

Organising Secretary of the Dravida Munnetra Kazhagam (DMK) Party in the State of Tamil Nadu, residing at address shown in cause title do hereby solemnly affirm and sincerely state as follows:

1. I am the Petitioner herein and as such I am well acquainted with the facts and circumstances of the case and I am competent to swear this Affidavit.
2. I state that I belong to the DMK party which is the principal opposition party in the State of Tamil Nadu. The DMK party is the largest party in the State and the torch bearer of the Dravidian ideology. The DMK party has also formed Government in the State of Tamil Nadu more times than any other party, and has been part of several Union Governments. The DMK's core ideology is based on the principles of rationalism, social justice and equality. From its formation, the DMK party has fought for the poor, downtrodden, and the marginalized sections of society. When in Government, we have implemented various schemes for the development and upliftment of these sections of society.
3. I state that 'caste discrimination' has been an evil plaguing Indian society for about three millenniums. 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'. The division is based on the writings contained in the vedas, particularly the Rig Veda which postulates four main divisions or varnas:

Brahmins - priests & teachers

Kshatryas - warriors & rulers

Vaishyas - farmers, traders & merchants

Shudras – laborers

This arbitrary division led to segregation in all forms of life – from dietary habits to social interaction, the ‘jati’ or caste of a person determined the value of his life. A person who did not fall under any of the four categories was termed an ‘outcast’ and was considered the bottom of the societal ladder. This abhorrent and inhuman system of classification of human beings merely on the basis of their birth, over which they obviously had no control, led to systemic oppression and discrimination. The Brahmins, as they sat perched on top of this fantasy hierarchy enjoyed complete economic and societal freedoms, whereas, per contra, the Shudras and the outcasts were denied basic human rights. Although initially, a person could change their ‘jati’, around 500 B.C., as per historians, 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 advantages.

4. I state that the caste system soon led to one of the most repulsive systematic discrimination practice the world has ever seen called ‘untouchability’. The people who worked in “unclean occupations” were considered untouchables. Such persons were denied any rights, including fundamental human rights and dignity. They were not permitted to dwell near other castes and not even allowed to touch people from the other four castes. They

were not allowed to enter houses of the higher castes. They were not allowed to enter temples. They were not allowed to use the same wells used by the castes. In public occasions they were compelled to sit at a distance from the four castes. In some parts, even a contact with their shadow was seen as 'polluting'. These facts are placed before this Hon'ble Court to paint a picture of the heinous nature of caste discrimination in India. It is an incomparable phenomenon, which denied basic human dignity to a vast section of Indians for several centuries. Naturally, as a result, over the centuries, people belonging to these 'lower castes' were segregated from the academic circles, were not permitted to be employed where 'higher' castes worked and as a result, their entire families rotted in poverty and exclusion, while the 'upper' castes educated and enriched themselves. The effect of this systemic discrimination was not just economic. It was social and psychological as well. Even if one person from the 'lower' caste became rich, he was not permitted to enter the social circles of the 'upper' castes. If an 'upper' caste member came into contact with a 'lower' caste person, he had to undergo a 'purification' ritual. In some cases, the 'lower' caste person was beaten to death for 'daring' to touch the 'upper' caste person or even his property.

5. Thus, a parallel nation of 'untouchables' was created. All the jobs and seats in educational institutions were made the sole preserve or 'birth right' of the 'upper' castes. Once India attained independence and the people constituted India into a sovereign, socialist, secular, democratic republic, the practice of

untouchability could no longer be permitted as it is obviously antithetic to the ideals upon which the country was built. Article 17 of the Constitution abolished untouchability. But the question was, how to heal the wounds of centuries of discrimination? 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. Article 15 (3) of the Constitution enables the State to 'positively discriminate' in favour of women and children. It is in the nature of an exception to the general rule of equality and non-discrimination enshrined under Articles 14, 15 (1) & (2). When the Constituent Assembly was debating Article 15 (3) of the constitution, there were several amendments moved by members to also add backward classes to the class of persons in whose favour the State can positively discriminate. However, the constituent assembly felt that the special provisions enacted for the backward classes in Article 16 (4) was sufficient.

6. I state that soon after the Constitution came into force and the first Parliament was sworn in, 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. 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 which reads as under:

“(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.”

In fact, the cause for the Constitution (First Amendment) Act, 1951 itself was a case from the Madras State, based upon a reservation policy of the State (described in detail below).

