

STATEMENT OF JURISDICTION.

The petitioner humbly submits this memorandum for the petition filed before this honorable court. The petition invokes its write jurisdiction under article 32 of the constitution of India. It sets forth the facts and the laws on which the claims are based.

STATEMENT OF FACTS.

I.

The month is the monthly magazine having widest circulations in India. It publishes the research articles and it has its own research wing headed by Mr. Subramanya, he is expert in sociolegal research and has published number of articles in international journal. On the basis of research work of Mr. Subramanya various states and central government have formulated and reformulated policies and reformed statutes. The central government constituted “the ad-hoc committee” and appointed Mr. Subramanya as a head for the purpose of preparing policy document on democratic administration.

II.

The ad-hoc committee conducted extensive research and scientific sample survey of representative of people, panchayat members, voters, political party members, former election commissioner, retired judges of high court and Supreme Court. Finally the committee submitted its recommendations to the central government. In that recommendation the analysis revealed that 70% of the representatives of the people throughout the country are the 4th generation representative of the people from the same family, and also the 50% of the representatives of the people never become ministers even after elected for more than 4 times. The report recommended that the family centric political representation has to be discouraged; every member of the society must have opportunity to become member of legislative house. The committee also felt that there should be limitations on the number of terms for which a person may become representative of people, prohibition of resignation of the representative of the people to the legislative with the twin objectives of ensuring a stable government, and whoever resigns shall attract disqualification for life. The committee also stated that it is the need of the hour to bring changes in qualifications for the president and the prime ministers.

III.

The government of India considered the recommendations of the committee in the light of the forthcoming elections to the parliament and different states assemblies hence, the central government issued an ordinance on democratic reforms. The ordinance provided that

Rule 1. No citizen shall become a member of legislative house more than four terms.

Rule 2. No duly elected representative of any legislative house shall tender resignation. Otherwise the resigned member shall be disqualified for contesting the election for life.

Rule 3. No two persons from same family shall contest for election to the same legislative house at a time.

Rule 4. No citizen shall become minister for more than 2 terms or 10 years.

In due course of time the parliament brought 104th amendment to the constitution of India which has affected changes in the following Articles of the constitution

Article 57- eligibility for re-election, article 58- qualification for election as a president and article 75 others provisions as to ministers.

IV.

The Indian national common man party (INC) challenged the ordinance and also the president of INC challenged the 104th amendment of the constitution, and decided to file petition in the Supreme Court to declare that the ordinance is unconstitutional and 104th amendment of the constitution as ultra-virus.

STATEMENT OF ISSUES.

10th M. K. NAMBYAR MEMORIAL NATIONAL LEVEL MOOT COURT COMPETITION.

Issue I: whether the writ petition filed by petitioner is maintainable?

Issue II: whether the ordinance issued by central government is unconstitutional?

Issue III: whether the representative of people's fundamental rights are violated?

Issue IV: whether the 104th amendment of the constitution of India is ultra-virus?

SUMMARY OF ARGUMENT

ISSUE: I. THE WRIT FILED BEFORE THE HONORABLE SUPREME COURT IS MAINTAINABLE.

The writ petition filed by the petitioner is maintainable. Firstly; under Article 32 of the constitution of India provides to all its citizen's constitutional remedies and every citizen has a right to move to the Supreme Court for the protection of their fundamental rights. Secondly; fundamental rights of the representative of people where infringed by the ordinance issued by the central government as well as 104th amendment of the constitution is also ultra-virus in view of the constitution. Therefore the writ petition will be maintainable on this regard. Thirdly; the constitutionality of the act; constitution amendment; and ordinance, cannot be challenged in any other court. According to the constitutional provisions the writ is maintainable on the basis of violation of the fundamental rights as well as ultra- virus act of the constitution amendment.

ISSUE: II. THE ORDINANCE ISSUED BY CENTRAL GOVERNMENT IS UNCONSTITUTIONAL.

Article 123 of the constitution has some limitations with regards to the ordinance making power of executive, as the parliament to legislate, given the distribution of the power between the union, states, and concurrent list, thus the following limitations exist with the ordinance making power of the executive; i) legislative is not in session; the president can only promulgate an ordinance when either of the two house of the parliament is not in session. ii) Immediate action is required; the president cannot promulgate an ordinance unless he is satisfied that there are circumstances that require taking "immediate action". iii) Parliamentary approval during session; ordinance must be approved by parliament within 6 weeks of the re-assembling or they shall cease to operate. Hence the ordinance issued by the government is unconstitutional.

