IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION CIVIL NO. 162 OF 2019

CONNECTED WITH

WRIT PETITION CIVIL NO. 55 OF 2019

IN THE MATTER OF:

Khalid Anis Anasari **… Petitioner**

Versus

Union of India & Ors. **… Respondents**

CONNECTED WITH

IN THE MATTER OF:

Janhit Abhiyan **... Petitioner**

Versus

Union of India & Ors. **... Respondents**

COMPILATION OF WRITTEN SUBMISSIONS FILED BY ALL PARTIES

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WRITTEN SUBMISSIONS ON BEHALF OF THE PETITIONER

IN WRIT PETITION. 55 OF 2019

CHALLENGING THE CONSTITUTIONAL AMENDMENT

Name of the Counsel : Yadav Narender Singh

Tentative Time Sought : 2 Hours

THE PETITIONER SEEKS TO CHALLENGE THE VIRES OF THE IMPUGNED CONSTITUTIONAL AMENDMENT PRIMARILY ON THE FOLLOWING GROUNDS

1 **IT IS IN VIOLATION OF ARTICLE 14 and 16 (1) (4) OF THE CONSTITUTION OF INDIA AND THEREBY ALTERS THE BASIC STRUCTURE OF THE CONSTITUTION:**

2 **PRESCRIPTION OF ECONOMIC CRITERIA AS THE SOLE BASIS FOR RESERVATION IS AGAINST THE SPIRIT OF CONSTITUTION AND ALSO CONTRARY TO THE LAW LAID DOWN BY THIS HONOURABLE COURT IN INDIRA SAWHNEY VS UOI: (para 361, 362, 363, 364. 571,799)**

3 **50% LIMIT OF RESERVATION IS SACROSANCT AND UNBREACHABLE:**

4 **LACK OF QUANTIFIABLE DATA:**

5 **RESERVATION IN AN EDUCATIONAL INSTITUTIONS IS BREACH OF BASIC STRUCTURE:**

6 THE TERM 'CLASSES MENTIONED IN ARTICLE 46 APPLIES TO SOCIALLY AND EDUCATIONALLY BACKWARD CLASSES AND NOT TO ECONOMIC WEAKER PEOPLE

SUBMITTED BY

Yadav Narender Singh

Advocate for the Petitioner

9350801938

Narender.lawyer@gmail.com

List of Citations

1. M.R. Balaji and others vs. State of Mysore and others, AIR 1963 SC 649,
2. Indra Sawhney vs. Union of India [1992 Suppl. (3) SCC 217

   (Para 361, 362, 363, 364. 571,683,799)

3. M. Nagaraj vs. Union of India, (2006) 8 SCC 212 (Para 55 -59)
4. Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1(Para 126-131)
5. Jarnail Singh and others vs. Lachhmi Narain Gupta and others, 2018(10) SCC 396
6. B.K. Pavitra v. Union of India, (2019) 16 SCC 129 (Para 134-137)
7. Dr. Jaishri Laxmanrao Patil Vs.The Chief Minister And Others (2021) 8 SCC 1 (Para 190 ,354,355,356,453,458)

IN THE HON'BLE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTOIN

W.P. (CIVIL) NO. 55 OF 2019

I.A. NO. 49922 OF 2018

IN THE MATTER OF:

JANHIT ABHIYAN & ORS

V.

UNION OF INDIA & ORS.

INTERVENTION ON BEHALF OF:

Dr. V.A.RAMESH NATHAN

KANDULA ANANADA RAO

WRITTEN SUBMISSIONS ON BEHALF OF INTERVENOR

1. The Intervenors represent the interests of the Dalit community. Intervenor No. 1 is the National Convenor, National Coalition for Strengthening POA Act (NCSPA) which is a forum of more than 450 Dalit and Adivasi civil society organisations, community leaders, activists, journalists and academics from 18 states of India who are committed to ending caste-based discrimination. Intervenor No.1 is also the General Secretary of the National Dalit Movement for Justice ("NDMJ") which was formed as a part of the National Campaign for Dalit Human Rights. Intervenor No. 2 is the Founder and National President of All India Dalit Rights Federation, the main objects of which are to promote the ideologies of Dr. B.R. Ambedkar and other thinkers and legends, and to represent the grievances of the SC, ST and backward classes. .

2. The intervenors are particularly aggrieved by the 103rd Constitutional Amendment Act as it provides for reservation of 10% seats in public and private educational institutions and in public employment for "economically weaker sections" of citizens other than Scheduled Castes, Scheduled Tribes and socially and educationally backward classes of citizens. It discriminates against SCs/ST/OBC's in creating a reserved category that specifically excludes SCs/STs/OBCs. Article 15(6) and 1612(6) provide for reservation to EWS excluding SCs/STs/OBCs. The *effect* of the exclusion of SCs and STs in the Act is such that whereas they have consistently been recognized to be communities in need of promotion due to their historical position, the present Act in fact discriminates against them to their detriment, solely on the basis of caste. As was seen in the case of UPSC entrance exams where the cut offs for the EWS category were lower than that for SCs, STs and/or OBCs, a person belonging to the latter category who is also economically disadvantaged will not be able to avail the benefit of the EWS reservation, *solely due to the fact that he / she belongs to a SC/ ST/OBC.*

Counsel seeks 30 mins from the Hon'ble Court to make submissions.

3. Further, the intervenors submit that the 103rd Constitutional Amendment Act is unconstitutional on the following grounds:

I. The 103rd Amendment alters the Equality Code and thus violates the Basic Structure of the Constitution.

(a) The Equality Code of the Constitution is seen in Articles 14, 15,16 as also in Articles 17,46,332,335,338 and 340. It provides that all persons will be treated equally and given equal opportunity and ensures non-discrimination on the basis of caste, race, religion, sex or place of birth, At the same time, it provides for positive discrimination in favour of certain classes of persons historically discriminated, backward and under-represented. The 103rd Amendment, however, seeks to create a new category of "economically weaker sections" for positive discrimination, not contemplated by the systemic and structural principles underlying and connecting various provisions of the Constitution which only contemplate special treatment to certain classes that are historically discriminated, backward and under-represented. The amendment is contrary to the equality code.

(b) Articles 15 and 16 deal with discrimination on the basis of religion, race, caste, sex, place of birth, descent or residence or any of them. Article15(1),15(2) and 16(2) state the rule that there shall be no discrimination on the basis of religion, race, caste, sex, place of birth or any of them. Articles 15(3),15(4) and 16(4), (4A), (4B) provide for positive discrimination in favour of women, children, and certain castes. The positive discrimination in Article 15 and 16 can only be on the basis of religion, race, caste, sex, place of birth i.e. categories contemplated in 15(1), 15(2) or 16(2). *Expressio unios exclusio alterius.* Any other basis for positive discrimination, such as income, changes the "width" and "identity" of Articles 15 and 16 and of the equality code.

(c) In *Indra Sawhney* (para 744) this Hon'ble Court while considering the question of whether Article 16(4) is exhaustive of the very concept of reservations or whether further classes for reservation can be created held that:

"*It is in very exceptional situations- and not for all and sundry reasons- that any further reservations, of whatever kind, should be provided under clause (1). In such cases, the State has to satisfy, if called upon, that making such a provision was necessary (in public interest) to redress a specific situation. The very presence of clause (4) should act as a dampener upon the propensity to create further classes deserving special treatment. The reason for saying so is very simple. If reservations are made both under clause (4) as well as under clause (1), the vacancies available for free competition as well as reserved categories would be correspondingly whittled down and that is not a reasonable thing to do.*"

(d) During the constituent assembly debates Dr. B.R. Ambedkar insisted on the use of the word "backward" to qualify the class of citizens eligible under Article 16(4) as he said that unless a qualifying word like "backward" is used "the exception made in favour of reservation will ultimately eat the rule [of equality of opportunity] up altogether "The 103rd

Counsel seeks 30 mins from the Hon'ble Court to make submissions.

Amendment, creating reservations in favour of persons merely on the basis of income, without reference to social and educational backwardness or underrepresentation, is eating up the rule of equality of opportunity. In *Nagraj* this Hon'ble Court held (para 122) :

"*We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse*."

II. The 103rd Amendment is making an inroad into the balance in the Equality Code struck by this Hon'ble Court in Indra Sawhney by breaching the 50% threshold

(a) To preserve equality, which is recognized to be a basic feature of the Constitution in *Indra Sawhney*, a balance was struck so as to ensure that the basic structure of Articles 14,15 and 16 remains intact and at the same time social upliftment, as envisaged by the Constitution, stood achieved. In order to balance and structure the equality, a ceiling limit on reservation was fixed at 50%. (see para 808,809, 810). This ceiling limit can only be breached in certain extraordinary situations and in doing so, extreme caution is to be exercised and a special case made out.

(b) *Indra Sawhney* relied on the speech of Dr. B.R. Ambedkar in the Drafting Committee and held that it is cleat that reservation of a majority of seats was never envisaged by the Founding Fathers. Nor are we satisfied that the present context requires us to depart from that concept.

Dr, B.R. Ambedkar said:

"*Then we have a massive opinion which insists that, although theoretically it is good to have the principle that there shall be equality of opportunity, there must at the same time be a provision made for the entry of certain communities which have so far been outside the administration. As I said, the Drafting Committee had to produce a formula which would reconcile these three points of view, firstly that there shall be equality of opportunity, secondly that there shall be reservations in favour of certain communities which have not so far had a 'proper look-in' so to say into the administration……Supposing for instance, we were to concede in full the demand of those communities who have not been so far employed in the public service to the fullest extent, what would really happen ism we shall be completely destroying the first proposition upon which we are all agreed, namely that there shall be an equality of opportunity. Let me give an illustration. Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70% of the total posts under the State and only 30% are retained as the unreserved. Could anybody say that that the reservation of 30% as open to the general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment Therefore the seats*

Counsel seeks 30 mins from the Hon'ble Court to make submissions.

to be reserved, if the reservation is to be consistent with sub-clause (1) of Article 10 must be confined to a minority of seats"

(c) See para 178 of *Indra Sawhney* quoting Balaji expressing its view that reservation should be less than 50% observed that "reservation made under Article 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution."

(d) "If the extent of reservation goes beyond cut-off point then it results in reverse discrimination……..Therefore, a numerical benchmark is the surest immunity against charges of discrimination."(*Nagraj*)

(e) This threshold of 50% has been recently reaffirmed by Constitutional Benches of this Hon'ble Court in *Jaishri Laxmanrao Patil v. The Chief Minister & Ors.* [2021 (8) SCC 1] and *Union of India v. Ramesh Ram,* [2010 (7) SCC 234] where it is reiterated that it is only in exceptional circumstances and with extreme caution that the 50% threshold may be relaxed. Such relaxation may be required for remote and far flung areas which are cut off from the rest of the nation resulting in an exceptional situation. In all other cases, the dictum laid down by this Court in *Indira Sawhney* (supra) is binding under Article 141.

(f) The Impugned Act however, provides for reservation cumulatively above 50% inasmuch as the existing reservations for SCs, STs and OBCs already amount to 49.5%. The additional 10% provided for in the Act take the overall reservations well above 50%.

