCFI 757] notes:

> *"It has long been accepted that policy is a matter for policy makers and that to interfere with the lawful discretion given to policy makers would amount to an abuse of the supervisory jurisdiction vested in the Courts."*

26. What is significant is if the separation of powers entrusts to Parliament and the Executive the exclusive jurisdiction to decide as to what would be the best policy, which would be necessary in public interest, then the principle of separation of powers itself would stand violated if the Judiciary interferes with issues of policy and substitutes what it believes would be a better policy.

27. That policy is exclusively a matter for the legislature and the executive, and should not be interfered with by the judiciary, unless it violates fundamental rights or any other provision of the Constitution is well settled by the following judgments:

(a) ***Narmada Bachao Andolan v. Union of India*** [(2000) 10 SCC 664]:

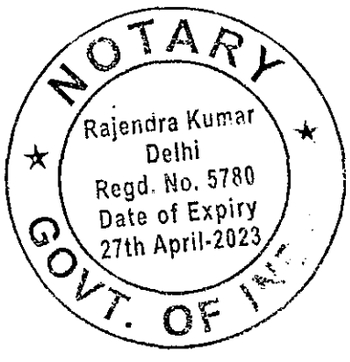
> *"229. It is now well settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of*

policy-making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken. The court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution. ....."

(b) ***Rajeev Suri v. DDA*** [2021 SCC Online SC 7] held:

*"**192.** The Government may examine advantages or disadvantages of a policy at its own end, it may or may not achieve the desired objective. The Government is entitled to commit errors or achieve successes in policy matters as long as constitutional principles are not violated in the process. It is not the Court's concern to enquire into the priorities of an elected Government. Judicial review is never meant to venture into the mind of the Government and thereby examine validity of a decision. In Shimnit Utsch India, this Court, in para 52, observed thus:*

> *"52. ... The courts have repeatedly held that the government policy can be changed with changing circumstances and only on the ground of change, such policy will not be vitiated. The Government has a discretion to adopt a different policy or alter or change its policy calculated to serve public interest and make it more effective. Choice in the balancing of the pros and cons relevant to the change in policy lies with the authority. But like any discretion exercisable by the Government or public authority, change in policy must be in conformity with Wednesbury [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., [1948] 1 K.B. 223] reasonableness*



and free from arbitrariness, irrationality, bias and malice."

28. The most elaborate discussion on the relationship between the three organs of the State is found in the three-judge judgement in ***Dr. Ashwani Kumar v. Union of India*** [2020 (13) SCC 585] wherein it was held that:

> *"13. [.....] Neither does the Constitution permit the courts to direct, advise or sermonise others in the spheres reserved for them by the Constitution, provided the legislature or the executive do not transgress their constitutional limits or statutory conditions. Referring to the phrase "all power is of an encroaching nature", which the judiciary checks while exercising the power of judicial review, it has been observed [.....] that the judiciary must be on guard against encroaching beyond its bounds since the only restraint upon it is the self-imposed discipline of self-restraint. [.....]"*

29. The independence of the judiciary cannot be affected by the duration of the tenure of the chairperson/member of a statutory tribunal being fixed as 4 years, with the option of re-appointment, or 5 years. The question of the independence of the chairperson/member and/or the tribunal itself could arise only if the conditions of appointment of the chairperson or member would permit the Government to influence or control his/her will. To quote from "*Guidance for Promoting Judicial Independence and Impartiality*" issued in January 2002 by the Office of Democracy and Governance, US Agency for International Development, which states:

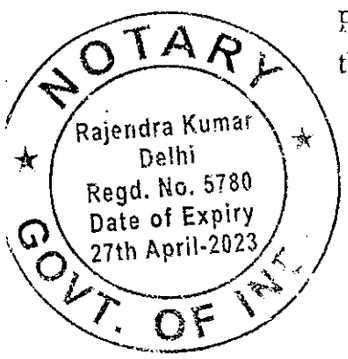
> *"Three arguments are generally advanced against increasing the length of tenure of judges: (1) shorter terms are necessary to weed out judges who are sub-standard; (2) shorter terms are necessary to ensure that the judiciary*

reflects the will of the people; and (3) long or life terms protect judges who are 'in someone's pocket'."