ISSUE: III. THE FUNDAMENTAL RIGHTS OF REPRESENTATIVE OF THE PEOPLE ARE VIOLATED.

The ordinance issued by the central government is violated of the fundamental rights of the representative of the people and the ordinance is bad in law. The ordinance is adversely affecting the fundamental rights of the representative of people. The right to stand

for an election is conferred by the Article 84(b) and article 173(b). The right to stand as a candidate and contest an election is not a common law right, but it is a special right created by statute. Every person in the territory of India irrespective of his proprietary or educational claims should be allowed to participate in the political system or in politics (political justice), a representative democracy.

ISSUE: IV. THE 104TH AMENDMENT OF INDIA IS ULTRA-VIRUS.

The substantive power to amend is not to be found in Article 368, this article only contains the procedure to amend the constitution. The basic feature of the constitution is non amendable. The 104th amendment of the constitution of the India is affecting the basic structure of the constitution and this act found as ultra-virus.

ARGUMENT ADVANCE.

ISSUE: I. THE WRIT PETITION FILED BEFORE THE SUPREME COURT IS MAINTAINABLE.

1) It is submitted that the writ petition filed in the Supreme Court is maintainable. There is no alternative remedy before the petitioner (A) the writ is maintainable on account of violation of fundamental right. (B) To challenge the constitutionality of the ordinance and amendment if the constitution.

A) The writ is maintainable on account of the violation of fundamental right.

2) Democracy is the basic feature of the Indian constitution.¹ Political parties are a unique institution of the modern constitution state. Even though the right to the candidacy is recognized in numerous regional and international human right treaties.² Free and fair election has been held is basic feature of the constitution.

3) In case of *dhartipakar mandanlal agrwal v. Rajiv Gandhi*.³ Supreme Court has held that, in parliamentary form of democracy political party's plays vital role and occasionally they sponsor candidates of the election.

4) The right to move to the Supreme Court under Article 32 is itself a fundamental right.

1. M.P. JAIN, INDIAN CONSTITUTIONAL LAW, 851, (2018).

2. 16, Alecia Johns, *the case for the political candidacy as fundamental human rights*, *human rights law review*, (mar.1, 2016)29, <https://doi.org/bar10.1093/hrlr/ngv036>.

3. AIR. (1987) S.C. 1577.

4. S.R. MYNENI, ADMINISTRATIVE LAW, 306, (2014).

5) In case of extrajudicial executing victim families association v. union of India and others,⁵ it was held that, in a matters concerning gross violation of human rights, Supreme court and every constitutional court should adopt an “open door policy” hence there is no doubt at all the petition filed by the petitioner is absolutely maintainable in view of the constitution

6) In Dulhari Devi and others V. state of Rajasthan and others.⁶ It was held that in order to lead in democratic governance, a person is required to understand the needs of social development and require the mental attribute of being wise in the estimation of the people, who elect her for representation. Hence the petition filed by the petitioner is maintainable on this ground.

7) In case of Rajbala and others v. state of Haryana and others.⁷ stated that every citizen has a constitutional right to elect and to be elected to either parliament or state legislature.

8) Therefore, it is humbly submitted by the petitioner, that the writ petition filed would be maintainable.

5. Extrajudicial executing victim families association v. union of India and others, (2016) 5 S.C. 3400.

6. Dulhari Devi and others V. state of Rajasthan and others, (2015) 10 RAJ. 85.

7. Rajbala and others v. state of Haryana and others, (2016) 1 S.C. 38.

ISSUE:II. THE ORDINANCE ISSUED BY CENRAL GOVERNMENT IS UNCONSTITUTIONAL.

9) It is humbly submitted that the ordinance issued by the central government is unconstitutional. A) Power of president to promulgate ordinances during recess of parliament.⁸ under Article 123 the president has power to promulgate ordinance.⁹ B) The exercise of ordinance making power is unconstitutional. In case of emperor v. benoarylal Sharma,¹⁰ it was held that the exercise of the ordinance making power may be challenged if it could be established that the president has not acted bonafied. Therefore which ordinance issued by the union government is unconstitutional.

10) The power to issue an ordinance is not an executive power but a legislative power of president devised to meet urgent situations and necessary for peace and good government of the country.¹¹ in the present case there is no any urgent situation, and violation of public tranquility so there is no question arising of peace. The said ordinance is totally covered by politics. Therefore the issued ordinance is unconstitutional.