7. Now, even though Article 15 (4) was added by an amendment to the Constitution, the idea of making “special provisions” or “reservations” in favour of ‘backward classes’ was discussed in detail in the constituent assembly debates. In fact, Dr. B.R. Ambedkar was one of the many who fought passionately and fervently to include Article 16 (4) in the Constitution in the face of staunch opposition for many members who believed that reservations offended the equality clause.

8. During one such debate, a question was posed by Mr. T.T. Krishnamachari as to whether the term backward class referred to in Article 16 (4) was based on economic status or caste. To this, the reply of Dr. B.R. Ambedkar reflects the intention of the drafters. He said that *“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.”* Hence, it is clear that the concept of reservation

itself is not with reference to the economic status of a person but rather with reference to the community to which he belongs, with an idea to integrate that community into the mainstream system of education and employment.

9. I state that in so far as the State of Tamil Nadu is concerned, the State has always been far ahead of the Central Government in implementing reservation programmes for the integration and upliftment of the backward classes. As early as August 1921, a resolution was passed in the Madras State Legislative Council recommending to the Government to take steps to increase the proportion of posts in Government offices held by the backward classes. The resolution was accepted by the Government and necessary instructions were issued to all Heads of the Departments to make appointments. Accordingly, the first Government Order G.O.No.613, Public Department, dated 16.09.1921 making reservations was introduced. This Government Order was the first of its kind in India and heralded an era of change. Soon after, another “communal G.O.” in G.O.No. 658, Public Department, dated 15.08.1922 was passed which enhanced the career opportunities of non-forward castes. The year 1927 was another milestone for passing the “third communal G.O.” in G.O.Ms. No.1071, Public Department dated 04.11.1927, which also enabled the non forward castes to have their share in employment. Thereafter, following suit, the Central Government, in the year 1943 provided for reservations in employment under the Central Government.

10. I state that therefore, till the Constitution was enacted, the Government of Madras was implementing the reservation policy through its various Government Orders between 1927 – 1950. After the Constitution came into force, the reservation policies were implemented with further gusto. Vide G.O.Ms.No.2432, Public Services Department, dated 27.09.1951, a roster system was introduced in the State for reservation. However, aggrieved by this Government Order prescribing reservation, two persons belonging to forward castes namely Srimathi Champakam Durai Rajan who applied for a seat in Madras Medical College and C.R. Srinivasan Rao who applied for a seat in an engineering college filed a writ petition in Madras High Court against the communal G.O. reserving seats since they were not selected. The Government order was quashed by this Hon'ble Court, and subsequently, an appeal was filed before the Hon'ble Supreme Court. The Hon'ble Supreme Court confirmed the order of this Hon'ble Court striking down the communal G.O. on the ground that it violates the equality clause. Subsequently, realising that special provisions cannot be made in favour of backward classes qua education unless the Constitution is amended, the Parliament passed the Constitution (First Amendment) Act, 1951. Hence, it is abundantly clear that the provision of reservation for backward class, SC and ST was of utmost importance to their upliftment. After the Constitution (First Amendment) Act, 1951, various states began implementing reservation policies in full swing.

11. I state that subsequently, due to some decisions of the Hon'ble Supreme Court, a question arose about the competence of the State to prescribe for reservations in private and minority institutions in the cases of *P.A. Inamdar* and *T.M.A. Pai*. To overcome these difficulties, the Parliament again amended Article 15 by way of the Constitution (Ninety-third Amendment) Act, 2005 to add Article 15 (5) which reads as under:

“(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.”

Article 15(5) however maintained reservation based on community. It has never been the intention of the framers of the constitution to make reservations based on economic status of an individual.

12. I state that contrary to the *animus imponentis* of the Constituent Assembly in framing a reservation policy, the 1st Respondent has now enacted The Constitution (One Hundred and Third Amendment) Act, 2019 to enable the State to make reservations based on the economic criterion alone. The 1st Respondent in a Cabinet meeting on 07.01.2019 took a decision to provide 10% reservation for the “economically weaker

sections” (hereinafter referred to as ‘EWS’) in the general category i.e., the category other than OBC, SC and ST. The cabinet decision was widely reported in the press and television media.