A copy of the article titled "*Guidance for Promoting Judicial Independence and Impartiality*" issued in January 2002 by the Office of Democracy and Governance, US Agency for International Development is annexed herewith and marked as **Annexure-A**.

30. What is most relevant is that any re-appointment of a Chairperson/member will take place only on the basis of a recommendation by the Search-cum-Selection Committees, in which the judiciary has a dominant voice. Hence, the claim of the independence of the judiciary being adversely affected by a fixed tenure of 4 years, but not by a fixed tenure of 5 years, has no substance or merit.

31. This would equally apply to the fixation of 50 years as the minimum age for appointment as chairperson or member of a statutory tribunal. The directive in **MBA-III** that advocates with 10 years of standing would be eligible for appointment was based on the fact that the Constitution permits the appointment of such persons as judges of the High Courts. Yet, this rule of 10 years has not resulted in a single appointment having taken place, till date, to any High Court, of a lawyer with only 10 years of professional standing. On the other hand, this Hon'ble Court, in ***Lok Prahari v. Union of India and Ors.*** (Judgement dated 20.04.2021 in WP (C) No. 1236/2019 at para. 22, reported in 2021 SCC Online SC 333), has observed that it is only lawyers falling in the age band of 45 to 55 years who are held to be eligible for satisfactorily discharging the functions of a judge of a High Court. It should be noted that the dissent by Justice Hemant Gupta specifically upholds 50 years. He also points out that the Companies Act, 2013 requires a minimum of 50 years for appointment of a member or Chairperson to the National Company Law Tribunal. It is submitted therefore that 50 years would be wholly within the competence of Parliament as a declaration of policy by the elected representatives of the people.



32. It should also be remembered that to limit the experience to 10 years in the case of a professional like a lawyer without extending the same benefit to other professionals who are eligible to be appointed as members of the Tribunals like chartered accountants, environmentalists, and other technical experts such as those having professional experience in economics, business, commerce, finance, management, industry, public affairs, administration, telecommunications, investment, financial sectors including securities market or pension funds or commodity derivates or insurance, commercial matters in regard to railways, etc. would be *ex facie* discriminatory and would be liable to be struck down.

33. In this background it is submitted that neither the Executive nor Parliament can be deprived of their right to make laws declaring policy, as otherwise the constitutional requirement of separation of powers will stand violated by the judicial pronouncements. This is the very reason why the Parliament has no choice other than to assert its Constitutional right under the rule of law as otherwise even the dividing line between governance and judicial adjudication or decision-making would stand obliterated. This is the distressing position in which the Parliament would be driven to yield the Constitutional right to make laws for the country through deciding upon the policy, based on the will of the 534 elected representatives of the people which, in fact, reflects the will of the people.

34. The other two challenges pertain to the decision of this Hon'ble Court that only one recommendation against each vacant post will be made by the SCSC for acceptance by the Government. It is found in a few cases that there have been reports of corruption by the recommended persons and, in one case, the name of the counsel who was a conduit was also mentioned. The Government asserts that it has the right to reject a recommendation on valid grounds. The very fact that the waitlist is also being sent which according to the court is to be used only when the main list is exhausted would show that it would be prudent to have a panel of two names to prevent delay in appointments. Surely, since both the names are found suitable by the SCSC, even if

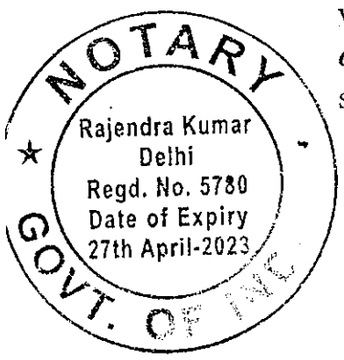
Government were to exercise a choice between the two, that amount of faith and trust between the three great wings of the State has to exist.

35. The Appointments Committee of Cabinet ("**ACC**"), which takes a decision on the recommendations made by the SCSC, is headed by the Prime Minister of the country. The Government functions through 53 Ministries, each one dealing with matters of great importance to the country. In matters of significance, the ACC would also have to be consulted to prioritise the multitude of issues important to the State, and thus the need not to have an inflexible 3 months. Even with pressing internal and external affairs of great importance coming in the way, 3 months may not be sufficient in some cases. The word 'preferably' used in Section 3(7) is a choice of Parliament and for the Court to object to it would not be conducive to good governance.