11) Dr. B.R. Ambedkar, chairman, drafting committee while discussing about jurisdiction of the ordinance making power, submitted that it is difficult to imagine cases where the power conferred by the ordinary law, existing at any particular movement may be deficient to deal with a situation which may suddenly and immediately arise. What is the executive to do? The executive has to got a new situation which it must deal with ex-hypothesi.¹²

8. V.N. SHUKLA, CONSTITUTION OF INDIA 407 (Mahendra P. Singh, 2007).

9. INDIA CONST. art. 123.

10. Emperor v. Benoarylal Sharma, (1945) P.C. 48.

11. V.N. SHUKLA, CONSTITUTION OF INDIA 410 (Mahendra P. Singh, 2007).

12. Constituant Assembly Debate 8 213.

12) It is humbly submitted that in *A.K. Roy v. union of india*.¹³ it was held that an ordinance made under Article 123 is subject to like a restrictions as the power of the parliament to make a laws. The ordinance making power of the president in India is rather unusual in a democratic constitution and it is not found in any other common wealth constitution.¹⁴

13) In case of *D.C. Wadhawa v. state of Bihar*¹⁵ held that “subversion of democratic process” and “colorable exercise of power” amounted to fraud on the constitution and hence unconstitutional. Which means the ordinance issued by central government is unconstitutional because the said ordinance has crossed the restrictions of the constitution.

14) It is further submitted that appropriate test to be applied is the test of public interest and constitutional necessity is essential.¹⁶

15) It is further submitted that ordinance are subject to constitutional limitations originating in i) Fundamental right contended in part III. ii) Distribution of legislative power between the union and the states. iii) Other constitutional limitations.¹⁷ In this petition the issued ordinance is against the constitutional limitations. Therefore the honorable court has to be declared unconstitutional.

16) In *R.K Garg v. union of India*,¹⁸ held that ordinance promulgated under Article 123 is a law under Article 13(3). It can be challenged as other laws on the grounds of impropriety, unconstitutionality and contravention of fundamental right.

13. *A.K. Roy v. union of India* (1982) S.C. 710.

14. V.N. SHUKLA, *THE CONSTITUTION OF INDIA* 410 (10th ed.).

15. *D.C. Wadhawa v. state of Bihar* (1987) 1 S.C.R. 798.

16. M.P. Jain, *INDIAN CONSTITUTIONAL LAW* 87 (2018).

17. *id. at 87*.

18. *R.K Garg v. union of India* (1981) S.C. 2138: (1981) 4 SCC 675.

17) Apex court can scrutinize whether satisfaction to promulgate ordinance was based on the relevant material or spurred by an oblique motive, a constitution bench of supreme court widened the boundaries of the judicial review to the extent that it can now examine whether the president or the governor was spurred by an “oblique motive” to by-pass the legislature and promulgate an ordinance.¹⁹

18) it is further submitted that “ the satisfaction of the president under Article 123 and of governor under Article 213 is not immune from judicial review”, Justice D.Y.Chandrachud wrote in a common judgment with Justice S.A. Bobde, A.K. Goel, U.U. Lalit and L. Nageshwarrao.²⁰ therefore in this petition I humbly pray before this honorable court that the issued ordinance kindly be declare unconstitutional.

19) It is also stated that the government using the ordinance root is unconstitutional and autocratic. The U.P.A Government issued 59 ordinances. The Narendra Modi let BJP government has already made many ordinances. The constitutional text pre-conditions i) executive satisfaction ii) condition of necessity iii) requiring immediate action is essential.²¹ in S.R.Bomai v. union of India²² case, the court implied it could review ordinance in appropriate cases.

The Aadhar Ordinance : overruling the supreme court in its final verdict on Aadhar matter, the majority opinion, which otherwise upheld the constitutional validity of project, and struck down sec.57 as unconstitutional.²³ therefore, the honorable supreme court as already decided in the many cases accordingly in the present case kindly be declared that the ordinance is unconstitutional.

19. Krishnadas Raj Gopal, THE HINDU, New Delhi pub., Jan 3,2017.

20. *id.*

21. Economics times.com(Jan.14,2015,05.19 PM, IST).

22. S.R.Bomai v. union of India case, (1994) S.C. 1918.

23.Reetika Khera (mar. 1,2019, 5.36 PM IST), www.bloombergquint.com.

ISSUE:III. THE FUNDAMENTAL RIGHTS OF THE REPRESENTATIVE OF PEOPLE ARE VIOLATED.

20) The petitioner submits that- A) Representative of the people's fundamental rights are violated and the said issued ordinance of the union government is against and bad in law, and also this ordinance is against the free and fair election.

21) Political parties are private associations of individuals who aim to be represented in political institutions, including through the presentation of the candidates to free and democratic elections, as well as to exercise political powers and take part in public affairs.²⁴

22) It is further submitted that before this honorable court that political parties play vital role in democratic governance. No democratic system can function without alternative parties and candidates, political parties are crucial in aggregating interest, presenting policies, alternatives to citizens, nominating candidates and linking voters with elected public officials. Moreover, political parties can play a central role in generating cadres of leaders who promote democratic governance principles and monitor elected representatives.²⁵ therefore for good and stable democratic governance, free and fair elections and also social responsible candidates are too essential hence the binding on the candidatures in election is against the democracy. Therefore the said binding means ordinance issued by the central government violates the fundamental rights of the candidates.

23) It is further submitted before honorable court that, no government can be legitimate, if it does not allow to people in some manner to choose its ruler and rules. If the political system does not provide participation, then it cannot be legitimate political system from the view of democratic principles. Therefore participation has been accepted as a human right in international laws.²⁶

24. Stephenie Lagoutta & Marrie Juul Petersen, *political parties and human rights*, 4 (mar. 2008) www.djpd.dk.com .

25. id.

26. UDHR. art. 21,; ICCPR. art. 25.

Therefore the honorable court has to declare that the said ordinance violates representatives of the people's fundamental right.

24) it is further summated by the petitioner that all persons have "right to participate" in the governance of the nation, and this right may be exercised through the representatives of the people.²⁷ If the restrictions imposed on the rights of MP/MLA to participate in the governance then it will be the restriction not only on the MP/MLA but also a restriction on all the persons whom he represents, therefore the restriction of the right to participate in governance of the nation is violation of the human rights.²⁸

25) It is further submitted before this honorable court that according to constitution of the India anyone who is 25 years of age or older is eligible to contest an election to the lok sabha seat. The candidate must be register elector of the constituency, and a citizen of India. However, if he is a registered voter of particular state, he can contest from any seat in any state.²⁹ therefore the binding issued by the government is unconstitutional hence shall be declared void.

26) It is further submitted that the constitution guaranteed freedom of association as a fundamental right.³⁰ therefore restraining candidates for contesting elections more than two times it violates fundamental rights of the people.

27) it is further submitted that right to form associations is the vary lifeblood of democracy. Without such right, political parties cannot be formed, and without such parties a democratic form of government, especially that of the parliamentary type, cannot be run properly.³¹

27. *id.*

28. Kamal Kumar Arya, *participation in democracy*, ILI law review (2016)

29. lok sabha election 2019, *who can file nomination to contest polls* (Apr. 02, 2019, 07:25:40 IST) www.firstpost.com.

30. INDIA CONST. art .19,c(1)(c).

31. M.P JAIN, INDIAN CONSTITUTION LAW, 1096.

28) It is further submitted before the honorable court that every citizen shall have the right and the opportunity, without any of distinctions mentioned under Article 2 and without unreasonable restrictions:

a) to take part in conduct of public affairs, directly or through freely chosen representative,

b) to vote and to be elected at a genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot guarantying the free expression of the will of the elector.³² therefore the ordinance issued by the government has to be considered against the will of the public hence shall be declared unconstitutional.

29) In *smt. Anguri Devi v. State of Haryana*,³³ it was held that democracy is the basic feature of the constitution of India and it turn , fair and free election is an essential feature of democracy. Therefore the petitioner humbly evoke that the ordinance issued by t5he government is against the democracy system and also fair and free election. Hence honorable court has to declare that the ordinance issued is void.

30) In *Rajbala v. State of Haryana*³⁴, stated that the right to vote is protected by the Article 19(1)(a) and the right to contest has been held to be a constitutional right. Therefore the candidate's constitutional rights has been violated by the ordinance issued by the central government.

31) Right to choose is a fundamental right under Article 21 of the constitutin.³⁵ Also in *Jyoti basu v. Debi Ghosal*³⁶ stated that a right to elect, fundamental though it is to democracy, is anonymously enough.

32. ICCPR. art. 25.

33. *Anguri Devi v. State of Haryana* (1998) Para 24.

34. *Rajbala v. State of Haryana* (2016) 2 S.C.C. Para 9.

35. *Krishnadas Rajgopal, Right to convert is a part of fundamental right of choice*, THE HINDU (Apr. 9, 2018. 21:33 IST).

36. *Jyoti basu v. Debi Ghosal* (1982) S.C.

32) It is further submitted that in *Indira Neharu Gandhi v. Raj Narayan*³⁷ Justice Khana held that democracy postulates that there should be periodic elections where the people should be in a position to re-elect their old representative or change the representatives or elect in their place a new representative. It was also held that democracy can function only when elections are free and fair and the people are free to vote for the candidates of their choice. Therefore the ordinance issued by the union government is against the free and fair elections and also it is against the basic structure of the Indian constitution, hence the Honorable court has to declare that the said ordinance is void.

ISSUE IV. THE 104TH AMENDMENT OF THE CONSTITUTION OF INDIA IS ULTRA- VIRUS.

33) The Supreme Court has the power to declare such amendments invalid or ultra virus because the constitution vest in judiciary. The power to adjudicate upon the constitutional validity. The Supreme Court has acted as a break to the legislative enthusiasm of parliament ever since independence.³⁸

34) it is further submitted that sikri, C.J. explained that the concept of basic structure included democratic form of government.³⁹ but the said constitution amendment is against the basic structure and 104th amendment is surely against the democratic form of government. Therefore the petitioner humbly prays that the amendment has to declare ultra- virus and void.

35) it is also submitted that Hegade, J. and Mukherjea, J. identified separate and shorter list of basic features: democratic character of the policy.⁴⁰ therefore 104th constitutional amendment is absolutely against the democratic character of the polity. Further this constitutional amendment is destroying democratic character of the polity . hence, this amendment has to declare ultra virus.

37. *Indira Neharu Gandhi v. Raj Narayan*, (1975) S.C.C. 198.

38. Venkatesh Nayak, *the basic structure of Indian constitution*. www.constitutionnet.org.com .

39. *Keshwanand Bharti v. State of Kerala*,(1973) S.C.

40. *id.*

36) It is further submitted that the Supreme Court reaffirmed in *Indira Gandhi Nehru v. Raj Narayan*⁴¹ that the doctrine of basic structure and held the amendment act to be violative of the basic structure of the constitution and therefore void. Therefore the petitioner prays that 104th amendment is to declare void, because the present 104th amendment is also against the democracy and free elections. Therefore the 104th amendment has to declare ultra-virus.

37) It is further submitted that the SCOTUS has stated that the validity of amendments to the federal constitution are political issues,⁴² therefore also in this case the said amendment is against the political liberty and freedom. Hence the Honorable court kindly be declare that the 104th amendment is ultra- virus. Social, political and economic justice,⁴³ basic human rights are stated in constitution but the 104th constitutional amendment is absolutely against the political justice and said amendment is against the preamble of the constitution.

39) It is submitted that *Minerva mills Ltd. V. Union of India*.⁴⁴ held that Article 368 was amended for the third time by the constitution amendment Act 1976 where by clauses (4) and (5) were inserted to make it clear that on no ground, not even on the ground of procedural non compliance with the requirement of Article 368 shall any court be competent to invalidate any constitutional amendment Acts. This amendment was an instance of political arrogance of the then rulers of the country but these clauses have been declared to be invalid by the Supreme Court. Therefore the petitioner humbly prays that the 104th constitutional amendment has to declare invalid or ultra-virus.

41. *Indira Gandhi Nehru v. Raj Narayan*, (2015) 11, *EVN. of law desk of photo acts*, N.O.C., 83.

42. Clyde F. Heabeck, *can a constitutional amendment be deemed unconstitutional by the Supreme Court*. (Aug. 10, 2019). www.quora.com.

43. DR. ADISH C. AGGARWAL, *CONSTITUTION OF INDIA*, 1 (2014).

44. *Minerva mills Ltd. V. Union of India*, (1980) S.C. 2041.

40) It is further submitted that Mr. N.A. Palkhivala, council submitted that essential features for basic structure in that he pointed out the guarantee of basic human rights contained in part III of the constitution.⁴⁵ therefore the 104th amendment is against the basic human rights hence the petitioner submitted that 104th amendment to be declare ultra-virus and unconstitutional.

45. DR. ADISH C. AGGARWAL, CONSTITUTION OF INDIA, 647 (2014).

PRAYER

In light of the issues raised, arguments advanced and authorities cited the council for the petitioner humbly prays the Honorable court be pleased to adjudge, hold & declare:

1. That the writ filed is maintainable in the court of law.
2. That the ordinance issued by the central government is unconstitutional.
3. That the fundamental rights of representatives of the people are violated.
4. That the 104th amendment of the constitution is ultra-virus.

And pass any order that this Honorable court may deem fit in the interest of equity and justice

And for this act of kindness, the council for the petitioner shall duty bound forever pray.

S.d.-

(council for petitioner)