13. Thereafter, on the very next day, The Constitution (One Hundred and Twenty-Fourth Amendment) Bill, 2019 was introduced in the Lok Sabha on 08.01.2019. It is to be noted that the introduction of the Bill was not part of the agenda of the Lower House of Parliament. Hence, it is not an exaggeration to say that the Bill was foisted on the Lok Sabha. It is on the records of the House that the copies of the Bill were not even furnished to the Hon’ble Members sufficiently in advance so as to enable the Hon’ble Members to go through it, have a meaningful deliberation and consult with their constituents. The said Bill was “rushed through” the Lok Sabha and subsequently sent to the Rajya Sabha on 09.01.2019. In fact, it is pertinent to note that originally, there was no sitting of the House on the 9th of January. However, the Parliamentary session was extended by one day to enable the Rajya Sabha to pass the Bill on the same day. It can be seen from the records of the House that barely any time was allocated for discussion on the Bill by the Hon’ble Members opposing it. Even on 09.01.2019 the Business of the House doesn’t include the constitution 124th Amendment bill. However, when the suddenly the bill was tabled before Rajya Sabha the Bill was taken up for consideration, a motion was introduced by Mrs. Kanimozhi Karunanidhi, Honourable Member from the D.M.K. party under Rules of Procedure and Conduct of Business in the

Council of States to send the Bill to a Select Committee for further study and the said motion was negatived by the House by 18 to 155 votes. Subsequently, the Rajya Sabha passed the Constitution Amendment Bill as The Constitution (One Hundred and Third Amendment) Act, 2019 and the Act received the assent of the Honourable President on 12.01.2019 and was published in the Gazette on the same day.

14. I state that the crux of the impugned “The Constitution (One Hundred and Third Amendment) Act, 2019” (hereinafter referred as the impugned amendments) is that clause (6) was inserted in Article 15 and 16 of the Constitution. Clause (6) inserted in the Article 15 reads as follows:

‘(6) Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making,-

- (a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and*
- (b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be*

in addition to the existing reservations and subject to a maximum of ten per cent of the total seats in each category.

Explanation:- For the purpose of this article and article 16, “economically weaker sections” shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage.’

15. Similarly, Clause (6) was inserted into the Article 16 and it reads as follows:

“(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent of the posts in each category.”.

16. The intention of the impugned amendments to Articles 15 and 16 is to include economically weaker sections (EWS) of citizens as one of the “classes” of citizens in favour of whom reservations can be made in educational institutions and matters of employment, and for the making of special provisions for the advancement of the said EWS class. In so far as the education is concerned, the newly inserted Article 15 (6) permits the State to make reservation in favour of EWS for admissions to educational institutions including private educational institutions, aided and unaided institutions. It further provides that such reservation is in addition to the existing reservation and caps the same at a

maximum of 10% of the total seats in each category. In other words, when our State already have 69% reservations, the impugned amendment permits further reservation up to a total of 79%. In so far as the newly inserted clause (6) of Article 16 is concerned, it enables the States to make provisions for reservation in favour of EWS matters of employment under the State in addition to the existing reservations subject to a maximum of 10% in each category.

17. I state that the impugned amendments are unconstitutional and violate the basic feature of the Constitution. The broad grounds of challenge are as follows:

- (a) The concept of reservation, being an exception to the equality clause, is only justified when it is used for the purpose of upliftment of communities which have suffered discrimination and oppression like the OBC, SCs and STs. Economic criteria alone cannot be the basis of reservation since reservation is not a poverty alleviation scheme;
- (b) Reservation in Tamil Nadu is already at 69% due to the operation of the Tamil Nadu Backward Classes, Schedules Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1993 (Tamil Nadu Act 45 of 1993) which has the protection of Article 31-B and has been placed in the IXth Schedule of the Constitution. Therefore in Tamil Nadu, reservation cannot exceed 69% and in other States, reservation cannot exceed 50% of the total seats

available since it is would then be contradictory to the principle enshrined in Articles 14, 15(1) and 16 (1);

- (c) The power to amend the Constitution, though vast, is subject to the 'basic feature doctrine' as propounded by the Hon'ble Supreme Court in the case of *Keshavnanda Bharati vs. State of Kerala*, (1973) 4 SCC 225; The impugned Amendment Act tampers with the fundamental rights and changes the basic structure of constitution.
- (d) An amendment to the Constitution is also liable to be struck down on the grounds of manifest arbitrariness and non-discrimination, both being facets of Article 14, which is now well enshrined as an "untouchable" basic feature of the Constitution.

18. Having no other alternate or efficacious remedy, I am constrained to file the above Writ Petition under Article 226 of the Constitution of India as a Public Interest Litigation on the following among other

GROUND

- A. The impugned THE CONSTITUTION (ONE HUNDRED AND THIRD AMENDMENT) ACT, 2019 is unconstitutional, violates the basic feature of the Constitution, and is *ultra vires* of Articles 14, 15, 16, 19, 29, 30 and 368 of the Constitution of India.
- B. As per the decision of the Hon'ble Supreme Court in the case of *Indira Sawhney vs. Union of India*, 1992 (Supp.) 3 SCC 217, economic status cannot be the sole criterion for reservation.