36. This Hon'ble Court in **MBA-IV** has held that the decision in regard to these four issues do not fall under Article 142 but would fall under Article 141 which is a declaration of law which is binding in nature. It is submitted that these findings of the Court really relate to factual issues as to whether 4 years is not an acceptable tenure affecting the independence of the judiciary, but five years will uphold the independence of the judiciary. Equally, whether ten years should be the experience for advocates alone and leaving the existing tenure to operate for the other categories mentioned earlier, so too the word 'preferably', or whether the panel of names recommended by the SCSC should consist of 1 or 2 names.

37. Article 141 states "*The law declared by the Supreme Court shall be binding on all courts within the territory of India.*" It has been held that it is only the *ratio decidendi* that would be binding and that too only on the courts.

38. In fact, in the case of ***Vishaka v. State of Rajasthan*** [1997 (6) SCC 241, para 16] the judgment itself states that the guidelines laid down will be law under Article 141. However, in ***Ashwani Kumar v. Union of India*** [2020 (13) SCC 585, para 29], it has been held that even if a subsequent law violates the guidelines laid down in *Vishaka* the



subsequent legislation cannot be held to be in violation of Article 141 of the Constitution.

39. The real problem arises because starting with ***S.P. Sampath Kumar v. Union of India and Ors.*** [(1987) 1 SCC 124], ***Union of India v. R. Gandhi, President, Madras Bar Association*** (hereinafter referred to as "**MBA-I**") [(2010) 11 SCC 1], ***Madras Bar Association v. Union of India and Anr.*** (hereinafter referred to as "**MBA-II**") [(2015) 8 SCC 583], ***Rojer Mathew v. South Indian Bank Limited and Ors.*** [(2020) 6 SCC 1], **MBA-III**, and **MBA-IV**, uniformly the Court has issued directions, which it describes as being mandatory in nature, in regard to all the four issues which have been set out earlier. In the clear teeth of the series of judgments which say that it is not open to the judiciary to compel Parliament to pass a law in accordance with the directions relating to policy, whether described as mandatory or not.

40. These directions can only be treated as recommendatory in nature. Not implementing these directions cannot be said to be in violation of the judgments of the Court. This is on the basis that the Courts cannot direct the legislature to make a law in a particular manner [*See* ***Supreme Court Employees Welfare v. Union of India*** 1989 (4) SCC 187]. In ***Dr. Ashwani Kumar v. Union of India and Anr.*** 2020 (13) SCC 585, this Hon'ble Court referred to its earlier decisions in ***Kalpana Mehta v. Union of India*** 2018 (7) SCC 1 and in ***SC Chandra v. State of Jharkhand*** 2007 (8) SCC 279 and held:

> *Thus, while exercising the interpretative power, the courts can draw strength from the spirit and propelling elements underlying the Constitution to realise the constitutional values but must remain alive to the concept of judicial restraint which requires the Judges to decide cases within defined limits of power. Thus, the courts would not accept submissions and pass orders purely on a matter of policy or formulate judicial legislation which is for the executive or elected representatives of the people to enact. Reference was made to some judgments of this Court in the following*

words : (Kalpana Mehta case [Kalpana Mehta v. Union of India, (2018) 7 SCC 1] , SCC pp. 47-48, para 43)

> *"43. In S.C. Chandra v. State of Jharkhand [S.C. Chandra v. State of Jharkhand, (2007) 8 SCC 279 : (2007) 2 SCC (L&S) 897 : 2 SCEC 943] , it has been ruled that the judiciary should exercise restraint and ordinarily should not encroach into the legislative domain. In this regard, a reference to a three-Judge Bench decision in Suresh Seth v. Municipal Corpn., Indore [Suresh Seth v. Municipal Corpn., Indore, (2005) 13 SCC 287] is quite instructive. In the said case, a prayer was made before this Court to issue directions for appropriate amendment in the M.P. Municipal Corporation Act, 1956. Repelling the submission, the Court held that it is purely a matter of policy which is for the elected representatives of the people to decide and no directions can be issued by the Court in this regard. The Court further observed that this Court cannot issue directions to the legislature to make any particular kind of enactment. ....."*

41. It has been held in ***Supreme Court Employees Welfare v. Union of India*** [1989 (4) SCC 187, at paragraph 51] that this principle will equally apply to subordinate legislation. Therefore, not following these directions to make a law in a particular manner would be solely within the competence and jurisdiction of Parliament.