III. Economic criteria cannot be the basis for reservation

(a) This Hon'ble Court in *Indra Sawhney* has unequivocally held that:

"*a backward class cannot be determined only and exclusively with reference to economic criterion*."(para 799) It further held "*Reservation of 10% of the vacancies among open competition candidates on the basis of income/property holding means exclusion of those above the demarcating line from those 10% seats. The question is whether this is constitutionally permissible? We think not. It may not be permissible to debar a citizen from being considered for appointment to an office under the State solely on the basis of his income or property holding. Since the employment under the State is really conceived to serve the people (that it may also be source of livelihood is secondary) no such bar can be created, Any such bar would be inconsistent with the guarantee of equal opportunity held out by clause (1) of Article 16* (para 845).

(b) *Indra Sawhney* citing *Janki Prasad Parimoo* v. *State of J & K* and *State of U.P.* v. *Pradip Tandon* held that:
"*poverty alone cannot be the basis for determining or identifying the social and educational backwardness. It was emphasised that Article 15(4) – or for that matter Article 16(4) – is not an instance of poverty alleviation programme. They were directed mainly towards removal of social and educational backwardness.*"

Counsel seeks 30 mins from the Hon'ble Court to make submissions.

(c) "Economically Weaker Sections" defined as a person having a family income of less than Rs. 8 lakhs is not a backward "class" that is inadequately represented in educational institutions or government jobs. A "class" has a collective identity, it is a community, a homogenous group based on a common characteristic.

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IV. 10% seats for "EWS" other than SC/ST/OBCs is arbitrary and excessive.

(a) A systematic and elaborate basis has to be evolved for identifying classes deserving reservation.

(b) The Sinho Commission Report as also the Pandey Committee reflect arbitrariness and non-application of mind without sufficient statistical evidence.

V. Reservations imposed on unaided educational institutions violate Article 19(1)(g) and are unreasonable and arbitrary.

(a) This Hon'ble Court in the case of T.M.A. Pai held that private unaided educational institutions enjoy the freedoms guaranteed by Article 19(1)(g). Imposing reservations is an unreasonable restriction on their freedoms.

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Counsel seeks 30 mins from the Hon'ble Court to make submissions.

Submitted by **EQUITY LEX ASSOCIATES** Counselfor Respondents

In the matter of:**TRANSFER PETITION(CIVIL)NO.1245of 2019**

UOI (Pet.)vs M.H.Jawahirullam & Ors (Res.)

Tagged with W.P. No. 55/2019

Counsel likely to appear in this case Sr.Adv.Salman Khurshid

Expected time to present the case against the validity of impugned amendments:-30-45 minutes.

WHY RESERVATION WAS NEEDED

The constitution of India envisages fundamental rights, which strive to secure a better standard of life, mainly for the Citizens of India . But due to the history of disproportionate allocation of resources and amenities , most of the citizens lacked a decent life, and the purpose of enabling fundamental rights were seemed to fail . At the time of partition only 5-10% of land owners had control of about 60 % of the whole land. The data is more staggering in the Industrial fields and about 65 percent of the wealth was and is still concentrated in the hands of the top few business houses. The concept of social and economical justice was nothing but a concept meant to glorify the constitution commentaries. Thus, by not allowing the unequals to be treated with equals, the constitution was amended many times to enshrine the principles of reservation in constitution to strengthen the concept of social and economical equality. Articles 15(4)(5) and 16(4),(4A) added subsequently and enables the state to make reservation in the favour of schedule caste and scheduled tribes as well as for socially and educationally backward classes, constituting 70% of the population leaving no space for any further reservation scheme .

Article 15(6)and 16(6)

That by the 103rd Constitution Amendment Act, Article 15(6) and 16(6) was added in the Constitution giving reservation to those “Economic Weaker Section” of the society who are not covered by

the Article 15(4),(5) .The constitutional validity of the above said amendments are needed to be scrutinized in the light of following grounds

(1)That the amendments are ultravires to the constitution for the very first reason , that it violates the ceiling cap of maximum 50 % seats to be reserved under for the underprivileged class , as laid down in **M.R.Balaji Vs State of Mysore [(1963)Supp.1 SCR 439]** which was affirmed by the Hon'ble Supreme Court in **Indra Sahney's case [2(2008)6SCC1]** while holding that "no provision of reservation or preference can be so vigorously pursued as to destroy the very concept of equality"

(2)That the "class of economic weaker section" is already included in the "classes" who are protected under clause (4)(5) of Article 15 because the 'social backwardness' is the cause and not the consequence of the economic, educational & political backwardness in society .

(3) That the impugned amendments aims to achieve, an object of doing something indirectly which cannot be done directly i.e. to benefit the general bourgeoisie class who used to be an oppressors of the classes protected under clauses (4)(5) .

(4)That the general bourgeoisie class which constitute only 30 percent of the whole population already have 50% of seats which are unreserved ,in which persons belonging to the classes mentioned under clauses (4)(5) cannot compete due to the lack of standard of facilities and resources to which the general bourgeoisie class have privilege to avail .

(5) That the reservation in unaided institutions under clause 15(6) adversely affects the fundamental right protected under Article 19(1)(g).

(6) The impugned amendments do not qualify the 'width' and 'quantity' test as laid down in the case of **M. Nagraj & Ors vs UOI & Ors** because as soon the ceiling limit of 50% reservation would

be crossed by applying these special provisions which creates a sort of proviso or exception to the principle of 'equality' as enshrined under Article 14 of the Constitution , it would actually overpower the concept of 'equality' by disturbing the equilibrium of 'equality' and 'reasonable classification' which is no doubt basic structure of our constitution .

(7) That the economic criteria cannot be the sole basis to identify the backwardness of a class because economic backwardness is consequence and the social and educational backwardness is the cause for it .

(8) The reservation under Article 15(6) and Article 16(6) is ultravires to Article 14 as well as Article 15(4)(5),16(4)(4A) because by giving reservation to economic weaker section, which ultimately protects the interest of General Category, the unequals-classes in whose favour reservation is given under Article 15(4)(5)and Article 16 will be treated equally with privileged General Category candidates in the matter of admission of educational institutions as well as in matters of employment which simply violates Article 14 of Indian constitution.

(9)That the impugned amendments do not qualify the twin test of "reasonable classification "as laid down in the case of **State of West Bengal Vs Anwar Ali Sarkar** .On the other hand the object to uplift the poor which is alleged to be achieved by the impugned amendments has already been achieved by the reservation given under Article 15(4)(5) and Article 16(4)(4A) and it seems that the amendments are enacted to achieve some ulterior political motive.

(10) That as per observation of Pandit Nehru in the Constituent Assembly the "socially backwardness" includes "economically ".

Details of case laws relied upon by the counsel of Respondent in the matter of :-

TRANSFER PETITION(CIVIL)NO.1245of 2019

UOI (Pet.)vs M.H.Jawahirullam & Ors (Res.)

Tagged with W.P. No. 55/2019

at the time of the arguments:-

1.Indira Sahney and others vs UOI and others (AIR 1993 SC 477)

2. M. R. Balaji And Others vs State Of Mysore (1963 AIR 649)

3. M. Nagaraj & Ors. V. Union of India & Ors. (2006) 8 SCC 212)

4. I.R. Coelho (Dead) by LRS. v. State of Tamil Nadu.(2007)SCC 1

5. The State Of West Bengal vs Anwar All Sarkar , 1952 AIR 75

Due to short time notice the Counsel for the Respondent wants to raise some other necessary points at the time of arguments within time limit as sought by him in his 3 pages submissions.

WRITTEN SUBMISSIONS ON BEHALF OF THE RESPONDENT NO. 1 IN TRANSFER PETITION (CIVIL) NO. 2715 OF 2019: UNION OF INDIA & ANR. V. SHRI N. PUTTANAJAIAH & ANR. [TENTATIVE TIME SOUGHT: 2 hours]

1. The impugned 103rd Amendment to the Constitution of India inserting Clause 6 in Article 15 and Clause 6 in Article 16 providing reservation on the basis of economic criteria (excluding SC, ST and OBC – Non-Creamy Layer) would violate the basic feature of equality principle existing in the Constitution or the essence of equality in the Constitution, and therefore, unconstitutional, for the reasons:
   I. Economic criteria alone cannot be made the basis of reservation;
   II. Any benefit given on economic consideration alone cannot fall within the parameters of "reservation" as conceived under the Constitution;
   III. Providing any benefit to EWS (excluding SC, ST and OBC – Non-Creamy Layer) can be characterised only as a form of Affirmative Action not falling within the parameters of Reservation.

2. Even before the Constitution, several States had provided benefits to the backward classes on the basis of social and educational backwardness.[1] The framers of the Constitution were quite aware of the then existing situation. While debating on introduction of Article 16(4), they had kept in mind those socially backward groups who were excluded from the mainstream national life due to historic injustice, discrimination, stigma, and exclusion. Dr. Ambedkar (Constituent Assembly Debates, 30 Nov. 1948) said that "reservations in favour of certain communities which have so far not had the 'proper look-in' so to say into the administration". K.M. Munshi (30 Nov. 1948) stated: "the word 'backward' signifies… a class of people who are so backward that special protection is required (for them) in the services". Therefore, by specifically using the term "Reservation in favour of any backward class of citizens", substantive equality was sought to be provided where SCs and STs would fall within the parameters of "backward classes".[2] In the Constituent Assembly Debates, nowhere has 'economic backwardness' been discussed as the *sole criteria* of backwardness; it was discussed only in the context of social and educational backwardness.[3]

3. In **State of Madras v. Champakam Dorairajan**, AIR 1951 SC 226, Madras reservation in education was struck down. Thus, debarring all preferential treatment outside the public employment. This led to the First Constitutional Amendment in 1951 by which Clause 4 was inserted in Article 15. Instead of using the term "reservation", Article 15(4) used the term "special provision" for "advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or Scheduled Tribes". The debate which took place in the Parliament specifically mentions that economic criteria cannot be the sole basis for providing the benefit of the special provision (See rejected proposal of K.T. Shah, Parliamentary Debates, 29 May 1951 and rejected proposal of Chief Minister of Madras).[4]

4. It is submitted that even if any ambiguity existed in the Constituent Assembly Debates as it used the term "Reservation for Backward Classes" in Article 16(4) and did not specify the reasons for backwardness necessitating reservation, it was made clear in the first Constitutional Amendment that the basis was educational and social backwardness. Therefore, if the connotation "Reservation" has to be understood as per the provisions of the Constitution and read with the debates in the Constituent Assembly and in the Parliament at the time of First Constitutional Amendment, the basis can only be social and educational backwardness, and not economic criteria.

5. There are many judgments which were delivered by this Hon'ble Court interpreting Articles 15 and 16 to which reference if required would be made at the time of arguments. It was held that social backwardness is not to be equated with poverty.[5] What may be relevant here is reference to the judgement in **Indra Sawhney v. Union of India,** 1992 Suppl. (3) SCC 217. *In the said judgement, 8 out of 9 judges held that the economic criteria cannot be the sole criteria for providing reservation even under Article 16(1).* (See Justice Jeevan Reddy on behalf of CJ Kania, Justices Venkatachaliah, Ahmadi, and himself: Paras 860(3), 845; Justice Pandian concurred; Justice Thommen: Para 324(B); Justice Sawant: Paras 484, 493; Justice Sahai: Para 635(7)).

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[1] Proclamation of reserved seats for Backward Castes in the princely State of Kolhapur dated 26.07.1902 published in Kolhapur State Gazette.

[2] Anurag Bhaskar, "Reservation, Efficiency, and the Making of Indian Constitution", *Economic & Political Weekly,* Vol. 56(19), https://www.epw.in/journal/2021/19/special-articles/reservations-efficiency-and-making-indian.html (See compilation)

[3] Malavika Prasad, "From the constituent assembly to the Indra Sawhney case, tracing the debate on economic reservations", *The Caravan* (28 March 2019), https://caravanmagazine.in/law/economic-reservations-constituent-assembly-debates

[4] Ibid: See also Granville Austin, *Working a Democratic Constitution,* Oxford University Press (1999), *p. 97*

[5] Janki Prasad v. State of J&K, AIR 1973 SC 930 (para 20); Jayasree v. State of Kerala, AIR 1976 SC 2381 (para 13, 20)

6. The Respondent, therefore, submits that the concept of economic criteria as the sole basis for providing reservation was not accepted by the framers of the Constitution and by this Hon'ble Court as mentioned above and that only those who suffer inequality because of social and educational backwardness will fall within the framework of substantive equality. Providing reservation on the sole basis of economic criteria violates not only the rationale of Reservation as conceived in our Constitution but also the substantive equality principle. The impugned amendment provides benefits to that segment which does not require the protection under the substantive equality principle for the reason that they are not the sufferers of historic injustice, discrimination, stigma, and exclusion resulting from social backwardness which is "visualised in terms of accumulated effects of low position in a social hierarchy".[6] At this juncture, it is apposite to quote Oxford Professor Sandra Fredman's paper "Substantive Equality Revisited". She defines substantive equality as a four-dimensional concept: *"Firstly, the right to substantive equality should aim to redress disadvantage. Second, it should counter prejudice, stigma, stereotyping, humiliation, and violence based on a protected characteristic. Third, it should enhance voice and participation, countering both political and social exclusion. Finally, it should accommodate differences and achieve structural change"* (See compilation). In this context, Article 17 of the Constitution may be referred to which abolishes untouchability.

7. The problems faced by the economically weaker sections ("EWS") and the poverty induced sufferings were taken cognizance of in the Constitution while striving to achieve equality. There are several provisions in the Directive Principles of State Policy viz., Articles 38, 39, 41, 43 46, 47 read with Chapter III dealing with the Fundamental Rights. The Government can come out with welfare schemes as a part of affirmative action to provide relief to the deprived classes. It is through the policies and their implementation that the State can improve the lives of the people by providing them adequate food, water, education, employment, healthcare, etc. This will fall within the parameters of good governance. If the policies are not in accordance with the aspirations provided in the Constitution, it may lead to unemployment, poverty, and the gap between the poor and rich increasing day-by-day. Therefore, if any benefit has to be provided to the EWS, the State can always provide it through its policies, proper implementation, and monitoring. The failure to alleviate the sufferings of the economically weaker sections cannot be remedied by providing reservation on the basis of economic criteria. Observations made by Justice PB Sawant (concurring opinion) in **Indra Sawhney** (Supra) are relevant**:** "*The purpose of Article 16(4) is limited. It is to give adequate representation in the services of the State to that class which has no such representation. Hence, Article 16(4) carves out a particular class of people and not individuals from the "weaker sections", and the class it carves out is the one which does not have adequate representation in the services under the State. The concept of "weaker sections" in Article 46 has no such limitation. In the first instance, the individuals belonging to the weaker sections may not form a class and they may be weaker as individuals only. Secondly, their weakness may not be the result of past social and educational backwardness or discrimination. Thirdly, even if they belong to an identifiable class but that class is represented in the services of the State adequately, as individuals forming a weaker section, they may be entitled to the benefits of the measures taken under Article 46, but not to the reservations under Article 16(4). Thus, not only is the concept of "weaker sections" under Article 46 different from that of the "backward class" of citizens in Article 16(4), but the purpose of the two is also different. One is for the limited purpose of the reservation and hence suffers from limitations, while the other is for all purposes under Article 46, which purposes are other than reservation under Article 16(4).* ***While those entitled to benefits under Article 16(4) may also be entitled to avail of the measures taken under Article 46, the converse is not true.****"* (See also Paras 481, 482, 552)**.** The Respondent, therefore, submits that providing any benefit to EWS may come within the parameters of welfare schemes of the Govt which is also a way to provide Affirmative Action, but it cannot be a basis for providing Reservation. What the impugned amendment seeks to achieve is providing reservation when the need is to provide relief to the economically weaker section through its policies and implementation.

8. In **Indra Sawhney (supra)**, a 50 % cap on reservation has been provided. In **M. Nagaraj v. Union of India, (2006) 8 SCC 129**, in Para 114, it has been observed that in **Indra Sawhney**, the equality which was protected with the rule of 50%, was by balancing the rights of general category vis-a-vis the rights of Backward Classes en bloc consisting of OBCs, SCs and STs. The question is whether by providing further reservation which will exceed 50%, the Twin Test provided in M Nagaraj (Supra) i.e., **Width Test and Identity Test** is violated. It is submitted that it violates both. By exceeding Reservation beyond 50%, the equality balance is disturbed resulting in violation of width test. The Identity Test is violated because as mentioned above, FIRSTLY, the economic criteria cannot fall within the parameters of Reservation as constitutionally understood, and SECONDLY that it proceeds on the basis of economic criteria alone and does not include social and educational backwardness which are essential parameters for deciding the question of reservation. The

[6] Marc Gallanter, Competing Equalities, Page 239

Constitution bench in **Dr. Jaishri Laxman Rao v. Chief Minister, Maharashtra**, reported in (2021) 8 SCC 1, held that there is unanimity in conclusion by seven judges in Indra Sawhney that the outer limit for reservation is 50%.

9. The Width Test as prescribed by **M. Nagaraj (supra)** which applies to Article 16(4) and Article 16(4A) requires that reservations for SCs, STs and OBCs be based on the data on backwardness and inadequacy of representation in services. There is no such compelling requirement under the impugned Article 16(6) in providing reservations for EWS excluding SCs, STs and OBCs-NCL. No study was done before bringing the impugned amendment.

10. The impugned amendments violate the basic structure of equality code enshrined under Article 16(1) provides for equality of opportunity. The 50% open seats are available to everyone ***(Indra Sawhney,*** *and* ***Saurabh Yadav v. State of Uttar Pradesh*** reported in (2021) 4 SCC 542). By excluding Scheduled Castes (SC), Scheduled Tribes (ST), and Other Backward Classes (the target groups under Articles 15(4) and 16(4), the impugned provisions deny 10% opportunities to these groups, and in effect reduce the open seats to only 40% for them, while keeping open seats as 50% for the communities other than SCs, ST, and OBCs. Even the reservation granted to Persons with Disabilities (PwD) under Article 16(1) does not categorically exclude members of backward classes and all PwDs who belong to backward classes can claim reservation under open category on the basis of merit.

11. In ***Kesavananda Bharati v. State of Kerala,*** (1973) 4 SCC 225**,** it was held that the principle of democracy is a part of the basic structure of the Constitution. In ***Indra Sawhney,*** the majority of judges held that the objective behind Article 16(4) was the "sharing of State power", as the State power, which was "almost exclusively monopolised by the upper castes i.e., a few communities, was now sought to be made broad-based" (Paras 694, 482). Both Constituent Assembly Debates[7] and ***Indra Sawhney*** endorsed the constitutional position that representation of marginalised communities against the hegemony of upper castes was intrinsic to the realisation of Indian democracy. The "dominance of certain communities" in the national mainstream, which the Constitution makers sought to undo through reservations, is against democracy and therefore violative of basic structure doctrine. The 103rd amendment in granting reservations to the economically weaker sections of the "upper-castes" while excluding the economically weaker sections of "low castes" from its ambit, only reinforces the existing systemic dominance of the "upper castes" by further excluding the "low castes" from mainstream national life. In doing so, the 103rd Amendment leads to "over-participation" of those communities who have historically hegemonized socio-political life, thereby leading to unequal participation and skewed representation which is anti-democratic and therefore violative of the basic structure of the Indian Constitution.

12. The impugned amendment effectively places the socially and educationally forward groups alongside socially and educationally backward groups who are lower in social hierarchy which completely disregards the principle of equality as envisioned by the framers of the Constitution. The income limit of Rs. 8 Lakh per annum and asset limit prescribed[8] to give effect to the impugned amendment are the same as the limits fixed for determining the creamy layer of the OBCs (socially and educationally backward). Thus, the criteria for social backwardness which is central to the equality code of the Constitution is nullified and therefore, violates the identity of the Constitution inasmuch as it places social and educational unequals on an equal footing effectively infringing upon their right to equality of opportunity.

13. It is pertinent to mention that there are certain historically marginalised communities like the ex-criminal tribe (denotified tribes) and nomadic tribes who have had a long-standing demand of 10% reservation in Government Jobs and Education. A National Commission on Denotified Tribes recommended 10% reservation for such excluded Nomadic and Denotified Tribes who suffer from historic injustice and the stigma of criminalization.[9] The Government has not paid any heed to this recommendation given by a National Commission but has gone ahead with 10% reservation based solely on economic criteria.

14. The principles of equality enshrined in our Constitution are part of basic features of the Constitution. The Impugned Amendment violates the essential equality principles and thereby, the basic features of the Constitution. Therefore, the impugned provisions are unconstitutional.

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[7] Anurag Bhaskar, "Reservation, Efficiency, and the Making of Indian Constitution", *Economic & Political Weekly,* Vol. 56(19), https://www.epw.in/journal/2021/19/special-articles/reservations-efficiency-and-making-indian.html (See compilation)

[8] OM No. 36039/1/2019-Estt(res) issued DOPT, Ministry of Personnel, Public Grievances & Pensions.

[9] Report dated 2008 National Commission

DRAWN BY:

Disha Wadekar, Anupam Chaudhary, Satwik Parikh, Shashank Singh, Advocates

(OFFICE ASSISTANCE from Bhavya Pokhriyal, Kanishk, Hemant Tiwari, Keerti Bhushan)

SETTLED BY:

SANJAY PARIKH

SENIOR ADVOCATE

DATED: 03.09.2022

IN THE SUPREME COURT OF INDIA
TRANSFER CASE (CIVIL) No. 8/2021

IN THE MATTER OF:-

RS BHARATHI,
ORGANISING SECRETARY
DRAVIDA MUNNETRA KAZHAGAM …. PETITIONER

Vs.

UNION OF INDIA & 2 Ors. …. RESPONDENT

WRITTEN SUBMISSIONS BY P.WILSON SR. ADVOCATE ON BEHALF OF THE PETITIONER

1. ***Brief background:***

1.1. The Petitioner is organising secretary of the Dravida Munnetra Kazhagam (DMK), presently the ruling party in Tamil Nadu. The DMK's core ideology is based on the principles of rationalism, social justice and equality. From it's formation, the DMK party has fought for the poor, downtrodden and the marginalized sections of society.

1.2. The evil of caste discrimination has been plaguing Indian society for about three millennia. The word 'caste' is of recent origin but from about 1200 B.C., Indian society has been divided on the basis of 'jati' or 'varna'. Although initially, a person could change their 'jati', as per historians around 500 B.C., the 'jati' system became more rigid. Persons born into a particular 'jati' remained in that 'jati' till their death. This was so that those in the upper echelons of the caste system ensured that their descendants always remained with the same systemic advantages. The 'lower' castes were denied fundamental human rights and dignity. They were not permitted to dwell near 'upper' castes and not even allowed to touch people from the other castes. Needless to say, they were ostracized from mainstream education and employment for centuries.

1.3. It is to remedy this centuries of oppression that affirmative action in the nature of reservations were contemplated by the framers of our Constitution. The constituent assembly was very conscious that there cannot be a clean slate post-independence because a vast section of Indians were subject to centuries of injustice. The first Parliament (many members of which were also members of the Constituent Assembly) realized that there must be a general enabling provision in Article 15 to bring out schemes in favour of the backward classes other than in matters of employment, which was already covered in Article 16. Hence, the Constitution (First Amendment) Act, 1951 was passed and the very first amendment made to our nation's Constitution was to insert clause (4) to Article 15.

1.4. It is to be noted that the State of TN has been at the forefront of affirmative action to alleviate social backwardness. Even before the adoption of the Constitution, the State issued Government Order. No.613, Public Department, dated 16.09.1921 making reservations for BCs. This Government Order was the first of its kind in India and was termed the "communal G.O". The State issued further G.O.s to make further reservations in employment till the adoption of our Constitution.

1.5. The Petitioner has challenged the impugned 103rd Constitution Amendment Act, 2019 on the following grounds:

A. Reservations cannot be based on economic criteria:

2. It is now well settled that reservations are an exception to the equality clause under Article 14 and the non-discrimination clause in Article 15(1).
3. Reservations have been upheld by this Hon'ble Court only on the ground that it is necessary to offset centuries of oppression and social ostracization. Reservations are affirmative actions to narrow the social gap. Granting reservations to "upper castes", irrespective of their present economic status is a mockery of the concept of reservations. In ***Indra Sawhney 1992 Supp (2) SCC 217 (Constitution Bench 9JJ)*** this Court has clearly held in para 627 that "Reservation for backward class seeks to achieve the social purpose of sharing in services which had been monopolised by few of the forward classes. Such affirmative actions have been upheld as the social and educational difference between the two classes furnished reasonable basis for classification. **Same cannot be said for rich and poor. Indigence cannot be a rational basis for classification for public employment.** Therefore, the present amendments fall foul of the ratio in Indira Sawhney. In paras 207-211 & 208, Ratnavel Pandian J. holds that economic status cannot determine backwardness and that economic status is "see-saw".

B. Concept of Reservation is to achieve social justice and not economic justice

4. Reservations are constitutionally valid only when made to achieve social equality and are not constitutionally valid when made on economic factors as per the judgements of this Hon'ble Court. *It is well settled that reservation cannot be poverty alleviation scheme*. Reservation is meant to remedy the handicap of prior discrimination impeding the access of classes of people to public administration/ education. It is a remedy or a cure for the ill effects of historical discrimination. What qualifies for reservation is backwardness which is the result of identified past discrimination and which is comparable to that of the Scheduled Castes and the Scheduled Tribes. ***Indra Sawhney (supra) (See Para 253, 294, 480, 481)***
5. The sine qua non for every affirmative action is discrimination. The SCs/STs/BCs suffered systematic and institutional discrimination which handicapped these communities. Jobs and education were reserved solely for the "upper" castes isolating other backward classes to a destitute state. One could improve their economic status but not their social status due to caste. The indigents from the upper caste did not undergo such systemic discrimination to warrant such positive discrimination.
6. The concept of reservation is to be construed as means to achieve social justice and participation in the education and employment of the State to offset centuries of discrimination and not economic justice. State has other methods to assist the poor through grant of scholarships, free coaching classes, waiver of tuition fees etc.
7. Poverty as an exclusive test cannot be the basis for reservation. Please see *Janki Prasad* v. *State of Jammu* (1973) 1 SCC 420 paras 23& 24.
8. Articles 15(6) and 16(6) are poverty alleviation programmes under the guise of reservations and cannot be sustained.

C. Amendment Act of 2019 prescribes for breaching 50% limit which cannot be breached under any circumstances except if a law is protected under IXth schedule.

9. It must be said that through EWS reservations, the Union has breached the 50% outer limit set by this Hon'ble Court in granting reservations. In ***Indra Sawhney*****,** this Hon'ble Court has held as under: *Power conferred by Art. 16(4) should be exercised in a fair manner and within reasonable limits, reasonable to say that reservation shall not exceed 50% of the appointments or posts, barring certain extraordinary situations*. ***(See Paras 518, 807, 808, 810-814)***
10. Similarly, in ***Dr. Jaishri Lakshmanrao Patil vs. Chief Minister and Ors. (2021) 8 SCC 1 (Constitution Bench 5JJ)*****,** this Hon'ble Court held: The greatest common measures

of agreement in six separate judgements delivered in ***Indira Sawhney*** was that the Reservation under Article 16(4) should not exceed 50%. ***(Paras 356-366, 408)***. Breaching the 50% limit would also open floodgates for further politically motivated reservations.

11. It is to be noted that the 103rd Amendment Act has not been moved to the 9th schedule so as to offer further protection from judicial review. Therefore, it must be certainly tested on regular parameters of challenge.

D. Granting EWS Reservations is not a reasonable classification

12. In ***State of Kerala vs. NM Thomas (1976) 2 SCC 310,*** this Hon'ble Court had opined that discrimination is the essence of classification. Therefore, a classification has to be founded on substantial differences which distinguish persons grouped together from those left out and such different attributes must bear a just and rational relation to the object sought to be achieved. ***(para 24)*** Just because a class of persons are poor/economically backward, the same cannot be construed to be discrimination. When compared to Socially backward classes who were handicapped due to rampant historical discrimination, the EWS did not face any kind of systemic social discrimination in order to classify them as one group.
13. That apart, a person may be poor now but could have been rich even one generation ago or vice versa. However, the stigma of caste does not detach itself for generations. So the state cannot equate indigence with social ostracization.
14. Thus, the reservations envisaged by the 103rd Constitutional Amendment are violative of the conditions for reasonable classification laid down by this Hon'ble Court in ***NM Thomas (supra).***

E. The impugned amendments violate the basic feature of the Constitution.

15. Thus, when Articles 14 & 15(1) are core to the basic feature and exception to them in the form of reservations have been permitted only on the basis of social backwardness, the impugned acts fall foul of the basic feature of the Constitution.
16. The impugned amendments fail the twin 'width of power' and 'identity' tests laid down in ***M. Nagaraj v. Union of India (2006) 8 SCC 212 (See paras 102, 103, 107, 112-121)***
17. The unguided power conferred on the States by explanation to Art 15(6) falls foul of the "guided power" test in ***M.Nagaraj (Please see paras 107 & 108)***
18. Even as per the Sinho Commission Report of 2010 which the Union claims is the basis for EWS reservation, welfare measures should to be undertaken to uplift EWS category. Hence there was was no necessity for separate reservation. In fact, a reading of Art 15(6) & 16(6) shows that EWS reservation is vertical, not horizontal.
19. That apart, the manner in which the Constitution Bill was introduced in the Parliament as a supplementary list of business which did not provide time to the members to study and deliberate the amendment Bill and its consequent passage without a debate or a study displays its political motivations and is a mockery of the democratic process.
20. Therefore, in view of the above, this Hon'ble Court maybe pleased to declare the 103rd Constitutional Amendment Act, 2019 to be unconstitutional and void and pass such further orders which this Hon'ble Court may deem fit and proper to pass in the circumstances of this case and thus render justice.

SETTLED BY:

Mr. P. Wilson, Senior Advocate

(R. Nedumaran)
Counsel for the Petitioner

Arguing Counsel- Advocate **AKASH KAKADE** & AOR Somanath Padhan
10 MINUTES TIME
Writ Petition No. 596 of 2019
Rajat Rajendra Agrawal Versus State

Submissions on EWS Reservation

1. The Parliament amended the Constitution vide the Constitution (One Hundred and Third Amendment) Act, 2019 more particularly Articles 15 and 16 thereof. The copy of the Constitution (One Hundred and Third Amendment) Act, 2019 is annexed as **ANNEXURE P-4**. (Pages 147 to 148 of the Writ Petition) As a result, sub-article (6) came to be inserted in Articles 15 and 16 so as to enable the State authorities to make special provision for the advancement of any Economically Weaker Sections of the citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admissions to educational institutions including private educational institutions, whether aided or unaided by the State other than minority educational institutions. However, in the case of reservation in addition to the existing reservations, the same shall be subject to a maximum of 10% of the total seats in each category. As a sequel to the amendment to Article 15 of the Constitution, the Government of Maharashtra decided provide 10% reservation to the Economically Weaker Sections educational institutions. Accordingly, the General Administration Department of the State of Maharashtra requested the respective Departments to issue necessary orders vide Government Resolutions dated 12.02.2019. Copy of Government Resolution dated 12.02.2019 is annexed as **ANNEXURE P-5**. (Pages 149 to 165 of the Writ Petition)
2. The Medical Education and Drugs Department issued a Resolution on 07.03.2019 providing 10% reservation to the Economically Weaker Section in Post Graduate Courses in Health Sciences. Copy of Government Resolution dated 07.03.2019 is annexed as **ANNEXURE P-6**. (Pages 166 to 168 of the Writ Petition).
3. The Central Educational Institutions (Reservation in Admissions) Act, 2006 provides 15% reservation for SCs, 7.5% reservation for STs and 27% reservation for OBCs, whereas the Maharashtra Private Professional Educational Institutions (Reservation of Seats for Admission for SCs, STs, DTs (VJs) NTs, and OBCs) Act, 2006 provides 50% reservation as per the distribution shown in the table given in Section 4 of the Act. Moreover, additional 16% reservation would be provided in all educational institutions including Private Professional Educational Institutions in Maharashtra in favour of Marathas.
4. The Rules regulating admissions in Government education Institutions, private professional educational institutions in Maharashtra and the Central educational Institutions all over India are

different from each other resulting into discrimination and inequality amongst the students. Such, reservation policy is arbitrary, discriminatory, unjust and violative of Articles 14 and 15(4) of the Constitution of India.

5. The Petitioners submit that the population of Scheduled Castes and Scheduled Tribes is roughly 21% whereas the population of the communities which are included in VJNT, OBC, SBC is roughly 42 percent whereas the population of Maratha community is looking for reservation in Maharashtra is roughly 30%. As such, all kinds of social reservations (vertical reservations) as exist in the State of Maharashtra literally cover 93% of the population. Meaning thereby, roughly 7% of the population is left out from the umbrella of social reservations clearly in violation of catena of Judgments passed by this Hon'ble Court.

6. The Petitioners submit that the maximum reservation that can be provided for economically Weaker Section would be 10% under the newly inserted Article 15(6) of the Constitution. However, that does not mean that every state shall provide 10% reservation mindlessly. It is only for scheduled castes and scheduled tribes the reservation is provided to the extent or in proportion to the population of the Scheduled Castes and Scheduled Tribes. If the State of Maharashtra provides 10% reservation for communities which are roughly 7% of the total population, such reservation would be quite excessive. 10% reservation for 7% population for general categories which constitute 7% of the total population shocks the conscience and defies the logic. The maximum reservation for economically weaker section if at all was necessary should be not exceed 3.5%. However, in the State like Maharashtra where there is already 69% reservation covering 93 of the population the Government should not have provided 10% reservation for the communities which constitute 7% of the population. Worthwhile to note that the total seats that would be available for the general category are even otherwise very less inasmuch as the candidates from SC, ST, VJNT, OBC, SBC are free to compete with general category and thereby they occupy additional 10-15% seats. As such, the seats that would be available to the candidates belonging to General Category would be less than 10%.

7. The Government of Maharashtra should have thought of the consequences of providing 10% flat reservation to the general category. As per directives of Medical Council of India, whenever reservation is provided, equal number of additional seats are to be created. As a matter of fact, the Central Government or the Medical Council of India has neither proposed nor created additional 10% seats of the total intake of graduate and post graduate courses in health

sciences. Unless additional 10% seats are created and intake capacity of the institutions imparting education in health science courses is provided, is increased by 10% for health sciences courses, the application of GR dated 12.02.2019 issued by the General Administration and dated 07.03.2019 issued by the Medical Education and Drugs Department be deferred to 2020-2021 as is done in case of health science course by the Medical Council of India Ministry of Health and Family Welfare.

8. It is submitted that the Government of India through Ministry of Social Justice and Empowerment by its office memorandum dated 17.01.2019 has clearly stated that "every educational Institutions shall, with the prior approval of the appropriate authority, increase the number of seats over and above its annual permitted strength in each branch of study or faculty so that the number of the seats available excluding those reserved for the persons belonging to the EWSs, are not less than the total seats available in the academic session immediately preceding the date of the coming into force of these O.M". This OM makes it clear that the Central Government had clearly communicated that to implement the EWS reservation there should have been increase in the number of seat proportionally for effective implementation of the EWS reservation. Copy of the office memorandum dated 17.01.2019 is annexed as ANNEXURE P-11. (Page 184 in Writ Petition)

GROUNDS TO BE URGED

I. At the outset, the impugned Government Resolutions dated 12.02.2019 and 07.03.2019 are issued without application of mind inasmuch as Article 15(6) also are arbitrary, discriminatory, unjust and violative of Articles 14 and beyind the purview of clause (3) and (4) of Article 15.

II. The Impugned GRs are violative of Section 54 of the Maharashtra University Health Sciences Act, 1998 as well as Section 5 of the Maharashtra Act No. XXX of 2006.

III. The reservation of 10% provided for economically backward classes for 7% population of the State of Maharashtra is excessive and, therefore, violative of Article 14 of the Constitutions of India.

Drawn By Filed By

Akash Kakade Somanath Padhan

23

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITON (CIVIL) NO. 133 OF 2019
Ryaga Krishnaiah and another
Versus
Union of India and others

WRIT PETITON (CIVIL) NO. 168 OF 2019
G.Karunanidhi
Versus
Union of India and others

WRIT PETITION (CIVIL) NO.343 OF 2019
P.V.Ramakrishna
Versus
Union of India and others

WRITTEN SUBMISSIONS

1. The present Writ Petitions challenge the Constitutional validity of Constitution (One Hundred and Third Amendment) Act, 2019 inserting Articles 15(6) and 16(6) of the Constitution of India permitting the

(a) The State to provide for special provisions/reservations for any economically weaker sections of citizens;

(b) These economically weaker sections to be of those other than the backward classes or SCs/STs;

(c) These measures to be to a maximum of 10% of seats/posts in addition to the existing reservations;

(d) The reservations in Article 15(6) to be for unaided institutions as well, notwithstanding the provisions of Articles 19(1)(g) and 29(2).

Each of the above 4 aspects violate one or other of the basic features of the Constitution, and hence such a manifest and obvious violation of the Constitution ought to be prevented.

2. The Writ Petition No.343 of 2019 also challenges (i) The Andhra Pradesh Economically Weaker Sections of Citizens (Reservation of Seats in Educational Institutions and of Appointments of Posts in the Public Services under the State for Kapus) Act 2019 (Act 14 of 2019); and (ii) The Andhra Pradesh Economically

Weaker Sections other than Kapus (Reservation of Seats in Educational Institutions and of Appointments of Posts in the Public Services under the State) Act 2019 (Act 15 of 2019) on the ground that it violates several basic features of the Constitution.

3. **Economic criteria cannot be the sole basis for reservation**: In Indra Sawhney Vs. Union of India – 1992 Suppl. SCC 217, the Nine Judges Bench of this Hon'ble Court specifically stated that the economic criteria cannot be the sole basis for reservation under the Constitution. The majority holds as follows in para 799:

> *"It follows from the discussion under Question No.3 that a backward class cannot be determined only and exclusively with reference to economic criterion. It may be a consideration or basis along with and in addition to social backwardness, but it can never be the sole criterion. This is the view uniformly taken by this Court and we respectfully agree with the same."*

Concurring with the above view, Justice Sawant says at para 481 –

> "*Thus, not only the concept of "weaker sections" under Article 46 is different from that of the "backward class" of citizens in Article 16(4), but the purpose of the two is also different. One is for the limited purpose of the reservation and hence suffers from limitations, while the other is for all purposes under Article 46, which purposes are other than reservation under Article 16(4). While those entitled to benefits under Article 16(4) may also be entitled to avail of the measures taken under Article 46, the converse is not true. If this is borne in mind, the reasons why mere poverty or economic consideration cannot be a criterion for identifying backward classes of citizens under Article 16(4) would be more clear.*"

In addition, Justice Sahai records at para 627 :

> *"But any reservation or affirmative action on economic criteria or wealth discrimination cannot be upheld under doctrine of reasonable classification. Reservation for backward class seeks to achieve the social purpose of sharing in services which had been monopolized by few of the forward classes. To bridge the gap, thus created, the affirmative actions have been upheld as the social and educational difference between the two classes furnished reasonable basis for classification. Same cannot be said for rich and poor. Indigence cannot be a rational basis for classification for public employment."*

The above Constitution Amendment completely violates the Constitutional norm that economic criterion cannot be the only basis of reservation as has been laid down by the 9 Judges Bench in Indra Sawhney, without removing the basis of the judgment. Such an amendment is hence, vulnerable and ought to be struck down as it merely negates a binding judgment.

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4. **The economic reservation cannot be limited to the general categories**: Repeatedly, this Hon'ble Court has upheld the equality code as one of the foremost basic features of the Constitution. From Menaka Gandhi – (1978) 1 SCC 248 and I.R. Coelho (2007) 2 SCC 1 to Shayara Bano, the value of equality has been repeatedly emphasized to ensure that equals are not treated unequally. By way of the present amendments, the exclusion of the Socially and Educationally Backward Classes (SEBCs) and the SCs/STs from the scope of the economic reservation essentially implies that only those who are poor from the general categories would avail the benefits of the quotas. This is violation of the basic feature of equality enshrined in Article 14 of the Constitution.

5. **The 50% ceiling limit cannot be breached**: This Hon'ble Court speaking through the Constitution Bench in the case of M.Nagaraj Vs. Union of India and others (2006) 8 SCC 212, upheld the Constitutional validity of Article 16(4A) and the proviso to Article 335 in the following words:

> "*We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.*"

In para 104, the Court specifically states that "As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the Constitutional mandate." Thus, the 50% ceiling limit of reservation has been engrafted as part of the basic structure of the Constitution's equality code. This has in fact been reiterated by the Constitution Bench in Jarnail Singh Vs. Lachhmi Narain Gupta (2018) 10 SCC 396, which declined to refer the correctness of the dicta laid down in Nagaraj to a larger Bench.

Tentative Time sought: 60 minutes

(ASUTHOSH DUBEY)
Advocate for the Petitioners
(A.D.N.RAO)
Senior Advocate
(M.N.RAO)
Senior Advocate

BRIEF WRITTEN NOTE

Gopal Sankaranarayanan, Sr Advocate
[For the Petitioner] IN
Youth for Equality vs. Union Of India
WP(C) No.73/2019

Tentative Time to be taken – One HOUR

PROPOSITIONS

The 103rd Constitutional amendment to the extent it says "*in addition to the existing reservation*" is unconstitutional because:

(a) It freezes the existing reservations of 27%, 15%, 7.5%, etc., which are inconsistent with Articles 15 and 16 and are manifestly arbitrary.

(b) It is contrary to the temporary nature of reservations and the fact that it must be petered out/reduced.

- State of Madras v. Champakam Dorairajan 1951 SCR 525 [7J]
- MR Balaji v. State of Mysore 1962 SCR Supl. (1) 439 [5J]
- Indira Sawhney v Union of India (1992) Supp. (3) SCC 217 [9J]
- Ashok Kumar Thakur v. State of Bihar (1995) 5 SCC 403 [2J]
- Indira Sawhney (2) v Union of India (2000) 1 SCC 168 [3J]
- Ashok Kumar Thakur v. Union of India (2008) 6 SCC 1 [5J]
- Nair Service Society v State of Kerala (2007) 4 SCC 1 [2J]
- Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1 [5J]
- Subhash Chandra v. Delhi Subordinate Services Selection Board, (2009) 15 SCC 458 [2J]

(c) It violates the 50% ceiling limit which is now a constitutional norm that is a basic feature

- M. Nagaraj v. Union of India, (2006) 8 SCC 212
- Jarnail Singh vs Lachhmi Naraian Gupta, (2018) 10 SCC 396
- Article 16(4B)

(d) It breaches the Equality Code

- I.R. Coelho v. State of T.N. (2007) 2 SCC 1 [9J]
- K.S. Puttaswamy (Privacy-9J.) v. Union of India (2017) 10 SCC 1 [9J]
- Subramanian Swamy v. CBI (2014) 8 SCC 682 [5J]

Written Submissions by Shadan Farasat, Arguing Counsel & AOR in *Khalid Anis Ansari v. Union of India & ors.* W.P. (C) No. 162/2019 *[Time requested for oral hearing: 45 minutes]*

"*Any view of the caste system, class or cursory, will at once reveal the firm links which the caste system has with economic power…Social hierarchy and economic position exhibit an undisputable mutuality. The lower the caste, the poorer its members. The poorer the members of a caste, the lower the caste. Caste and economic situation, reflecting each other as they do are the Deus ex-Machina of the social status occupied and the economic power wielded by an individual or class in rural society...*" **[O. Chinnappa Reddy, J. in *KC Vasanth Kumar v. State of Karnataka,* 1985 Supp SCC 714]**

1. For the purpose of arguments, the Counsel will focus solely on the exclusion of economically weaker individuals belonging to Scheduled Castes, Scheduled Tribes, and Other Backward Classes (collectively referred as 'backward classes' hereinafter) from the ambit of economically weaker sections ('EWS') under Articles 15(6) and 16(6). Although adopting the position that special provisions in the nature of reservations based solely on economic criterion violate the Constitution's basic structure, the Counsel submits that even if such measures are *per se* permissible, the restriction of the EWS category to members of forward castes alone negate the Constitution's basic structure by altering the 'width' and 'integrity' of the equality code enshrined in Articles 14, 15 and 16. (*M. Nagaraj* (2006) 8 SCC 212, para 102.)

A. Exclusion of backward classes from EWS amounts to discrimination solely on the basis of caste, and negates the formal and substantive equality underpinning the equality code

2. Data from the UN demonstrates plainly that around 85% of the poorest in Indian society belong to the backward classes.[1] Thus, the Amendment, by excluding the backward classes from the ambit of EWS reservations, betrays its actual intent to serve as a quota for middle-class members of forward castes. In fact, the income criteria fixed by the Union of India for the EWS quota, that is Rs. 8,00,000, mirrors, not any criteria for identifying the poor, but the criteria for identifying the creamy layer already used for OBC reservations. At this threshold, as per available data, merely 2-5% of forward caste members are ineligible.[2] The notification merely reveals the nature of the quota sought to be embedded in the Constitution itself, as being one for almost all forward caste members, excluding only a thin creamy layer among them, while excluding the poorest members of society (who are statistically mostly from backward classes) on the other end. In effect, this exclusion reveals the impugned Amendment as not, in substance, encoding any reservation for economically weaker sections at all.

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[1] United Nations Development Programme, United Nations Global Multidimensional Poverty Index 2021: Unmasking Disparities by Ethnicity, Caste, and Gender, p.15-16.

[2] Sonalde Desai, A Solution in Search of A Problem: On 10% Reservations, The Hindu (January 11, 2019) (citing data from NSSO and India Human Development Survey).

3. The effect of this on the integrity of the equality code is both apparent and egregious. Articles 14, 15, 16 are built on equal opportunity and equality 'in law', tempered by a recognition of ground realities of caste and the need for equality 'in fact' for the socially and educationally backward classes [*M. Nagaraj at para 44*]. The impugned Amendment, by effectively enacting a quota for forward castes, completely negates the equality code. To illustrate this with just one example; if the cut-off for identifying EWS is at an annual income of say Rs. 5,00,000, since all backward classes are excluded, all backward class applicants with a family income of Rs. 4, 99,000 and lower will not be able to compete for the 10%. This will be the case even though such backward class members are both economically worse-off, and on account of their caste identity, socially and educationally backward than the forward caste beneficiaries of 10% quota.
4. **Thus, the net effect of exclusion of backward classes from EWS is that persons who were hitherto able to access this 10% as part of the general category, will now be denied open competition for the same, even though large number of such excluded persons on <u>each and every</u> constitutionally relevant aspects of equality are worse off than those who will now monopolise access to this 10%.** No conception of equality, certainly not the one envisaged by the Constitution of India, can permit such complete inversion of equality.
5. In other words, this breaches both the identity and the width of the equality code. *First,* the exclusion of backward classes in a category that is purportedly based on economic criteria is formal discrimination on the ground of caste alone and amounts to inequality 'in law'. *Second,* the fact, as illustrated by the example above, that persons who are factually worse-off on both economic, social, and educational parameters, will be denied access into this 10% in favour of those who are better off on all counts, is inequality 'in fact'.

B. Merely the presence of reservation for backward classes on account of their social and educational backwardness does not permit their exclusion from reservations on account of economic backwardness

6. It is settled law that members of backward classes otherwise eligible for reservations are also eligible for seats in the general category. (*M. Nagaraj at para 60).* This settled proposition is based on the importance of a large, continuing category in which citizens irrespective of their caste, class or economic makeup can compete together in open competition on equal terms. The importance of a large pool for open competition has been reemphasized by this Court as recently as in *Saurav Yadav v. State of Uttar Pradesh* (2021) 4 SCC 542*,* lest reservations be seen as 'rigid slots' and devolve into *'communal reservations*'. (*Saurav Yadav* at para 66). The exclusion of backward classes from EWS risks reservation on the trajectory of "separate but equal", the now delegitimised doctrine of US Supreme Court, where citizens are first siloed into separate groups and then considered as equal within their own groups. This is not desirable for the purposes of reservations in education/employment, or from the perspective of the kind of

country the Constitution envisages, namely, one where certain beneficial measures for disadvantaged groups are protected while keeping a large pool of interaction and open competition for all in the society. In fact, reservations for the backward classes were envisaged by the framers as a tool to level the playing field so as to, over time, allow open competition on equal terms.

7. The exclusion of backward classes from the EWS category, if sought to be justified solely on the ground that the economically backward within these groups have access to reservation because of their educational and social backwardness, will only mean that the entire concept of reservations will be progressively reduced into segregated silos of opportunities divided by caste groups, where the space for open competition will be increasingly limited to among members of one's own caste groups. The impugned Amendment operates to create such silos for narrow parochial identities despite the universal experience of poverty across caste lines, and thereby goes against the grain of fraternity and equal opportunity in the Constitution.

C. This Court should purposively interpret the words 'other than classes mentioned in Clause 4…' in Articles 15(6), 16(6) to exclude only non-economically weaker persons from backward classes

8. It is settled law that interpretation of constitutional text should be such that advances or is in line with the basic features of the Constitution. (*NCT v. Union of India,* (2018) 8 SCC 501, Chandrachud, J. concurring para 436, Misra, C.J. majority paras 284.10, 284.11, 135). In this case, the inclusion of backward classes in the EWS reservation category eliminates formal inequality and enhances substantive equality, both of which are crucial elements of the equality code which is a basic feature of the Constitution.
9. The text of Articles 15(6), 16(6) insofar as it uses the phrase *'any economically weaker sections of **citizens** other than the classes mentioned in clause (4)...*' is open to two interpretations. *First,* that it excludes persons belonging to all backward classes from the newly created EWS criteria, regardless of their economic status. As argued above, such an interpretation would completely negate the equality code itself. The second construction which can be placed on the same text and which construction the text is fully capable of bearing, is that it seeks to exclude persons from backward classes **only** *qua* their membership of a backward class *per se,* meaning that such exclusion shall not extend to members of backward classes claiming reservations, not *qua* their social/educational backwardness, but *qua* their economic status if they are otherwise found to meet the EWS criteria. This construction gets force from the use of the word 'citizens', which is all-inclusive and not limited to any class, caste, group, *etc*.

Drawn by:

Shadan Farasat, Advocate; Ujwala Uppaluri, Advocate and Hrishika Jain, Advocate.

IN THE SUPREME COURT OF INDIA

WP(C) 182 OF 2019

IN THE MATTER OF:

Dr. Thol. Thirumavalavan …Petitioner

Versus

Union of India …Respondent

SHORT WRITTEN SUBMISSIONS ON BEHALF OF PETITIONER IN THE EWS MATTER - Ms. Meenakshi Arora, Sr. Adv.

These Short Written Submissions on behalf of the Petitioners challenging the 103rd amendment to the Constitution, are structured as follows:

First, Section A on the Equality in the Indian Constitution and its facets.
Second, Section B on how the Impugned Amendment is destructive of equality.
Third, Section C suggests a possible reading down.

A. The equality Code in the Indian Constitution and its facets

1. The Equality Code has the following non-derogable facets[1]:
   1.1 Formal equality- all equal persons are treated equally, without discrimination, or special hereditary privilege[2].
   1.2 Special provisions for *backward classes* in public employment in the form of reservations based on lack of representation and subject to administrative efficiency[3].
   1.3 Special provisions for the *socially and educationally backward classes* ("SEBC") in the form of reservations in education[4].

2. The object of reservations, "*is to see that backward classes of citizens move forward so that they may march hand in hand with other citizens of India on an equal basis*"[5]. Reservations have been so designed to address the problem of inadequacy of representation caused by class disadvantage.

3. Backwardness of social classes[6] is the lynchpin for reservations. It was designed as a qualifying phrase to ensure that the exception does not eat the rule[7]. When reservations are made to remove such backwardness of classes, they further the ideal of substantial equality rather than act as an exception to equality[8].

4. Reservations that ignore the issue of backwardness[9] or are based only on a single criterion such as caste[10], or income[11] have consistently been struck down. The requirement for detailed and constantly evolving criteria to determine reservations has been a *sine qua non* of court decisions for over 60 years[12].

5. Reservations prior to this amendment are subject to important *guardrails* to avoid abuse:
   5.1 Backwardness must be determined on multiple factors by expert committees[13].

5.2 Backward classes have limited representation[14] requiring reservation to correct.
5.3 Reservations cannot exceed 50% of seats.
5.4 Reservations must balance "efficiency of administration" with social justice[15].

6. Reservations are a class based remedy to counteract historic injustice[16] and provide reparations for classes who have been out of the power structure with a view to increase their representation and to uplift them to the standard of other forward classes. Reservations are not poverty alleviation programs[17] or political freebies. The essential scheme of Articles 15 and 16, relies upon balancing the twin factors of uplifting backward classes and efficiency[18] all in the service of substantial equality.

B. How the 103rd amendment is destructive of the Equality Code and the basic structure of the Constitution

7. Reservations for PEWS suffer at least 3 constitutional defects:
7.1 They impermissibly discriminate against backward classes;
7.2 They do not further the cause of substantial equality; and
7.3 They destroy the reparative character of reservations

8. The 103rd amendment discriminates against the backward classes as follows:
8.1 Reservation for PEWS need not be justified on the basis on "backwardness"[19].
8.2 There is no logical end point of PEWS reservation as there will always be people poorer than others in a capitalist system. There is no class, as "section" means people of all classes, regardless of backwardness or historical injustice.
8.3 The government is free to choose any economic criteria it chooses for eligibility of this reservation.
8.4 There is no such requirement of balancing administrative efficiency for PEWS.

9. With this Amendment there is now a Jim Crow like dual structure for the backward and forward poor. To pretend that PEWS and the backward classes both need reservation is akin to Anatole France's observation, "*The poor have to labour in the face of the majestic equality of the law, which forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread*."

10. The 103rd amendment detracts from substantial equality because:
10.1 PEWS are not a "class" but are a "section" comprising of all classes except the backward who are specifically excluded. This converts a class based remedy to an individual one. Further, there is no way to determine adequacy of representation or even to determine the 50% rule.
10.2 Without having to objectively account for backwardness or efficiency, there is no principled way in which reservations can be restricted leaving governments open to reserve posts for any group that is politically favored.

11. The 103rd Amendment, through its 10% reservation for economically weaker individuals *who nonetheless belong to groups that do not suffer from inadequate representation*, violates the foundations of the equality code.It directly *boosts* the representation of groups that are already adequately represented, and thereby necessarily *dilutes* the representation of the SEBCs that are the original beneficiary groups of the State's reservation policies.

12. **How The 103rd Amendment Erases the Principle of Reparative Justice from the Constitution**

12.1 Reservations express the principle of reparative justice[20], acknowledging historic and ongoing oppression and promising reparation for the same. These injustices include social stigma, psychological damage, mental and emotional stress individually and at the class level.

12.2 An affront to the dignity of SEBCs - the target beneficiaries under Article 16(4) - necessitates a specific, tailored response. Under our Constitutional scheme, this tailored response is reservations.

12.3 The principle of reparative justice is thus an essential underlying element of Article 16(4) (and other hitherto existing reservation provisions), without which the equality code would lose its essence, or its identity. In accordance with the "width and identity" test proposed in M. Nagaraj, the principle of reparative justice is a part of the basic structure of the Constitution.

13. Extension of reservation provisions to groups that have not suffered the historical and continuing, structural and institutional injustices suffered by the SEBCs, would thus amount to diluting - and indeed, erasing - the reparative character of reservations.

C. Reading down of the Amendment

14. In the alternative if reservation for sections as opposed to classes is deemed constitutionally acceptable, then one possible way out to keep the amendment *intra vires* is to by

a) Striking down the ban on SEBCs, SCs, STs etc and other vulnerable groups from being granted reservation under the PEWS category.

b) And further clarifying that that PEWS may be implemented only after fully exhausting the 50% *Indra Sawhney* limit for all other SEBC, SC and ST reservations.

DRAFTED BY

Gautam Bhatia
Prasanna S
Rahul Narayan
SETTLED BY
Ms. Meenakshi Arora, Sr. Adv,

PETITIONERS

Through
Rahul Narayan, Advocate-on-Record

Time Sought: 2 hours

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[1] See Also *Indira Sawhney* v *Union of India*, 1992 Supp. (3) SCC 217 ("*Indira Sawhney*") ¶ ¶ 145, 261, 415; *M Nagaraj* v. *Union of India*, (2006) 8 SCC 212, ("*M Nagaraj*") ¶ 120

[2] Arts. 14, 15(1) &(2), 16(1)&(2), 17 and 18 of the Constitution.

[3] Art 16(4), 335. See *Chitralekha* v. *State of Mysore*, (1964) 6 SCR 368 ¶ 20 for why reservation is for classes.

[4] Art 15(4); *Indira Sawhney*.

[5] See *Jarnail Singh* v. *Union of India*, (2018) 10 SCC 396, ¶ 26; *T Devadasan* v. *Union of India*, AIR 1964 SC 179, ¶ 26, per Subba Rao, J(diss.); *Indira Sawhney*, ¶ ¶ 143, 250-255, 356-359, 419, 640.

[6] Class is defined in *State of AP* v. *P Sagar*, (1968) 3 SCR 595: AIR 1968 SC 1379, ¶ 7; *Triloki Nath* v. *State of J&K*, (1967) 2 SCR 265, ¶ 4.

[7] Ambedkar, CAD, Vol. 7 p. 701-702 (1948-1949).

[8] *State of Kerala* v. *NM Thomas*, (1976) 2 SCC 310, ¶¶ 46, 78, 184.

[9] *Ram Singh* v. *Union of India*, (2015) 4 SCC 697, ¶ ¶54,55; *Triloki Nath* v. *State of J&K*, (1967) 2 SCR 265 ¶ 7

[10] *Balaji* v. *State of Mysore*, [1963] Supp. (1) SCR 239, ¶¶ 23, 34, 35.

[11] *Indira Sawhney*, ¶¶ 207, 208, 217, *KC Vasanth Kumar* v. *State of Karnataka*, 1985 Supp. SCC 714 ¶¶ 28-30, 80; *Janki Prasad Parimu* v. *State of J&K*, (1973) 1 CC 420, ¶ 24; *State of UP* v. *Pradip Tandon*, (1975) 1 SCC 267, ¶ ¶ 24, 26

[12] *Chitralekha* v. *State of Mysore*, (1964) 6 SCR 368, ¶ 21; *KS Jayasree* v. *State of Kerala*, (1976) 3 SCC 730, ¶ 22; *Ram Singh*, ¶¶ 54-55

[13] Arts. 340-342; Also see *Jarnail Singh*, *M Nagaraj* (*supra*).

[14] *Gen. Manager* v. *Rangachari*, (1962) 2 SCR 586 ¶ 27; *T Devadasan*,¶ 29, *KC Vasanth Kumar*, ¶ 34; *Indira Sawhney*, ¶¶ 250-253, 255, 407

[15] Art. 355

[16] *Indira Sawhney*, ¶¶ 146, 294, 788

[17] *Indira Sawhney*, ¶¶ 482, 492

[18] *M. Nagaraj*, ¶ 120, *KC Vasanath Kumar* , ¶ 140.

[19] *Contra*, for backwards classes, see *Mukesh* v. *State of Uttarakhand*, (2020) 3 SCC 1

[20] Distinct from distributive justice. See *Indira Sawhney*, ¶¶ 520, 575

Index of case law

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION (CIVIL) NO. 178 OF 2019

IN THE MATTER OF :

Raghu Thakur and anr. … … … PETITIONERS

Versus

Union of India & Anr. … … … RESPONDENTS

Synopsis of Arguments/ Written Submissions on behalf of the Petitioners [Tentative Time Sought: One Hour]

(A) The 103rd Constitutional amendment destroys the basic structure of the Constitution, that is, equality since inserting Article 16 (6) providing for reservation exclusively with reference to economic criteria is destructive of the basic feature of equality totally. This has been laid down in Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 in para 481-382:

It is further respectfully submitted that backwardness for the purpose of reservation under Article 16 must be backwardness both educationally and socially as laid down in Indira Sawhney and Janaki Prasad Parimoo Vs. State of J & K AIR 1973 SC 930 (1)

(B) The 103rd Constitutional amendment destroys the basic structure of the Constitution of equality since inserting Article 15(6) providing for reservation exclusively with reference to economic criteria destroys equality. This principle has been laid down in Indra Sawhney (supra) in para 627, 481. The backwardness for the purpose of reservation under Article 15 must be backwardness both educationally and socially as laid down in Indira Sawhney (supra) and Janaki Prasad Parimoo Vs. State of J & K AIR 1973 SC 930

(C) The exclusion of SC/ST/OBC by the insertion of Article 15(6) is violative of basic structure of equality under Articles 14, 15, 16 and 29 thus destroying the basic structure of the Constitution by providing reservation for "economically weaker sections other than classes mentioned in clauses (4) and (5)" which specifically excludes SC/ST/OBC and makes it a reservation for solely and exclusively for non-SC/ST/ OBC which are the castes among the Indian citizens who are forward socially and educationally, in other words "Savarna" castes. This is further substantiated by the

notifications implementing the amendment like the dated 31/1/2019 and its annexures, including the format of EWS certificate.

(D) The exclusion of SC/ST/OBC by the insertion of Article 16(6) is violative of basic structure of equality under Articles 14, 15, 16 and 29 thus destroying the basic structure of the Constitution by providing reservation for "economically weaker sections other than classes mentioned in clauses (4) " which specifically excludes SC/ST/OBC and makes it a reservation for solely and exclusively for non-SC/ST/ OBC which are the castes among the Indian citizens who are forward socially and educationally, in other words "Savarna" castes. This is further substantiated by the notifications implementing the amendment like the dated 31/1/2019 and its annexures, including the format of EWS certificate.

(E) The impugned amendment is violative of principle of equality as basic feature of equality constituting the basic structure since it provides 10 % reservation to less than 20 % population against a reservation of 27 % for a population of now more than 60 % population of OBC (52 % as per Mandal Commission).

(F) The EWS reservation is a caste based reservation, providing reservation to those sections other than SC/ST/OBC and whether such a caste based reservation is destructive of the basic aim of the Constitution of a caste less society making the aim of a casteless society part of the basic structure of the Constitution. It is respectfully submitted that present amendment creates two level classification:-

1st classification is between people belonging to the SC/ST/OBC, that is, those covered under Article 16 (4) or 15 (4) & (5) and the non-SC/ST/OBC, that is, those not covered under those, this classification is based only on caste. 2nd classification is based EWS of forward castes and non EWS of forward castes.

This is further glaring from the prescription of the amendment that EWS for this amendment is only the EWS of the forward castes, that is, non-SC/ST/OBC. Casteless society is one of the basic aims of the Constitution.

V.V. Giri v. D. S. Dora (1960)1 SCR 426; State of Kerala v. N.M. Thomas (1976) 2 SCC 310; Ashoka Kumar Thakur (2008) 6 SCC 1.

(G) The amendment in issue is violative of basic structure of secularism, diversity and pluralism as specified in the concept of adequacy of representation as contained in Article 16 (4) since the present amendment excludes the necessary limitation and conditionality of inadequacy of representation. It is respectfully submitted that sections of citizens covered under Article 15(4) and 16(4) are inadequately represented and those not covered under these, that is, non-SC/ST/OBC are more than adequately represented. Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217.

(H) The providing of 10 % of seats for the EWS of non SC/ST/OBC, preventing the EWS of SC/ST/OBC even for applying or competing for these posts and seats even as an open or general category candidate is making this 10 % of posts or seats untouchable to SC/ST/OBC even if they are more backward than those EWS covered in the 10 %. This strikes at the root of the basic structure of abolishing exclusion and untouchability.

(I) The excluding of the SC/ST/OBC, from the 10 % of posts and seats, that too preventing also those EWS of SC/ST/OBC even if they are more backward than those EWS covered in the 10 % is taking away and annihilating the competency and representability these sections have acquired or obtained through the operation of the Constitution including 15 (4) and (5) and 16 (4) till the present amendment in 2019. These 10 % of posts and seats as all general seats were available for SC/ST/OBC to compete as general or open category, which is a constitutional mandate, as held in V.V. Giri and R. K. Sabharwal. This prohibition and abolition is more than cutting the thumb away which militates against the basic feature of fraternity assuring the dignity of the individual.

(J) The present amendment obliterates the bar of discrimination and classification ‘only’ on the grounds specified in Articles 15, 16 and 29 thus destroying the basic structure of equality and secularism.

Dr. M. P. Raju, Advocate
through S. S. Nehra Advocate
For Petitioners

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No.95 of 2019

Justice Vangala Eswaraiah (Retd.) & Ors. Vs. Union of India and Ors.

WRITTEN SUBMISSIONS ON BEHALF OF PETITIONER

Arguing Counsel: Prof. (Dr.) **G. MOHAN GOPAL,** Advocate

Advocate-on-Record **D. Mahesh Babu**

Tentative Time sought for arguments**: 2 Hours**

1. The Impugned Amendment violates two elements of the Basic Structure of the Constitution namely;

(i) Equality, including equality of opportunity in public employment; and

(ii) Democratic form of Government.

2. EWS Violates the Basic Structure Norm of Equality

Classification of economic weaker sections into an excluded category consisting of communities eligible for Vertical Reservations; and an eligible category of others, being arbitrary, is unconstitutional inter alia for the following reasons namely;

(a) Eligibility for Vertical Reservations under Articles 15(4) and (5) and 16(4) is selectively picked as a ground of exclusion from EWS but eligibility for Horizontal Reservations is not a ground for exclusion — which is arbitrary and *mala fide*;

(b) Under the system of inter-locking reservations mere eligibility for any type of reservation does not make a person ineligible for any other type of horizontal reservations (EWS is horizontal reservation as per the definition in Indra Sawhney);

(c) Such classification violates, and does not have any rational nexus with, the claimed Article 46 object of EWS of "promoting with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes" and "[protecting] them from social injustice and all forms of exploitation".

(d) The classification is in reality based solely on an illegal prohibited intelligible differentia (membership of a "forward"caste) to serve an illegal object (providing reservations exclusively for "forward castes" after excluding a "creamy layer" amongst them).

3. The width of the Impugned Amendment further damages the basic structure norm of equality by greatly broadening the basis on which

equality of opportunity in public employment may be denied. The Impugned Amendment alters the "identity" of the Constitution from being a charter for social revolution as laid down by this Hon'ble Court in *SP Gupta* , to being a guardian of caste privilege.

EWS violates the Basic Structure Norm of Democratic Government

4. At the heart of a democratic government is adequate representation of all social groups in public employment such that State laws and policies serve the interests of all sections of the people. Reservation is a tool for securing democratic representation in public employment and education.

5. Reservation for classes that are already over-represented is unconstitutional because it entrenches the domination of oligarchic classes, damaging the goal of a representative, democratic government.

The Impugned Constitutional Amendment is thus unconstitutional.

03.09.2022 **D. MAHESH BABU**
Advocate-on-Record for the Petitioner

Cases Relied on:

1. Kesavananda Bharati Sripadagalvaru and Ors vs. State of Kerala (1973) 4 SCC 225 @ Para 316; (para 506 A of SCC). (paras 520 and 535A of SCC).(paras 648,652).(para 886). (para 1159) (para 1471), (para 1621).(paras 1882, 1883) (para 2086).
2. Secretary, State of Karnataka vs Umadevi & Ors.
   2006 (4) SCC 1 @ Para 32
3. Indra Sawhney Vs. Union of India
   1992 Supp. (3) 212 @ Para (paragraphs 6 and 7 at pages 544 and 545)
4. Indira Sawhney Vs. Union Of India And Ors. (13/12/1999)
   No para numbers. First full para on page 20 in JUDIS pdf; https://main.sci.gov.in/jonew/judis/16589.pdf
5. Anwar Ali Sarkar v. The State of West Bengal
   1952 S.C.R. 284 @ Para 71 (N.Chandrasekhar Iyer J.)
6. E.P. Royappa v. State of Tamil Nadu
   1974 SCR (2) 348 @ Para 85
7. Maneka Gandhi v. Union of India
   1978 (1) SCC 248 @ Paras 4 to 7
1. Minerva Mills Ltd. & Ors. Vs.Union Of India & Ors.
   1981 SCR(1) 206 @page 285-286

Material Relied on:

1. Constituent Assembly Debates on Article 16(4)
   (Article 10, Draft Constitution); Volume 7, CAD; 30 November 1948.

03.09.2022 **D. MAHESH BABU**
Advocate-on-Record for the Petitioner

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION (CIVIL) NO. 55/2019

IN THE MATTER OF:

JANHIT ABHIYAN …PETITIONER

VS.

UNION OF INDIA …RESPONDENT

APPROACH NOTE ON BEHALF OF SHRI K.K. VENUGOPAL, ATTORNEY GENERAL OF INDIA ON BEHALF OF RESPONDENT NO. 1

Time required for hearing: 3 hours approximately

1. In the present case, the ground of basic structure is being raised by challenging the inclusion of the economically weaker sections of the society by a Constitutional Amendment, comprehended within the scope of Article 15(6) and and Article 16(6). This approach is based on a total misconception because the basic structure of the constitution is the foundation on which the original constitution as passed by the Parliament stands.

2. The very preamble to the Constitution declares India to be a Sovereign, Socialist, Secular, Democratic Republic where Justice: social, economic and political, as well as Equality of status and of opportunity are to be established in addition to promoting Fraternity, assuring the Dignity of individuals and Unity and Integrity of the nation. These solemn promises alone to the Constitution would require,

above all, more than Article 15(4) and Article 15(5) and Article 16(4) and Article 16(5) to provide for the upliftment of economically weaker sections, which could be by way of reservations in educational institutions, reservation of posts in public employment and a catena of welfare measures, which a State is bound to hold out for its weaker sections of the society.

3. It may be mentioned that the judgment in ***Indra Sawhney vs. Union of India, 1992 Supp (3) SCC 217***) cannot be invoked, as the issues there, dealt with the scope and content of reservations contained in Article 15(4) and Article 15(5) and Article 16(4) and Article 16 (5), which dealt with a totally different category of weaker sections, namely the socially and educationally backward and the Scheduled Caste and Scheduled Tribes. No question of whether the weaker section of the society were entitled to the benefit of reservation could arise in that case and if decided can only be treated as *Obiter*. On the other hand, the passages extracted below from *Indra Sawhney* (supra) would show that the judgment itself holds that they are not dealing with the economically weaker sections of the society being given benefits through affirmative action:

> "*481. However, the provisions of Article 46 should not be confused with those of Article 16(4) and hence* ***the expression "weaker sections of the people" in Article 46 should not be mixed up with the expression "backward class of citizens" under Article 16(4). The purpose of Article 16(4) is limited***. *It is to give adequate representation in the services of the State to that class which has*

no such representation. Hence, ***Article 16(4) carves out a particular class of people and not individuals from the "weaker sections", and the class it carves out is the one which does not have adequate representation in the services under the State. The concept of "weaker sections" in Article 46 has no such limitation. In the first instance, the individuals belonging to the weaker sections may not form a class and they may be weaker as individuals only. Secondly, their weakness may not be the result of past social and educational backwardness or discrimination. Thirdly, even if they belong to an identifiable class but that class is represented in the services of the State adequately, as individuals forming weaker section, they may be entitled to the benefits of the measures taken under Article 46, but not to the reservations under Article 16(4). Thus, not only the concept of "weaker sections" under Article 46 is different from that of the "backward class" of citizens in Article 16(4), but the purpose of the two is also different. One is for the limited purpose of the reservation and hence suffers from limitations, while the other is for all purposes under Article 46, which purposes are other than reservation under Article 16(4).*** *While those entitled to benefits under Article 16(4) may also be entitled to avail of the measures taken under Article 46, the converse is not true. If this is borne in mind,* ***the reasons why mere poverty or economic consideration***

cannot be a criterion for identifying backward classes of citizens under Article 16(4) would be more clear. *To the consideration of that aspect we may now turn*." ("Emphasis Supplied)

If this be so, then the entire Writ Petition based on these grounds are liable to be dismissed.

4. The question of applying the ceiling limit of 50% can never arise as a result of Article 15(6), now under challenge for the simple reason that affirmative action towards weaker sections would include the bundle of the package under Article 15(4), Article 15(5), Article 16(4) and Article 16 (5) as well as Article 15(6). All these provisions taken together would now have to be dealt with as one single approach of the State intended for the upliftment of the weaker sections of the society, which include all these three classes, namely socially and educationally backward classes, the Scheduled castes and Scheduled Tribes and now the economically weaker sections. As to what percentage has to be reserved for these categories, together or separately, will now have to be decided by this Hon'ble Court. The 50% ceiling limit is not sacrosanct. The Petition raised on this ground also deserves to be rejected.

5. The submission made on the ground of economic criterion being the sole determining factor for grant of reservation is also without any merit. In several judicial pronouncements, economic criteria has been held to be a relevant factor for determination of social and educational backwardness. Reference is made to the decision of this Hon'ble Court in ***Society for Unaided Private Schools of***

Rajasthan v. Union of India, (2012) 6 SCC 1 **(**3 Judges), wherein the validity of the Right of Children to Free and Compulsory Education Act, 2009 ("2009 Act") , which was enacted to give effect to Article 21-A of the Constitution, was challenged. This Hon'ble Court held that the 2009 Act seeks to remove all barriers including financial and psychological barriers which a child belonging to the weaker section and disadvantaged group has to face while seeking admission and therefore upheld it under Article 21 of the Constitution. Furthermore, it held that earmarking of seats for children belonging to a specified category who face financial barrier in the matter of accessing education satisfies the test of classification in Article 14. It was held that the provisions provided for a level playing field in the matter of right to education to children who are prevented from accessing education because they do not have the means or their parents do not have the means to pay for their fees. Therefore, the provisions were upheld on the edifice of Article 14 of the Constitution as well.

6. The present Petition, accordingly, must be dismissed.

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) No. 55 OF 2019

IN THE MATTER OF:-

Janhit Abhiyan ...Petitioner

Vs.

Union of India & Ors ...Respondents

WRITTEN SUBMISSIONS FOR RESPONDENT No.2 [EWS]

BY

V K BIJU, AOR

02, Lawyers' Chambers, Supreme Court of India, New Delhi – 110 001

E-Mail :- bijuvkaor@gmail.com Mo. 9650939333,9868234336

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[Time required to substantiate the points -1hr.]

IN THE SUPREME COURT OF INDIA

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1

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WRITTEN SUBMISSIONS FOR RESPONDENT No.2 [EWS] BY V K BIJU, AOR

I. Short Note about Respondent No.2

That Respondent No.2, Munnoka Samudaya Aikya Munnani is a registered organization vide Reg. No. KNR/CA/604/2015 consisting about 15 forward castes and its members of the State of Kerala. They are not having any type of reservation under caste wise or on the basis of social backwardness. The issue of adequate representation of economically backward class, in the services and in the higher education under the state, is the question to be decided on the basis of ground realities is the pure question to be analyzed and decided in the present case. It is a fact that the real situation of the social and educationally backward general category and their living condition in the Country especially in state of Kerala is extremely poor. However, the Applicant is not against reservation of SC/ST/OBC (except Creamy layer) etc. The only prayer of the Applicant is that the poor people of the Forwarded Communities also to be protected. Therefore, this Respondent filed IA No.36122 of 2019 and after going through the same this Hon'ble Court allowed the same vide order dated 1.7.2019 and accordingly added the as Respondent No.2 herein.

II. Backwardness to be decided on the basis poverty, social educational andeconomical backwardness in view of the following facts/views/:

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1. **Objects and Reasons of 104th Amendment Bill**
2. **Sinho Commission Report**
3. **Constituent Assembly Debates-(30 November, 1948)**
4. **Preamble of the Constitution of India**
   .... JUSTICE, SOCIAL, ECONOMIC AND POLITICAL.... Therefore, the very rights of the EWS purely in accordance with the preamble.
5. **A.I.R. (38) 1951 SC 226 (The State of Madras vs. Sm. Champakam Dorairajan&Anr.)**@228
6. **1963(1) SCR 439 (M.R. Balaji Vs. State of Mysore)**
7. **1968(2) SCR 786 (P. Rajendran Vs. State of Madras)**
8. **1968(3) SCR 565 (State of Andhra Pradesh Vs. P. Sagar)**
9. **1977(1) SCR 194 (K.S. Jayashree Vs. State of Kerala)**
10. **1992 Supp(3) SCC 217 (Indra Sawhney & Ors. Vs. UOI & Ors.)**
11. **Ashoka Kumar Thakur Vs. UOI, (2008) 6 SCC 1**
12. **Ram Singh Vs. UOI, (2015) 4 SCC 697**
13. In **R. Chitralekha&Anr vs State Of Mysore &Ors,)**
14. In **Nagaraj v. Union of India** 2006 SCC (vol 18)
15. **Jarnail Singh v. LachhmiNarain Gupta(2018 SCC OnLine SC 1641) -SCC 496 paras 13-14**
16. **Dr. Jaishri Laxman Rao Patil Vs State of Maharashtra (2021 SCC (2) 785)**
17. **Dr. Jaishri Laxman Rao Patil Vs State of Maharashtra (2021 SCC (8) 1)**
18. **Dr. Jaishri Laxman Rao Patil Vs State of Maharashtra (2021 SCC (2) 785)**
19. **Neil Aurilio Nunes (OBC Reservation) & Ors Vs UOI & Ors (2022 SCC (4) 1)**

III. **Writ petitions are not maintainable.**

Prepared by – V.K. Biju, AOR.
Abhay Pratap Singh
Amlendu Kumar Jha,
Adv.