- C. As per the ratio in *Indira Sawhney vs. Union of India*, 1992 (Supp.) 3 SCC 217 and the decision in *M. Nagaraj vs. Union of India & Ors.*, (2006) 8 SCC 212, the reservation cannot be beyond 50% of the available seats or posts at a given point in time. The impugned amendments enable for reservation over and above the 50% ceiling limit and therefore, violate basic feature of the Constitution, and are unconstitutional. However, in Tamil Nadu, the ceiling limit is 69% due to The Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of appointments or posts in the Services under the State) Act, 1993 (Tamil Nadu Act 45 of 1994) which is placed at entry 257A of the IXth Schedule. Hence, the reservation cannot be beyond 69% in the State of Tamil Nadu and 50% in other States.
- D. Articles 15 (4) & (5) and Article 16 clauses (3), (4), (4A), (4B) and 5 are all in the nature of exceptions to the general rule of equality enshrined in Articles 14, 15 (1) & (2) and 16 (1) & (2). These exceptions have been made only to re-integrate certain communities that have been historically ostracized and to uplift and advance these 'backward' classes.
- E. It is judicially recognized that reservations are not poverty alleviation programmes but rather are more in the nature of social justice programmes to uplift communities which have not had access to education or employment and consequently do not have representation in the services of the State or in upper echelons of society. Therefore, essentially, the exception to the equality clause

is only available to those communities which were ostracized for centuries in matters of education and employment. Economic criteria has been however used as a filter to exclude the 'creamy layer' i.e. persons belong to the backward classes but who are economically advanced. Hence, application of economic criteria solely is not contemplated as an exception to the rule of equality and consequently to provide reservation solely on economic criteria offends the basic structure of the Constitution.

F. It is well settled that the ceiling limit of 50% in reservation is also part of the basic structure and has been asserted by the Supreme Court in the decision in *M. Nagaraj* at para 122. This view has been affirmed subsequently by several decisions of the Hon'ble Supreme Court and by several High Courts across the country. However, in Tamil Nadu, the ceiling limit is 69% due to The Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of appointments or posts in the Services under the State) Act, 1993 (Tamil Nadu Act 45 of 1994) which is placed at entry 257A of the IXth Schedule. Hence, the reservation cannot be beyond 69% in the State of Tamil Nadu. However, the impugned amendments enable reservation to go up to 79% and the same are unconstitutional.

G. It is well settled that the power to amend the Constitution is traceable to Article 368 of the Constitution of India as per the decision in *Keshavnanda Bharati vs. State of Kerala*, (1973) 4 SCC 225. However, in the same judgement, the Honourable Supreme

Court has held that the power to amend the Constitution is subject to the limitation that the basic feature of the Constitution cannot be destroyed by such amendments. What constitutes basic feature has not been exhaustively spelt out by the Court but has been left to judicial wisdom to discern from time to time. Accordingly, the basic feature doctrine has evolved through judicial decisions. In so far as the reservation is concerned, as already stated, the 50% ceiling limit in other States and 69% in Tamil Nadu and the prohibition against prescribing economic status as the sole criterion for reservation have been held to be part of the basic feature.

- H. The Supreme Court in the case of *I.R. Coelho vs. State of Tamil Nadu*, (2007) 2 SCC 1 has categorically held that Article 15 of Constitution along with Articles 14, 19 and 21 constitute the 'core values' which cannot be abrogated.
- I. In the case of *Ashok Thakur vs. Union of India*, the Constitution Bench of the Supreme Court has held that in the case of private institutions and unaided institutions, the State cannot thrust reservation on them and such reservations violate the basic structure by obliterating the right under Article 19(1)(g).
- J. Although the impugned amendments are only enabling provisions, they confer upon the States a wide and unfettered discretion to identify the economically weaker sections of the society, since the term has not been defined in the impugned amendments. It can be seen from reports that the 1st Respondent is attempting to define

economically weaker sections as those families with income of less than Rs.8 lakhs per annum. Such a definition would encompass about 97% of the total population of the country, and therefore, is arbitrary. No study has been carried out by the 1st Respondent to identify economically weaker sections in general category and there is no scientific data or analysis as to whether this reservation would indeed benefit the economically weaker sections category. Hence, conferring such wide, unfettered and unguided discretion to the States, that too, by way of Constitution amendments, offends the basic structure, as it would lead to different States adopting different standards. This will lead to creation of different classes of persons in different States and such classification would not be based on any reasonable criteria and would not have nexus to the object sought to be achieved.