42. The four aspects which is really the controversy involved in the present case has been held to violate the basic structure, independence of the judiciary by Justice Ravindra Bhat in **MBA-IV** in paragraph 9 in the following words:-

> *"In L. Chandra Kumar v Union of India [1997 (3) SCC 261] this court invalidated Section 28 of the Administrative Tribunals Act on the ground that it excluded jurisdiction under Articles 226 and 227, and was thus in conflict with the basic structure of the constitution, as judicial review was part of the basic structure:*
>
> *[.....]*
>
> *In Ismail Faruqui v Union of India [1994 (6) SCC 360] provisions of a Central enactment [the Acquisition of Certain Area at Ayodhya Act, 1993] [Section 4 (3)] which abated all pending legal proceedings was held to be unconstitutional because: it amounted to "an extinction of the judicial remedy for resolution of the dispute amounting to negation of rule of law. Sub-section (3) of Section 4 of the Act is, therefore, unconstitutional and invalid." It is therefore, too late in the day to contend that infringement by a statute, of the concept of independence of the judiciary - a basic or essential feature of the constitution, which is manifested in its diverse provisions, cannot be attacked, as it is not evident in a specific Article of the Constitution."*

43. Justice Nageswara Rao on the other hand holds, in **MBA-IV** (at paragraph 22 at Pg.27-28), that the rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution and that violation of separation of powers would result in infringement of Article 14 of the Constitution, and that a legislation can be declared as unconstitutional if it is in violation of the principle of separation of powers, which stands violated by the provisions of the 2021 Ordinance in relation to the four aspects mentioned earlier.

44. It is submitted that the principle of basic structure in the Constitution can be used to strike down a constitutional amendment. It has been held in a series of cases including by two Constitutional Bench decisions and by a 7 judges bench of this Hon'ble Court that basic structure in the Constitution can only be used to test the validity of a Constitutional amendment but has no relevance when it comes to validity of a statue.

This has been held by a constitution bench judgment in ***Kuldip Nayar v. Union of India*** [2006 (7) SCC 1] which in paragraphs 106 and 107 holds that:

> *"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.*
>
> *Reference can also be made in this respect to Public Services Tribunal Bar Assn. v. State of U.P. [(2003) 4 SCC 104 : 2003 SCC (L&S) 400] and State of A.P. v. McDowell & Co. [(1996) 3 SCC 709]*
>
> *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."*

45. In ***Indira Nehru Gandhi v. Raj Narain*** [1975 Supp SCC 1], a constitution bench held that:

> *"136. The theory of basic structures or basic features is an exercise in imponderables. Basic structures or basic features are indefinable. The legislative entries are the fields of legislation. The pith and substance doctrine has been applied in order to find out legislative competency, and eliminate encroachment on legislative entries. If the*

theory of basic structures or basic features will be applied to legislative measures it will denude Parliament and State Legislatures of the power of legislation and deprive them of laying down legislative policies. This will be encroachment on the separation of powers."

46. Equally, the 7 judges in the ***State of Karnataka v. Union of India*** [1977 (4) SCC 608] also affirmed the same principle. It is therefore established beyond doubt that the principle of independence of the judiciary, which forms part of the basic structure, cannot be used to strike down a legislation.

47. The judgement in **MBA-IV** holds that once a mandamus is issued by the Court, it is bound to be obeyed by the Executive and the Legislature. This is not so. The judgement of the Supreme Court in ***Virender Singh Hooda v. State of Haryana*** [2004 (12) SCC 588] holds that

> "*67. [.....] A mandamus issued can be nullified by the legislature so long as the law enacted by it does not contravene constitutional provisions and usurp the judicial power and only removes the basis of the issue of the mandamus.*"

48. In the present case one tries to find out what is the foundation, or the basis of the directions issued, in regard to the four aspects mentioned earlier. It has already been stated that these directives to mould the legislation so as to implement the directives of the Court in regard to these four aspects is tantamount to directing Parliament to legislate in a particular manner. It has therefore been stated earlier that these directions are *ex facie* beyond the competence of the Supreme Court and, to give it validity, one could only treat it as recommendations and not binding directives.

49. The next question would be how does Parliament remove the basis where none exists. The Court merely holds that, in its view, independence of the judiciary would require 5 years and not 4 years as the tenure, or an advocate with ten years' experience being made

eligible for appointment though that would not be the yardstick for the numerous other classes of professionals mentioned otherwise resulting in discrimination, or that a minimum age criteria of 50 years is invalid or a panel of 2 names will not be permitted, and the 3 months' time limit for making appointments after receiving the recommendations of the SCSC is inflexible. What is the basis or foundation other than the fact that the Court is entering into the impermissible area of judicial legislation or directing laws to be made in a particular manner.

50. It is only in the case of the ten years' minimum experience for advocates that the basis was provided by pointing out to the provision in the Constitution. But as pointed out, no single appointment has been made to the High Court of an advocate with 10 years' practice and on the other hand, the judgment of this Hon'ble Court in ***Lok Prahari v. Union of India and Ors.*** (Judgement dated 20.04.2021 in WP (C) No. 1236/2019 at para 22, reported in 2021 SCC Online SC 333) has held that 45 to 55 years should be the age profile for elevation to the bench. Juxtaposing the judgment in **MBA-III** of 10 years' experience against the age of 45 to 55 years in the ***Lok Prahari*** (supra) judgment, to select the average of 50 years would be the justification for overriding the judgment of this Court The second justification is that *ex facie* permitting ten years' experience for advocates but not for the other classes/categories of professionals for being eligible to be appointed would violate Article 14 resulting in ten years' experience for advocates being *ex facie* discriminatory for violating Article 14 and therefore being struck down by the Courts. If 10 years' experience for an advocate had been declared as the eligibility condition, when it was certain to be struck down, and hence the Reforms Act provided for a uniform age applicable to all the classes/categories of professionals, no question of violating the judgment in **MBA-III** would arise. It should also be noted that Justice Hemant Gupta had upheld 50 years and relied upon the requirement of a minimum age of 50 years for appointment to the NCLT.

51. In all the cases of validating laws there was some basis to be removed, as elaborated hereunder:

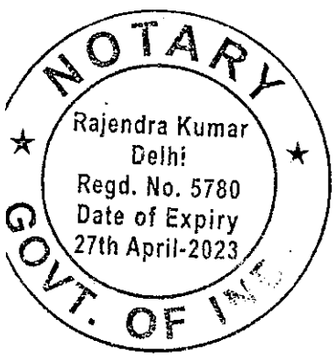
a. In ***Hari Singh and Ors. v. Military Estate Officer and Anr.*** [1972 (2) SCC 239], the Public Premises (Eviction of Unauthorised Occupants) Act, 1958 gave two procedures to achieve eviction of unauthorized occupation, and when this was struck down as unconstitutional, the validating act removed one alternate procedure so that the basis did not exist.

b. In ***Misrilal Jain v. State of Orissa and Anr.*** [1977 (3) SCC 212], the absence of sanction of the President was responsible for the striking down of the Inland Waterways Act as the Bill was moved without the previous sanction of the President of India. Thereafter, the Orissa Legislature obtained the previous sanction of the President and moved the Bill. There was a basis to be removed.

52. Any number of judgments could be cited on this point. However, to prevent prolixity a note on decisions on validating legislations is annexed herewith and marked as **Annexure-B** hereto.

53. It would be noticed that in the present case, however much the Executive and Parliament sought to find a basis for the directions with regard to these four aspects, which have to be removed for overriding the judgment, one could not find such a basis. These were concepts which the Court believed would relate to independence of the judges and hence issued directions in that regard. But there was nothing which formed the basis of these directions other than the concept of independence of the judiciary. Would this mean that Parliament had no means of nullifying these directives since independence by itself is a concept which could not be removed by legislation and hence, substituting its policy in regard to these four matters was the only course open to Parliament by invoking the '*notwithstanding...*' clause. It is submitted that declaring policy in regard to these four issues was wholly within the competence and jurisdiction of Parliament.

54. The Court has held that violation of separation of powers will violate Article 14 of the Constitution relying upon ***State of Tamil Nadu v. State of Kerala and Anr.*** [2014 (12) SCC 696]. This Counter Affidavit has elaborately dealt with the position that the decisions relating to



these four issues emanated from the Court as directives to make laws in the manner so directed which, as already pointed out, is beyond the competence of the Courts. The Legislature on the other hand has, by law, set out these four aspects which individually relate to the policy of the State. It is this declaration of policy in regard to these four matters that the Court has interfered with, which a catena of statements by jurists and by this Court, has clearly held is beyond the competence of the courts. As already pointed out, it is therefore the Court which has gone against the principle of separation of powers by interfering with these policies laid down by the State. However, there is no violation of Article 14 because no reasoning whatsoever has been given for this significant statement of constitutional law as set out in the judgment in ***State of Tamil Nadu v. State of Kerala and Anr.*** (supra). This statement on Article 14 can only be treated as *obiter dicta*.

55. The Parliamentary law overrides the findings in relation to these four issues through the *non obstante* provisions which substitutes the policy decisions of Parliament on each one of these four issues. A list of validating judgments are annexed (*See* Annexure-B) where in each case there was some basis which had to be removed. For example, absence of sanction, or when two procedures would result in violation of Article 14, or when the height of the building exceeded the limit fixed and so on. In all these cases, there was a basis which could be removed. For example, by obtaining the sanction of the President, by removing one among the two procedures, or increasing the height to an extent which would be far more than the height of the building to be demolished, and so on. Here, there is no such basis which could be removed because it is only the mental process and perception of the judges which direct a law to be made with 5 years and not 4 years, or ten years' experience for an advocate, even though the other classes of professionals would have to have 25 years' experience, or the judges direction of a panel of one name as against 2 or the mandate that the law should require the appointments to be made within 3 months of the recommendation. In all these cases, there is nothing to be removed as a basis to render the provision valid.

56. If for any reason independence of the judiciary is treated as the basis, one could not phrase a provision by declaring that independence is removed which would *ex facie* sound antithetical. What is more, independence of the judiciary is not a ground which can be used for testing statutes. A series of Constitution Bench judgements and one of 7 judges have held that the basic structure theory can be used only for the purpose of testing constitutional amendments and cannot be used for invalidating statutes, including laws made by Parliament.

57. Even assuming that independence would be a ground, which has to be neutralized, it can only be through substantive provisions which would clearly declare independence of the members and chairperson of the Tribunals. The Reforms Act provides for a Search-cum-Selection-Committee ("SCSC") with the dominance of the judiciary which would make recommendations for appointments of the members and the Chairperson and also make recommendations for reappointment on a preferential basis of a member or Chairperson who has completed 4 years. Additionally, based on the suggestions made by the bench which decided **MBA-III** and **MBA-IV**, the salary of the Chairperson is now Rs.2,50,000/- equivalent to that of the Cabinet Secretary and for a member, is Rs.2,25,000/-, equal to that of a Secretary to Government of India. All allowances payable to these bureaucrats is payable to the members and Chairperson. The reimbursable HRA is fixed at a ceiling limit of Rs.1,50,000/- for the Chairperson and Rs. 1,25,000/- for the members. With all these safeguards being included based on the directions of the Courts, the independence is wholly protected. Nevertheless, to still claim that because of these 4 issues the independence stands compromised is wholly unacceptable to Parliament and the policy enunciated by Parliament.

58. Parliament has extended itself to accommodate the various views expressed by the Court in **MBA-III** and **MBA-IV** as set out above. The legislation on the four issues is the declaration on policy which Parliament, expressing the will of the people on matters of policy, has to protect.

59. The ground raised that the deletion of Section 184 and 185 can be done only through a finance act is not based on any authority.

60. In view of the above, the present Writ Petition ought to be dismissed.

[redacted]

DEPONENT

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नई दिल्ली / New Delhi

VERIFICATION

Verified at New Delhi on this the 07th day of October, 2021 that the contents of the above affidavit are true and correct to the best of my knowledge and belief and nothing material has been concealed there from.

NOTARY
Rajendra Kumar
Delhi
Regd. No. 5780
Date of Expiry
27th April-2023
GOVT. OF INDIA

[redacted]

DEPONENT

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07 OCT 2021

CERTIFIED THAT THE CONTENTS EXPLAINED TO THE DEPONENT EXECUTANT WHO IS SEEMED PERFECT TO UNDERSTAND & AFFIRMED DEPOSED BEFORE ME AT DELHI ON 07 OCT 2021 .....IDENTIFIED BY
IDENTIFY TH[redacted]
SIGNED IN M

IDENTITY THE EXECUTANT / DEPONENT WHO WAS SIGNED IN THE PRESENCE OF