K. In the case of *Ashok Kumar Thakur* at para 374, the Hon'ble Supreme Court has held that beneficiaries of a law must be identified before making the law, and it is impermissible to amend the law and thereafter look for the beneficiary.

L. It is equally well settled that wide discretion cannot be conferred on States or Executive Authorities to interpret the Constitution or rather to act as delegate of the Constitution. The language of the impugned amendment would result in creating different classification for EWS and different yardsticks between States. Such unguided power offends the basic feature of the Constitution.

M. The manner in which the Constitution Amendment Bill was introduced in Parliament and passed, without furnishing copies to the Hon'ble Members sufficiently in advance, without a debate, and without any study is manifestly arbitrary. The doctrine of manifest arbitrariness is now available as a ground to challenge plenary legislation. Though the power to amend the Constitution flows from Article 368, such power too must necessarily be exercised in a fair and reasonable manner. The Constitution, being a reflection of the will of the popular sovereign viz. the people of India, cannot be amended in such a whimsical and authoritarian manner, without undertaking any study as to its impact. Amendment to a Part III right as important as Articles 15 and 16, which will impact the life of crores of citizens have been carried out within three days, without any study and without proper participation of the Members of the House, meaning thereby without the participation of the people.

N. The power to amend the Constitution has been given to the Parliament as part of a social contract by the people. Equally, it casts a solemn obligation on the Parliament to engage in some meaningful deliberation before exercising this power. Merely because the power to amend the Constitution is available, it cannot be used without prudence, study, deliberation or discussion. Hence, it cannot be wielded in such incautious and reckless manner. Thus, the impugned amendments are liable to be struck down as manifestly arbitrary, fraud on the Constitution and colourable exercise of power.

O. Further, the impugned amendments pave the way for legislation which violate the basic feature of the Constitution as described above. Such amendments which are in the nature of enabling provisions and pave the way for future legislation which would violate the basic structure can be struck down without waiting for the potential legislation as per the ratio in para 494 of *Ashok Kumar Thakur* (cited supra).

P. The impugned Amendment act violates Art 19(1)(g) as it obliterates citizens right to carry on an occupation as held in *Ashoka Kumar Thakur* case and therefore violates the basic structure of constitution.

15. I state that the above Writ Petition is being filed as a Public Interest Litigation in my individual capacity as a concerned citizen. Further, I am an elected representative of the people and the impugned amendments, being unconstitutional, affect the lives of crores of citizens of India qua their education and employment, and many of them will not be able to approach this Hon'ble Court. I am an Advocate, Member of Parliament (Rajya Sabha) and Organisation Secretary, DMK party and my PAN number is AASPS5891B. My annual income is Rs. 34 Lakhs/- per year. I state that no other petitions have been filed before this Hon'ble Court seeking similar reliefs. I undertake to pay cost if this Hon'ble Court finds that the petition is intended for personal gain or of oblique motive. I submit that I have filed this petition out of my own funds.

16. I state that the impugned amendment Act has been uploaded by the Respondent on its website and the original is not made available to the public. Hence, the production of the original may be dispensed with. The impugned amendment Act has been notified in the official gazette on 12.1.2019 and as per section 1(2) of impugned Amendment Act the date of coming in to force is notified w.e.f from 14.1.2019 by separate gazette notification issued by the 2nd Respondent. Thus the impugned Amendment has come in to force on 14.1.2019.
17. It is, therefore, prayed that this Honourable Court may be pleased to dispense with the production of the original of The Constitution (One Hundred And Third Amendment) Act, 2019 and pass such further or other orders as this Hon'ble Court may deem fit and proper to pass in the circumstances of the case and thus render justice.
18. It is therefore, humbly prayed that this Hon'ble Court may be pleased to grant an order of ad-interim stay of The Constitution (One Hundred And Third Amendment) Act, 2019 pending disposal of the above Writ Petition and pass such further or other orders as this Hon'ble Court may deem fit and proper to pass in the circumstances of the case and thus render justice.
19. It is humbly prayed that this Hon'ble Court may be pleased to issue a Writ, Order or Direction in the nature of WRIT OF DECLARATION declaring The Constitution (One Hundred And Third Amendment) Act, 2019 as unconstitutional and void and

pass such further or other orders as this Hon'ble Court may deem fit and proper to pass in the circumstances of the case and thus render justice..

DEPONENT

BEFORE ME

Solemnly affirmed at Chennai on this the 18th day of January, 2019 and signed his name in my presence.

ADVOCATE - CHENNAI

Page No.:

No. of Corrections: