IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL)

(Under Article 32 of the Constitution of India)

W.P.(C) No. _____ OF 2019

[PUBLIC INTEREST LITIGATION]

DR. THOL. THIRUMAVALAVAN &ANR.. …PETITIONERS

Versus

UNION OF INDIA …RESPONDENT

PAPER BOOK

(FOR INDEX PLEASE SEE INSIDE)

WITH

I.A. No. _____ of 2019

(Application for Exemption from filing O.T.)

ADVOCATE FOR THE PETITIONERS:

Mr. Rahul Narayan

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SYNOPSIS& LIST OF DATES

1. This Writ Petition has been filed in public interest praying *inter alia* for a direction that the Constitution (One Hundred And Third) AmendmentAct, 2019 (hereinafter the "Impugned Act"), which was passed in Parliament on 09.01.2019 and received the assent of the President of India on 12.01.2019, be declared as unconstitutional and *ultra-vires* Article 368 of the Constitution of India for "damaging and destroying" the 'Basic Structure' of the Constitution of India.

2. Petitioner No.1 is the president of Vidudalai Chiruthaigal Katchi (VCK), a political party registered with the Election Commission of India and has been contesting elections since the early 1990s. He was a member of the Fifteenth Lok Sabha until May 2014. Petitioner No.2 is a writer by occupation and the general secretary of VCK.

3. The Impugned Act amends Articles 15 and 16 of the Constitution so as to, *inter alia*, enable the State to make special provisions for purely 'economically weaker sections of the society'("PEWS"), to the *exclusion* of persons belonging to the class of Scheduled Castes ("SCs"), Scheduled Tribes ("STs"), Socially & Educationally Backward Castes ("SEBCs"), and Other Backward Classes ("OBCs") based on citeria notified by the Government. The Impugned Act further enables the State to reserve upto 10% of the seats in admissions to educational institutions and upto 10% of the posts in public employment for the PEWS.

4. The Preamble to the Indian Constitution assures "Equality of Status and Opportunity". This guarantee finds utterance in the fundamental right to equality and equal protection of the laws as contained in Articles 14 to

18 and is indisputably part of the basic structure of the Constitution of India. A vital facet of this guarantee is equality of opportunity as regards education and in the matter of public employment.

5. Prior to the Impugned Act, Article 16 of the Constitution which deals with public employment had two limbs- the first limb, contained in Article 16(1) and (2) ensured equality of opportunity in matters of public employment and the banning of discrimination on the basis of religion, caste, sex etc. The second limb contained in 16(4) specifically allowed the State to make reservations for backward classes of citizens who were not adequately represented in the services.

6. Similarly Article 15 also had two limbs. The first limb, contained in Articles 15(1) and (2) banned discrimination on the basis of caste, religion, sex, etc, on part of the State and also on part of private parties, in certain contexts; while the second limb in Article 15(4) allowed for the State to make "special provisions" in the form of reservations for the advancement of any "socially and educationally backward class of citizens" in addition to Schedules Castes and Scheduled Tribes.

7. In India special provisions to uplift "backward classes" or "depressed classes" in the form of reservations have a long history and have been provided for under the Constitution. These provisions – whose provenance dates back to the early-20th century – have always been premised on the understanding that in India, discrimination in its most powerful and virulent form has taken place along the axis of group membership; that is, more than any personal or familial characteristic (such as poverty), people are discriminated against by virtue of the group or class to which they belong. In addition to Articles 15 and 16, Articles

38 and 46 specifically provide for assistance to backward classes. Article 340 provides for appointment by the President of a Commission for investigation of the socially and educationally backward. Article 335 provides for reservations for SC/ST category persons in the political arena.

8. A perusal of the Constituent Assembly Debates as well as a passing reference to the history of affirmative action in India (and in other jurisdications such as the United States) makes abundantly clear the *raison d'etre* of reservations. The historical and doctrinal justification of reservations can also be gleaned from the *ratio* of many learned judgments of this Hon'ble Court, and in particular in the 9 judge decision in *Indra Sawhney v. Union of India*, 1992 Supp. (3) SCC 217. Reservation has always been intended to further the cause of equality of opportunity by uplifting those classes of persons who can be classified as "backward" or who have been historically suppressed or oppressed. In his concurring opinion in *Indra Sawhney*, Justice Sawant observes:

> **419.** The objectives of reservation may be spelt out variously. As the U.S. Supreme Court has stated in different celebrated cases, viz., *Oliver Brown* v. *Board of Education of Topeka [347 US 483 : 48 L Ed 2d 873 (1954)]* ; *Spottswood Thomas Bolling* v. *C. Melvin Sharpe* [347 US 497 : 98 L Ed 884] ; *Marco DeFunis* v. *Charles Odegaard [40 L Ed 2d 164 : 416 US 312 (1974)]* ; *Regents of the University of California* v. *Allan Bakke [57 L Ed 2d 750 : 438 US 265 (1978)]* ; *H. Earl Fullilove* v. *Philip M. Klutznick [448 US 448 : 65 L Ed 2d 902 (1980)]* and *Metro Broadcasting Inc.*v. *Federal Communications Commission [58 IW 5053 (decided on June 27, 1990)]*rendered as late as on June 27, 1990, the reservation or affirmative action may be undertaken to remove the "persisting or present and continuing effects of past discrimination"; to lift the "limitation on access to equal opportunities"; to grant "opportunity for full participation in the governance" of the society; to recognise and discharge "special obligations" towards the disadvantaged and discriminated social groups"; "to overcome substantial chronic under-representation of a social group"; or "to serve the important governmental objectives". What applies to American society, applies *ex proprio vigore* to our society. The discrimination in our society is more chronic and its continuing effects more discernible and disastrous. Unlike in America, the all pervasive discrimination here is against a vast majority.

The same understanding forms part of calculus of all the judgments delivered in the *Indra Sawhney* case.

9. In his landmark dissent in *T Devadasan v. Union of India*, (1964) 4 SCR 680: AIR 1964 SC 179, which became the majority view in *NM Thomas v. State of Kerala* (1976) 2 SCC, then Justice Subba Rao explained the rationale as under:

> "To make my point clear, take the illustration of a horse race. Two horses are set down to run a race — one is a first class race horse and the other an ordinary one. Both are made to run from the same starting point. Though theoretically they are given equal opportunity to run the race, in practice the ordinary horse is not given an equal opportunity to compete with the race horse. Indeed that is denied to it. So a handicap may be given either in the nature of extra weight or a start from a longer distance. By doing so, what would otherwise have been a farce of a competition would be made a real one. The same difficulty had confronted the makers of the Constitution at the time it was made. Centuries of calculated oppression and habitual submission reduced a ***considerable section*** of our community to a life of serfdom. It would be well nigh impossible to raise their standards if the doctrine of equal opportunity was strictly enforced in their case. They would not have any chance if they were made to enter the open field of competition without adventitious aids till such time when they could stand on their own legs. That is why the makers of the Constitution introduced clause (4) in Article 16." (Emphasis Supplied)

10. Following on from the clear statement made by Dr. B.R. Ambedar on 29th November 1948 in the Constituent Assembly, this Hon'ble Court has refused to accept mere inadequacy of representation without the underlying basis of "backwardness" to be a valid ground of reservation, holding in *Triloki Nath v. State of J&K*, (1967) 2 SCR 265:

> "7. ...The sole test of backwardness under Article 16(4), the argument proceeds, is the inadequacy of representation in the services under the State; that is to say, however advanced a particular class of citizens, socially and educationally, may be, if that class is not adequately represented in the services under the State, it is a backward class. <u>This contention, if accepted, would exclude the really backward classes from the benefit of the provision and confer the benefit only on a class of citizens who, though rich and cultured, have taken to other avocations of life. It is, therefore, necessary to satisfy two conditions to attract clause (4) of Article 16, namely, (*i*) a class of citizens is backward i.e. socially and educationally, in the sense explained in *Balaji case* (*i*); and (*ii*) the said class is not adequately represented in the services under the State</u>.(emphasis supplied)

11. The issue of reservations reverberates through the law reports from the 1960's onwards. There is extensive debate on the criteria of what

constitutes “backwardness” for the purpose of reservations. This Hon’ble Court has consistently considered various government orders, and committee reports to determine whether or not a class has been validly included in reservations or whether a government notification can withstand judicial scrutiny. A caste-only criteria was specifically rejected in *Balaji v. State of Mysore*, [1963] Supp (1) SCR 239 and income only criteria have been struck down in *Indra Sawhney*, (1992) Supp (3) SCC 217; *KC Vasanth Kumar v State of Karnataka*, 1985 Supp SCC 714; *Janaki Prasad v. State of J&K*, (1973) 1 SCC 420; *State of UP v. Pradip Tandon*, (1975) 1 SCC 267 and others.

12. The modern position remains that both poverty and caste are to be considered while determining who all deserve reservation in terms of backwardness. In *Chitralekha v. State of Mysore*, (1964) 6 SCR 368 this Hon’ble Court laid down:

> **21.** We do not intend to lay down any inflexible Rule for the Government to follow. ***The laying down of criteria for ascertainment of social and educational backwardness of a class is a complex problem depending upon many circumstances which may vary from State to State and even from place to place in a State. But what we intend to emphasize is that under no circumstance a “class” can be equated to a “caste” though the caste of an individual or a group of individuals may be considered along with other relevant factors in putting him in a particular class***. We would also like to make it clear that if in a given situation caste is excluded in ascertaining a class within the meaning of Article 15(4) of the Constitution, it does not vitiate the classification if it satisfied other tests. (Emphasis supplied)

In *K.S. Jayasree v. State of Kerala* (1976) 3 SCC 730, this Hon’ble Court held:

> 22. ***The problem of determining who are socially and educationally backward classes is undoubtedly not simple. Sociological and economic considerations come into play in evolving proper criteria for its determination. This is the function of the State***. The Court's jurisdiction is to decide whether the tests applied are valid. If it appears that the tests applied are proper and valid the classification of socially and educationally backward classes based on the tests will have to be consistent with the requirements of Article 15(4). The commission has found on applying the relevant tests that the lower income group of the communities named in Appendix VIII of the report constitute the socially and

> educationally backward classes. ***In dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens***. ***It is necessary to remember that special provision is contemplated for classes of citizens and not for individual citizens as such, and so, though the caste of the group of citizens may be relevant, its importance should not be exaggerated.*** If the classification is based solely on caste of the citizen, it may not be logical. Social backwardness is the result of poverty to a very large extent. ***Caste and poverty are both relevant for determining the backwardness. But neither caste alone nor poverty alone will be the determining tests. When the commission has determined a class to be socially and educationally backward it is not on the basis of income alone, and the determination is based on the relevant criteria laid down by the Court.*** Evidence and material are placed before the commission. Article 15(4) which speaks of backwardness of classes of citizens indicates that the accent is on classes of citizens. Article 15(4) also speaks of scheduled castes and scheduled tribes. Therefore, socially and educationally backward classes of citizens in Article 15(4) cannot be equated with castes. In R. Chitralekha v. State of Mysore [(1964) 6 SCR 368 : AIR 1964 SC 1823] this Court said that the classification of backward classes based on economic conditions and occupations does not offend Article 15(4). (Emphasis supplied)

In *Ram Singh* v. *Union of India*, (2015) 4 SCC 697, this Court held:

> 54 ...***Backwardness is a manifestation caused by the presence of several independent circumstances which may be social, cultural, economic, educational or even political. Owing to historical conditions, particularly in Hindu society, recognition of backwardness has been associated with caste. Though caste may be a prominent and distinguishing factor for easy determination of backwardness of a social group, this Court has been routinely discouraging the identification of a group as backward solely on the basis of caste. Article 16(4) as also Article 15(4) lays the foundation for affirmative action by the State to reach out the most deserving. Social groups who would be most deserving must necessarily be a matter of continuous evolution. New practices, methods and yardsticks have to be continuously evolved moving away from caste centric definition of backwardness. This alone can enable recognition of newly emerging groups in society which would require palliative action.*** The recognition of the third gender as a socially and educationally backward class of citizens entitled to affirmative action of the State under the Constitution in *National Legal Services Authority vs. Union of India* is too significant a development to be ignored. In fact it is a path finder, if not a path-breaker. ***It is an important reminder to the State of the high degree of vigilance it must exercise to discover emerging forms of backwardness. The State, therefore, cannot blind itself to the existence of other forms and instances of backwardness. An affirmative action policy that keeps in mind only historical injustice would certainly result in under-protection of the most deserving backward class of citizens, which is constitutionally mandated. It is the identification of these new emerging groups that must engage the attention of the State and the constitutional power and duty must be concentrated to discover such groups rather than to enable groups of citizens to recover "lost ground" in claiming preference and benefits on the basis of historical prejudice***.
>
> 55. The perception of a self-proclaimed socially backward class of citizens or even the perception of the "advanced classes" as to the social status of the "less fortunates" cannot continue to be a constitutionally permissible yardstick for determination of backwardness, both in the context of Articles 15(4) and 16(4) of the Constitution. Neither can backwardness any longer be a matter of determination on the basis of mathematical formulae evolved by taking into account social, economic and educational indicators. ***Determination of***

> ***backwardness must also cease to be relative: possible wrong inclusions cannot be the basis for further inclusions but the gates would be opened only to permit entry of the most distressed. Any other inclusion would be a serious abdication of the constitutional duty of the State.*** Judged by the aforesaid standards we must hold that inclusion of the politically organised classes (such as Jats) in the List of Backward Classes mainly, if not solely, on the basis that on same parameters other groups who have fared better have been so included cannot be affirmed. (Emphasis supplied)

13. The Impugned Act substantially alters this legal landscape by introducing purely economic means as determined by the Government as the *sole* criteria for 10% reservation and by specifically *excluding* socially backward classes and Scheduled Castes and Scheduled Tribes from such reservation. However, it does more than just "altering" the legal landscape. It goes further. The Petitioners respectfully submit that this Amendment is destructive of equality and non discrimination, and is as such destructive of the basic structure of the Constitution and merits being struck down for the following among other reasons:

A. The right to equality, and more particularly, the principle of substantive equality as contained in Articles 14, 15, 16 , 17 and 18 (that together constitute the "Equality Code"), is a basic feature of India's Constitution. The promises in the Preamble of "*social, economic and political justice for all*"; "*equality of status and opportunity for all*" and of "*dignity of the individual*" inform, guide and enrich the understanding of the right to equality under the Indian Constitution.

B. The right against non-discrimination – on the grounds of caste, sex, race, religion, place of birth etc is an essential part of the right to equality and is equally a basic feature of the Constitution.

C. Affirmative action, including reservation, is permissible under the Constitution only to the extent that it furthers substantive equality and

not when it merely creates an exception to the strict non-discrimination guarantee. The Impugned Act creates an unconstitutional and unconscionable exception to the non-discrimination guarantee and denudes the right to equality of its vitality.

D. Reservations without reference to "backwardness" violate the principle of equality as contained in the Constitution of India. Historically and doctrinally, reservations based solely on economic criteria do not further the cause of substantive equality. Since purely economic criteria ignore social backwardness, such reservations do nothing to ameliorate the backwardness of the backward classes, which has been a result of centuries of structural and systematic oppression and denial of rights. This Court has consistently struck down as unconstitutional reservations that are based on improper criteria of backwardness. As per this Hon'ble Court in *Jarnail Singh* (2018) 10 SCC 396 " *The whole 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.*" To paraphrase the famous opinion of Justice Blackmun of the US Supreme Court in *Regents of the University of California* v. *Bakke*, 438 US 265 (1978) just as you need to take account of race to ameliorate racism, you need to take account of social backwardness to ameliorate the historic inequalities that reservations seek to correct.

E. The Impugned Act fails the basic structure test laid down by this Hon'ble Court in *M Nagaraj* v. *Union of India*, (2006) 8 SCC 212 insofar as it removes all reference to backwardness and efficiency and in fact introduces the truncated criteria of poverty as the sole criteria for

upper class reservation. Introducing reservation for those who do not fall into backward classes creates an exception to equality unlike the reservations under 16(4) and 15(4) which are not an exception to equality but a manifestation of it. In *M Nagaraj*, the amendments under challenge were upheld because they did not alter the basic scheme of 15 and 16. Reservations that further empower persons who may not be socially and educationally backward turns the entire scheme on its head and is destructive of the Constitutional scheme as well as every idea of equality.

F. PEWS are not a homogenous 'class' as understood in the Constitution and thus cannot be the unit for reservation. "Social and/or educational backwardness" has to be considered in conjunction with poverty in order to determine a class. In a country such as India there are many different causes of poverty. What reservations seek to redress are historical or structural inequalities. However, reservations based on poverty alone violate equality as they treat unequals equally by failing to distinguish between structural poverty and poverty that is situational and non-systematic, which may be remedied by individual action, and for which *reservation* (based on the idea of ameliorating a lack of class representation in important sectors of society) is an irrational remedy.

G. Even assuming that poverty is a valid ground for reservation, specifically excluding backward classes from reservation goes against the very grain of reservation and converts it into a sort of poverty alleviation tool, which is completely contrary to its purpose. Deliberate exclusion of the backward would certainly be a violation of Articles 29(2), 15 and 16 of the Constitution being discriminatory against the

very people the constitution seeks to protect, and further entrenching hierarchies that this Constitution has always sought to annihilate. Even if poverty is valid as a sole determinant for reservation, denying such benefit to the backwards excludes those among the poor who need such reservations the most.

H. Sections 2 and 3 of the Impugned Act result in codifying discrimination and as such Constitutionally sanctioning extreme social stratification. From *NM Thomas* onwards, it has been abundantly clear that reservations for the backward classes are in furtherance of the principle of equality. However, by banning backward classes the Impugned Act excludes from the benefit of reservations a class that was denied representation for reasons of historic disability specifically in order to benefit more privileged classes. Since the object is to exclude rather than to include, the Amendment seeks to protect the strong against the weak and cannot in any way be deemed to be furthering substantive equality.

I. Even if it is assumed that the poor of the forward classes merit reservations over the backward classes, the way the Impugned Act works is to create a completely unequal structure for reservations. While reservation for the backward classes has to be justified by testing for social and educational backwardness, tests that are supposed to evolve perpetually, reservations for the PEWS need no such justification. While this Court has consistently held that backward class reservation must end when the class is no longer backward, PEWS reservation has no such end point and may continue in perpetuity as there will always be those who are poorer than others. Further, while

backwardness is properly determined by commissions appointed by the President or by the states, the Impugned Act leaves such determination to the Government of what constitutes economic disadvantage. In addition the presence of Article 335 of the Constitution would imply that while reservation of SC and ST candidates needs to be balanced against administrative efficiency, there is no such requirement of balancing for the PEWS. Thus, the immediate consequence of the Impugned Act is the creation of a dual structure for the backward and forward poor. They are separate and they are unequal, akin to a Jim Crow system that was struck down in *Brown v. Board of Education*. To pretend that PEWS and backward class poor are equal and thus both need reservation to protect them against each other 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.*

J. Understanding of substantive equality in the Indian Constitutional context has always been informed by the historical experience of inequality and in particular the hardship faced by the backward classes. Equal opportunities for all imply the same starting point which implies affirmative action for the backward who are so far behind that start point that they need a government knudge to reach such starting point. Privileges for those who are not backward does not further the cause of equality but in fact furthers the cause of inequality. Poverty as the sole criteria of reservation is alien to affirmative action in India and everywhere and raises issues that need to be addressed. For example, For the "poor", can it even be tested whether the poor are adequately

represented? What is the percentage of the rich and the percentage of poor who want government jobs? The dangers of representation based on poverty alone have been elaborately dealt with by this Hon'ble Court in para 207 and 208 of the concurring opinion of Justice S R Pandian in *Indra Sawhney*. Whereas there is plenty of sociological, historical and legal precedent for special provisions for the socially and educationally backward even in our Constitution, there is nothing for poverty alone. In fact this Hon'ble Court has specifically held that reservations are not meant for poverty alleviation but are intended for adequate sharing of power. Viewed in this context reservation for the forward poor is entirely distinct from the backward poor and this special reservation, insofar as it does not work towards including those in the power structure who have been wrongfully denied their place, is in violation of the very principle of equality and thus of the basic structure of the Indian Constitution.

K. The entire history of litigation on reservation has been themed on the identification of rational criteria for backwardness and reservation. Reservations based on improper criteria for backwardness, such as income alone, have been consistently struck down as violating equality. The removal of the requirement of backwardness negates decades of reservation jurisprudence and makes reservations entirely dependent upon where the Government chooses to define "poverty" or "economic disadvantage." The creation of a new species of reservation to magnify one of the components of backwardness, namely poverty, and exclude all others can be viewed as an attempt to sidestep the rigorous criteria laid down in *Indra Sawhney* and *Ram Singh* that flows directly from the

Constitutional principle of equality. This Trojan's Horse in Articles 15 and 16 could possibly result in what has been termed as a "fraud on the Constitution" by which criteria that forms an integral part of equality is simply read out of the Constitution or rendered ineffective by executive action. Further, adequate representation was the check for public employment under Article 16(4) (other than for SCs and STs). It is not clear what such a check will be on 16(6) and to that extent, it completely makes equality ceases to be a right and a privilege to be determined and rationed by the Government of the day.

L. The right to equality under the constitution has accumulated decades of progressive constitutional wisdom in its essence and the Impugned Act seeks to turn that understanding on its head as it creates special high-speed bylanes and sidelanes of privilege to the exclusion of SCs, STs and SEBCs and OBCs, virtually authorising a constitutionally sanctioned form of untouchability.

M. That since *Golak Nath* & *Kesavananda* (1967 (2) SCR 762 & (1973) 4 SCC 225 respectively), a constitutional amendment is recognised as an exercise of 'public reason' and not merely of'public will'and that the manner in which the Bill for the Impugned Act was introduced and passed within two days without presentation or consideration of necessary evidence justifying the need for a sudden and hasty amendment to the chapter on fundamental rights, vitiates the Impugned Act for manifest arbitrariness, the right against which is guaranteed as part of the right to equality which is a basic feature of the Constitution.

N. That the Impugned Act suffers from the vice of manifest arbitrariness to the extent that :-

i. No justification exists for carving a separate class of PEWS, independent of their social and educational backwardness (SEDBCs) and/or centuries of oppression (in the case of SCs and STs), as if to suggest the latter has nothing to do with poverty in purely economic terms;

ii. No justification exists for excluding SCs, STs and SEDBCs from access to the PEWS quota even as all available evidence suggests that there is a strong positive correlation between social and educational backwardness and economic disadvantage (poverty).

iii. No justification exists for the arbitrary number of a maximum of 10% for PEWS;

iv. There is no rational relationship between the grounds on which beneficiaries are selected (economic criteria based on the *family* unit) and the nature of the benefit (reservations, which are based on the principle of inadequate *class* representation).

The Petitioners respectfully contend that the Impugned Act amends the chapter on the right to equality, the cornerstone of the Constitution's Preamble and its vision without being properly considered or debated by Parliament. The Petitioners contend that the Impugned Act is not only manifestly arbitrary and therefore a violation of the right to equality, but that it is destructive of basic structure inasmuch as it seeks to amend the chapter on the right to equality in disregard for the constitutional vision enshrined in the Preamble.

Hence this Writ Petition.

LIST OF DATES

26th January, 1950	Most provisions of the Constitution of India, 1950 came into force on 26th January, 1950 including the Part III of the Constitution.
1951	The Constitution (First Amendment) Act , 1951 came into force. The said Act amended Article 15 to include Article 15(4).
1956	The Constitution (Seventh Amendment) Act, 1956 came into force which made a minor consequential amendment in Article 16 as part of the reorganisation of States.

1962 This Hon'ble Court decided the case of *General Manager, S. Rly v. Rangachari* AIR 1962 SC 36 holding that the Article 14, 15 and 16 to be read together to determine the underlying policy of advancement of socially and educationally backward classes of citizens and therefore the word "posts" in 16(4) also applied to promotions.

1963 In, *M R Balaji v. State of Mysore* AIR 1963 SC 649, a Constitution Bench of this Hon'ble Court, *inter alia*, held that:

1)15(4) is a proviso to 15(1) and 29(2).

2)That the State has a duty to demonstrate social and educational backwardness of the class that it seeks to make provisions like reservations.

3) That reservations should be capped at 50% the posts.

4) That any provision made under Article 15(4) need not be a legislation, it can also be an executive order.

1964 In, *T. Devadasan v Union of India* AIR 1964 SC 179, the scope of Article 16(4) was in dispute as to whether unfulfilled vacancies in the category of reserved posts could be carried forward and be treated as a separate class for the purpose of determining 50% limit as laid down by *Balaji* v. *Mysore*.

This Hon'ble Court by a majority held that :

1) The Carry-forward rule for reserved posts would be a contravention of the *Balaji* dictum and that;

3)Held that 16(4) is only a proviso to 16(1) and would have to be read as such.

Justice Subba Rao dissented on the point and held that 16(4) is an enabling provision and a special provision in furtherance of Article 16(1) in view of the underlying policy of advancement of backward classes and it cannot be read to be an exception to 16(1)..

1967 In *I.C. Golak Nath v. State of Punjab* (1967 SCR (2) 762), a 11-judge bench of this Hon'ble Court, by a majority of 6:5 held *inter alia* that Part III of the Constitution containing the charter of the Fundamental Rights could not be amended so as to take away or abridge the fundamental rights originally granted and as such, Article 368 did not envisage such an amendment.

1973 *Golak Nath*(supra) was overruled by a bench of 13 judges of this Hon'ble Court in *Kesavananada Bharati v State of Kerala* ((1973) 4 SCC 225). This Hon'ble Court, by a majority of 7:6 held that Article 368 contained the power to amend the Constitution including Part III, so long as such an amendment does not violate any basic features of the Constitution to the extent that it is destructive of the basic structure of parliament. This implied limitation on the amending power became henceforth known as "Basic Structure doctrine."

1976 In, *State of Kerala Vs N. M. Thomas* (1976) 2 SCC 310, a Constitution Bench of this Hon'ble Court upheld not only the relaxation in qualification criteria for SCs and STs considering the overall underlying policy of substantive equality and advancement of backward classes, particularly scheduled castes and scheduled tribes.

In the process, the Court went on to overrule *T.Devadasan* on the reading of Article 16(4) and held that 15(4) and 16(4) are only in furtherance of the equality guarantee in 14, 15(1) and 16(1) and in line with the overall constitutional policy of achieving equality of status an opportunity with special measures to backward classes, particularly SCs and STs.

1992 Government of India had begun to implement the Mandal Commission Report (which was prepared in 1980 and submitted to Parliament in 1982 and 1982) and issued Office Memoranda to the effect of providing reservations *inter alia* of 27% for socially and economically backward classes and a further 10% for other economically backward classes. These measures were challenged before this Hon'ble Supreme Court in *Indra Sawhney Vs. Union of India*, 1992 Supp. (3) SCC 217.

The Court therein, speaking through a majority of five judges among 9, *inter alia* held that :

a) That *N.M. Thomas* was correctly decided on the reading of Article 16(4). In other words, the understanding of the right to equality has to be guided and informed by substantive equality in addition to formal equality before the law.

b) That the reservation for Other Backward Castes as "Backward Class of Citizens" was held to be valid to the extent that a "creamy layer" among them were excluded and left it to the State to determine the final criteria for such a creamy layer after laying down guidelines in the interim.

c) That reservations based purely on Economic

Criteria are not valid and "Backwardness" in 16(4) primarily meant Social Backwardness and therefore struck down the 10% reservation for "Other Economically Backward" castes. (The Impugned Act however effectively attempts to neutralise this dictum.)

d) That the *Balaji* rule of 50% was a rule of caution and should not be exceeded except in exceptional circumstances.

e) Backwardness reference in Article 16(4) is only Social Backwardness and not "Social and Educational Backwardness" as required to be shown in Article 15(4).

f) SC/STs are a separate class qualifying as *most backward and among the backward classes* and that the State has no requirement to show adequacy or inadequacy of representation in reservations for SCs/STs. Further, no requirement to exclude creamy layer among SCs/STs as the Social Backwardness.

g) Reservations in promotions would be hit by the Creamy Layer principle and therefore invalid.

1995 By way of the Constitution (77th Amendment) Act, 1995, partly to reverse the effects of the *Indra Sawhney (I)* Ruling, Article 16(4A)was inserted in the Constitution permitting reservation in promotions for those Scheduled Castes and Scheduled Tribes who are, in the State's opinion, not adequately represented in the services under the State. .

2000 By way of the Constitution (81st Amendment) Act, 2000,Article 16(4B) is inserted in the Constitution. This amendment was necessitated to further partly reverse the effects of the *Indra Sawhney (I)* ruling and to allow for a Carry-Forward of unfulfilled vacancies among those posts reserved for SCs and STs.

2002 The Constitution (85th Amendment Act), 2002 came into force that further amended Clause 4A of Article 16 to also enabled the State to reserve posts, with consequential seniority in the case of promotions, to citizens belonging to SCs and STs.

2006 The Constitution (93rd Amendment) Act, 2005 (to partly reverse the effect of *T.M.A Pai* (2002) 8 SCC 481) came into force that further amended Article 15 that enabled the State to make special provisions for SEDBCs (or

OBCs), SCs and STs in the matters of admissions to educational institutions.

2006/07 In *M.Nagaraj v. State of Karnataka*, (2006) 8 SCC 212, inter alia, the 77th, 81st and 85th Amendment Acts to the Constitution was challenged on the touchstone of Basic Structure. A constitution bench of this Hon'ble Court upheld each of the amendments.

2007 In *I.R Coelho v. State of TamilNadu*, 2007 (2) SCC 1, a nine-judge bench of this Hon'ble Court *inter-alia* upheld the decision in *M Nagaraj* as a correct exposition of the basic structure doctrine.

Also another Constitution Bench of this Hon'ble Court in *Ashok Kumara Thakur v. State of Uttar Pradesh*,(2008) 6 SCC 1 tested the 93rd Amendment Act on the touchstone of Basic Structure and upheld it.

26.09.2018 A constitution Bench of this Hon'ble Court in *Jarnail Singh v. Lachhmi Narain Gupta* (2018) 10 SCC 396 reconsidered the questions raised in *M.Nagaraj* but refused to refer the questions to a larger bench holding that the unanimous constitution bench judgment in *M.Nagaraj* had stood the test of time even as it invalidated a portion in the said judgment that laid down that even for SCs/STs, reservation provisions must be

based on proof of inadequacy of the representation in the services.

08.01.2019 The Bill for the Constitution (103rd) Amendment Act, i.e. the Impugned Act was introduced and passed in Lok Sabha with requisite special majority to effect a constitutional amendment as mandated under Article 368.

09.01.2019 The Bill for the Constitution (103rd) Amendment Act, i.e. the Impugned Act, which was passed in Lok Sabha was passed in Rajya Sabha with the requisite special majority.

12.01.2019 The Impugned Act received the President's assent.

14.01.2019 The Impugned Act came into force vide gazette notification dt. 14.01.2019, as No. 194 in PART II—Section 3—Sub-section (ii) of the Extraordinary Gazette. The Impugned Act in Section 2 amended Article 15 by adding Article 15(6) thereto. Section 3 of the Impugned Act also amended Article 16 by adding Article 16(6) thereto.

24.01.2019 Hence this Writ Petition.

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION (CIVIL) NO. _____ OF 2016
(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)
[Public Interest Litigation]

BETWEEN

1. Dr.Thol. Thirumavalavan


2. Dr. D. Ravikumar


…Petitioners

Versus

Union of India
Throughits Secretary
Ministry of Law and Justice
Shastri Bhawan,
New Delhi-110001

…Respondent

WRIT PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA

TO

THE HON'BLE THE CHIEF JUSTICE OF INDIA AND HIS OTHER COMPANION JUSTICES OF THE HON'BLE THE SUPREME COURT OF INDIA.

THE HUMBLE PETITION OF THE PETITIONERS ABOVENAMED

MOST RESPECTFULLY SHOWETH:

A. Parties

1. The Petitioners are citizens of India who have preferred this Article 32 Petition, in the nature of public interest litigation, praying *inter alia*for a declaration that the Constitution (One Hundred And Third) Amendment Act, 2019 (hereinafter the Impugned Act), that was passed in Parliament on 09.01.2019 and received the assent of the President of India on 12.01.2019, as unconstitutional and *ultra-vires* Article 368 of the Constitution of India for being destructive of the 'Basic Structure' of the Constitution of India.

   A brief profile of the Petitioners herein is as follows.

   (i) Petitioner No.1 is the President of Vidudalai Chiruthaigal Katchi (VCK), a political party registered with the Election Commission of India and has been contesting elections since the early 1990s. He was a member of the Fifteenth Lok Sabha until May 2014. He is [redacted] and [redacted] His [redacted]

[redacted]

(ii) Petitioner No.2 is a writer by occupation. He is the General Secretary of VCK. His [redacted] His [redacted]

1A. The Petition seeks a declaration of an Act of Parliament amending the Constitution to be void and approaching a constitutional judicial forum such as this Hon'ble Court is the only remedy available under the law and therefore the Petitioners have not approached any authority for the reliefs prayed for herein.

2. The sole Respondent herein is the Union of India.

3. The Constitution (103rd Amendment) Act, 2019 (hereinafter, the "Impugned Act") came into force 14.01.2019 on publication of a notification to that effect in the Official Gazette, following the President's assent accorded on 12.01.2019 to a Bill for the same that was introduced in the Lok Sabha on 08.01.2019 and passed the same day and was later passed in the Rajya Sabha on 09.01.2019.

   A true copy of the Constitution (103rd Amendment) Act, 2019 as published in the Official Gazette is annexed herewith and marked as **ANNEXURE-P-1** (From Pgs ___ to ___).

   A true copy of the Gazette Notification dt. 14.01.2019 bringing into force the Constitution (103rd Amendment) Act, 2019 is annexed herewith and marked as **ANNEXURE-P-2** (From Pgs ___ to ___).

B. BACKGROUND & FACTS IN BRIEF

4. The Impugned Act *inter- alia* amends Articles 15 and 16 to provide in effect up to 10% reservation in educational institutions and for posts in public employment to economically backward citizens who already are not entitled to any reservation under Schedule Castes (SC), Schedule Tribes (SC), Other Backward Castes (OBC) or Socially & Educationally Backward Classes (SEBCs). The said Articles find place in the Constitution in the chapter titled "Right to Equality" in Part III of the Constitution that forms the charter of fundamental rights.
5. The Right to Equality is not merely a Fundamental Right, but is protected as a Basic Feature of the Constitution.
6. Articles 15 and 16 of the Constitution have been amended before. The history of amendments to Article 15, and 16, the concept of equality and the essential value behind the modern constitutional understanding of equality is as described herein.
7. Most provisions of the Constitution of India, 1950 came into force on 26th January, 1950 including the Part III of the Constitution. Articles 15 and 16 of the Constitution of India are extracted herein below:

> **15.** (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
> (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—
> (*a*) access to shops, public restaurants, hotels and places of public entertainment; or
> (*b*) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
> (3) Nothing in this article shall prevent the State from making any special provision for women and children.
>
> **16.** (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.
(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under any State specified in the First Schedule or any local or other authority within its territory, any requirement as to residence within that State prior to such employment or appointment.
(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.
(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

8. Thereafter, in 1951, The Constitution (First Amendment) Act , 1951 came into force. The said Act amended Article 15 as follows. (The change is emphasised in bold- italics hereinbelow).

15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—
(*a*) access to shops, public restaurants, hotels and places of public entertainment; or
(*b*) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
(3) Nothing in this article shall prevent the State from making any special provision for women and children.
(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.

9. Thereafter, in 1956, The Constitution (Seventh Amendment) Act, 1956 came into force which made a minor consequential amendment in Article 16 as part of the reorganisation of States.

10. In 1962, *General Manager, S. Rly v. Rangachari* AIR 1962 SC 36 was among the first cases to come before this Hon'ble Court on the interpretation of Article 16. Therein, a 3:2 majority of a constitution bench of this Hon'ble Court, speaking through Gajendragadkar CJ held

that the Article 14, 15 and 16 to be read together to determine the underlying policy of advancement of socially and educationally backward classes of citizens and therefore the word “posts” in 16(4) also applied to promotions and upheld State circulars providing for reservation in promotions to SCs/STs.

11. Thereafter, in *M.R. Balaji v. State of Mysore* AIR 1963 SC 649, a Constitution Bench of this Hon’ble Court, *inter alia*, held that:

1)15(4) is a proviso to 15(1) and 29(2).

2)That the State has a duty to demonstrate social and educational backwardness of the class that it seeks to make provisions like reservations.

3) That reservations should be capped at 50% the posts.

4) That any provision made under Article 15(4) need not be a legislation, it can also be an executive order.

12. In, *T. Devadasan v Union of India* AIR 1964 SC 179, the scope of Article 16(4) was in dispute. The issue was whether unfulfilled vacancies in the category of reserved posts could be carried forward and be treated as a separate class for the purpose of determining 50% limit as laid down by *Balaji*’s case. This Hon’ble Court by a majority held that :

1) The Carry-forward rule for reserved posts would be a contravention of the *Balaji* dictum and that;

3)Held that 16(4) is only a proviso to 16(1) and would have to be read as such.

Then Justice Subba Rao dissented on the point and held that 16(4) is an enabling provision and a special provision in furtherance of Article 16(1) in view of the underlying policy of advancement of backward classes and it cannot be read to be an exception to 16(1). This view would later find resonance with the majority in *N.M. Thomas* case, and was reaffirmed in *Indra Sawhney (I).*

13. In 1967, in *I.C. Golak Nath v. State of Punjab* (1967 SCR (2) 762), a 11-judge bench of this Hon'ble Court, by a majority of 6:5 held *inter alia* that Part III of the Constitution containing the charter of the Fundamental Rights could not be amended so as to take away or abridge the fundamental rights originally granted and as such, Article 368 did not envisage such an amendment.

14. Thereafter, in 1973, *Golak Nath* (supra) was overruled by a bench of 13 judges of this Hon'ble Court in *Kesavananada Bharati v State of Kerala*((1973) 4 SCC 225). This Hon'ble Court, by a majority of 7:6 held that Article 368 contained the power to amend the Constitution including Part III, so long as such an amendment does not violate any basic features of the Constitution to the extent that it is destructive of the basic structure of parliament. This implied limitation on the amending power became henceforth known as "Basic Structure doctrine." This Hon'ble Court stopped short of exhaustively defining the Basic Structure of the Constitution, allowing instead a case-by-case evolution of the doctrine.

15. Thereafter, in *State of Kerala Vs N. M. Thomas* (1976) 2 SCC 310, a Constitution Bench of this Hon'ble Court upheld not only the relaxation in qualification criteria for SCs and STs considering the overall

underlying policy of substantive equality and advancement of backward classes, particularly scheduled castes and scheduled tribes. In the process, the Court went on to overrule the majority in *T.Devadasan* on the reading of Article 16(4) and held that 15(4) and 16(4) are only in furtherance of the equality guarantee in 14, 15(1) and 16(1) and in line with the overall constitutional policy of achieving equality of status an opportunity with special measures to backward classes, particularly SCs and STs

16. Thereafter, circa. 1992, Government of India had begun to implement the Mandal Commission Report (which was prepared in 1980 and submitted to Parliament in 1982 and 1982) and issued Office Memoranda to the effect of providing reservations *inter alia* of 27% for socially and economically backward classes and a further 10% for other economically backward classes. These measures were challenged before this Hon'ble Supreme Court in *Indra Sawhney v. Union of India*, 1992 Supp. (3) SCC 217.The Court therein, speaking through a majority of five judges among 9, *inter alia* held:

a) That *N.M. Thomas* was correctly decided on the reading of Article 16(4). In other words, the understanding of the right to equality has to be guided and informed by substantive equality in addition to formal equality before the law.

b) That the reservation for Other Backward Castes as "Backward Class of Citizens" was held to be valid to the extent that a "creamy layer" among them were excluded and left it to the State to determine the final criteria for such a creamy layer after laying down guidelines in the interim.

c) That reservations based purely on Economic Criteria are not valid and "Backwardness" in 16(4) primarily meant Social Backwardness and therefore struck down the 10% reservation for "Other Economically Backward" castes. (The Impugned Act however effectively attempts to neutralise this dictum.)

d) That the *Balaji* rule of 50% was a rule of caution and should not be exceeded except in exceptional circumstances.

e) That Backwardness reference in Article 16(4) is only Social Backwardness and not "Social and Educational Backwardness" as required to be shown in Article 15(4).

*f)*That SC/STs are a separate class qualifying as *most backward and among the backward classes* and that the State has no requirement to show adequacy or inadequacy of representation in reservations for SCs/STs. Further, no requirement to exclude creamy layer among SCs/STs as the Social Backwardness.

g) That reservations in promotions would be hit by the Creamy Layer principle and therefore invalid.

17. Thereafter, by way of the Constitution (77th Amendment) Act, 1995, partly to reverse the effects of the *Indra Sawhney (I)* Ruling, Article 16(4A) was inserted in the Constitution permitting reservation in promotions for those Scheduled Castes and Scheduled Tribes who are, in the State's opinion, not adequately represented in the services under the State. Article 16 as amended by the said Act stood as follows.

> **16.** (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
> (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

> (3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.
> (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.
>
> ***(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.***
>
> (5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

18. Thereafter,in 1999, in *Indra Sawhney v. Union of India and Ors*., (2000) 1 SCC 168 (*Indra Sawhney (II)),* this Hon'ble Court summarised the findings of Indra Sawhney (I) and went on to hold:

a) That *Indra Sawhney (I),* on the question of exclusion of the ―creamy layer from the backward classes, there was agreement among eight out of the nine learned Judges of this Court. There were five separate judgments in this behalf which required the creamy layer to be identified and excluded.

b) As the creamy layer in the backward class is to be treated at par with the forward classes and is not entitled to benefits of reservation, it is obvious that if the creamy layer is not excluded, there will be discrimination and violation of Articles 14 and 16(1) inasmuch as equals (forwards and creamy layer of backward classes) cannot be treated unequally. Again, non-exclusion of creamy layer will also be violative of Articles 14, 16(1) and 16(4) of the Constitution of India

since unequals (the creamy layer) cannot be treated as equals, that is to say, equal to the rest of the backward class.

19. Thereafter, by way of the Constitution (81st Amendment) Act, 2000, Article 16(4B) was inserted in the Constitution. This amendment was necessitated to further partly reverse the effects of the *Indra Sawhney (I)* ruling and to allow for a Carry-Forward of unfulfilled vacancies among those posts reserved for SCs and STs. Article 16 as amended by the said Act stood as follows.

> **16.** (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
> (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.
> (3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territoryprior to such employment or appointment.
> (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.
>
> (4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.
>
> ***(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year***
>
> (5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

20. Thereafter, the Constitution (85th Amendment Act), 2002 came into force that further amended Clause 4A of Article 16 to also enabled the State to

reserve posts, with consequential seniority in the case of promotions, to citizens belonging to SCs and STs. This was purportedly done to reverse the rulings in a series of cases culminating in *M G Badappanvar Vs State of Karnataka* 2001(2) SCC 666 that struck down 16(4A) promotions that were made with a recognition of consequential seniority. As a result of the said Amendment, Article 16 stood as follows.

> **16.** (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
> (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.
> (3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territoryprior to such employment or appointment.
> (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.
>
> (4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, ***with consequential seniority***, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.
>
> (4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.
>
> (5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

21. Thereafter, the Constitution (93rd Amendment) Act, 2005 (to partly reverse the effect of *T.M.A Pai* (2002) 8 SCC 481) came into force that further amended Article 15 that enabled the State to make special provisions for SEDBCs (or OBCs), SCs and STs in the matters of

admissions to educational institutions. Article 15, following the said Amendment stood thus.

> **15.** (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
> (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—
> (*a*) access to shops, public restaurants, hotels and places of public entertainment; or
> (*b*) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
> (3) Nothing in this article shall prevent the State from making any special provision for women and children.
> (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.
>
> ***(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.***

22. Thereafter, in *M. Nagaraj v. State of Karnataka*, (2006) 8 SCC 212, inter alia, the 77th, 81st and 85th Amendment Acts to the Constitution was challenged on the touchstone of Basic Structure. A constitution bench of this Hon'ble Court upheld each of the amendments and in the process deepened the understanding of equality as a basic feature of the Constitution

23. Further, again in 2007, In *I.R Coelho v. State of Tamil Nadu*, 2007 (2) SCC 1, a nine-judge bench of this Hon'ble Court considered and exposited on the Basic Structure doctrine and inter alia held that with the advent of the Basic Structure doctrine, the essence and the value behind the rights recognised under the Constitution are as much protected and justiciable as well as the rights themselves. It also went on to hold that

many of the rights such as the right to equality and the right to dignity are inherent in human beings and that the Constitution has to be interpreted in a manner that recognises the progressively widening scope of each of the fundamental rights. This view would later find reaffirmation in another nine-judge bench ruling of this Hon'ble Court in *Justice (Retd.) Puttaswamy v. Union of India* (2017) 10 SCC 1.

24. Thereafter, another Constitution Bench of this Hon'ble Court in *Ashok Kumara Thakur v. State of Uttar Pradesh,* (2008) 6 SCC 1 tested the 93rd Amendment Act on the touchstone of Basic Structure and upheld it as not being violative of basic structure as far as the special provisions were still based on overall backwardness.

25. Recently on 26.09.2018, Another constitution Bench of this Hon'ble Court in *Jarnail Singh v. Lachhmi Narain Gupta* (2018) 10 SCC 396 reconsidered the questions raised in *M.Nagaraj* but refused to refer the questions to a larger bench holding that the unanimous constitution bench judgment in *M. Nagaraj* had stood the test of time even as it invalidated a portion in the said judgment that laid down that even for SCs/STs, reservation provisions must be based on proof of inadequacy of the representation in the services. The invalidation was because that was directly contrary to the nine-judge bench dictum in *Indra Sawhney (I).*

26. *Jarnail Singh* further clarified that the observation by Balakrishnan CJ in *Ashok Kumara* that 'Creamy Layer' was only a mechanism of identification and not flowing from the larger principle of equality was not a binding one and that the previous constitution bench judgments that clearly enunciated how the exclusion of creamy layer was certainly based

on unequals to not be treated equally, which is indeed a larger principle of equality.

27. Each of the amendments to Articles 15 and 16 and the judicial interpretations of those amendments and application of them have deepened the understanding of the right to equality as a basic feature of the Constitution and the "Backwardness" understood as social backwardness as the centrality of affirmative action including reservations.

28. The Impugned Act seeks to turn the jurisprudence of equality on its head as it embarks on protecting the strong against the weak and provides for a form of present-day untouchability as it seeks to exclude Scheduled Castes, Scheduled Tribes and other socially backward groups from the newly carved reservation.

29. It is submitted that poverty is not independent of social backwardness and that the latter often leads to poverty rather than *vice versa*. Further, the Backward classes including the Scheduled Castes and Scheduled Tribes and yet to see complete social justice and still remain inadequately represented both in state services as well as participation in higher education and the republic is no whereat a point where a reverse-reverse-discrimination could be contemplated and provided for. The Petitioners crave liberty to file additional documents at a later stage in support of and to buttress these submissions.

30. It is therefore submitted that the Impugned Act and Sections 2 and 3 to be be struck down as being violative of the Constitution of India on the following grounds each of which are taken without prejudice to one another and cumulatively. The Petitioners also crave liberty to urge

additional grounds at a later stage during the proceedings in this Writ petition. It is submitted that the amendment effected by Sections 2 and 3 of the Impugned Act are substantially similar although in respect of different Articles namely and respectively 15 and 16, Petitioners submit that the grounds urged generally or against either of the Sections may be read as having been urged against the other Section as well, unless otherwise stated.

C.GROUNDS

A. **BECAUSE** the Impugned Act violates the basic structure of the Constitution, as it is entirely at odds with the principle of equality enshrined in the Preamble and as contained *inter-alia* in Articles 14, 15 and 16 of the Constitution.

B. **BECAUSE** the right to equality, and more particularly, substantive equality as contained in Articles 14,15,16, 17, and 18 (collectively titled "the Equality Code" is a basic feature of India's Constitution. The promises of "*social, economic and political justice for all*"; "*equality of status and opportunity for all*" and of "*dignity of the individual*" which are contained in the Preamble inform, guide and enrich the understanding of the right to equality under the Indian Constitution

C. **BECAUSE** the right against non-discrimination on the grounds of caste, sex, race, religion, place of birth etc is an essential part of the right to equality and is equally a Basic Feature of the Constitution.

D. BECAUSE affirmative action including reservation is permissible under the Constitution only to the extent that it furthers substantive equality and not when it merely creates an exception to the strict non-discrimination guarantee. The Impugned Act creates an unconstitutional and unconscionable exception to the non-discrimination guarantee and denudes the right to equality of its vitality.

E. BECAUSE, more specifically, a perusal of the pre-Constitutional discourse on reservations, the Constituent Assembly Debates, and the text of the provisions of the Equality Code, reveals that, at its deepest and most basic level, the Equality Code of the Indian Constitution balances two cardinal principles: the principle that every individual must be treated impartially and equally (and therefore, the guarantee of equal treatment to all persons and non-discrimination on grounds of personal characteristics (such as race, gender, caste etc.) on the one hand, and the understanding that *substantive equality* requires the legislature to take into account structural and institutional barriers that have been thrown up *on the bases of group membership*, on the other. The Equality Code therefore mandates that the fundamental right of the individual to be treated as an individual is combined with the fundamental imperative that for equality to be genuine and substantive, group or class-based disadvantage must, in certain circumstances, be taken into account. This understanding of equality is a basic feature of the Constitution. It is respectfully submitted that the 103rd Amendment damages and destroys this carefully wrought scheme

by making "economic backwardness" – calculated on the basis of *individual* or (at best) *family-based* criteria – as a ground for reservations.

F. BECAUSE Reservations without reference to "backwardness" violate the cardinal principle of equality as contained in the Constitution of India. Historically and doctrinally, reservations based solely on economic criteria do not further the cause of substantive equality. Since purely economic criteria ignore social backwardness, such reservations do nothing to ameliorate the backwardness of the backward classes, which has been a result of centuries of structural and systematic oppression and denial of rights.

(a) This was the consistent understanding in pre-Constitutional times. The concept of reservations was introduced in the late nineteenth century and at the beginning of the 20th century in various princely States, and its rationale was always to ameliorate the structural and institutional barriers that had been thrown up before various *groups or classes*, and that had denied them equal participation and representation in key sectors of society. In the late 1920s, J.H. Hutton (the Census Commissioner) and the Starte Committee, in their review of classes that were in need of affirmative assistance, specifically pointed to instances of structural and group-

based oppression, such as economic and social boycotts, that were responsible for this position.

(b) This understanding continued into constitutional times. In the Constituent Assembly Debates, Dr. Ambedkar while discussing what eventually became Article 16(4) stated (1948-49) Volume 7 page 701-02:

> "Then we have quite 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 … that no better formula could be produced than the one that is embodied in sub-clause (3) of Article 10 of the Constitution; they will find that the view of those who believe and hold that there shall be equality of opportunity, has been embodied in sub-clause (1) of Article 10. It is a generic principle…. Supposing for instance, we are to concede in full the demand of those communities who have not been so far employed in the public services to the fullest extent, what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity…. I am sure they will agree that unless you use some such qualifying phrase as 'backward' the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain. That I think, if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word 'backward' which, I admit, did not originally find a place in the fundamental right in the way in which it was passed by this Assembly. (Emphasis supplied)

(c) Article 15(4) was inserted in 1951 as part of the 1st Amendment post the decision of this Hon'ble Court in *State of Madras* v. *Chamapakam Dorairajan,* AIR 1951 SC 226: 1951 SCR 525. Then Prime Minister Nehru introduced the Constitutional Amendment stating:

> "We have to deal with the situation where for a variety of causes for which the present generation is not to blame, the past has the responsibility, there are groups, classes, individuals, communities, if you like, who are backward. They are backward in many ways — economically, socially, educationally;

> sometimes they are not backward in one of these respects and yet backward in another. The fact is therefore that if we wish to encourage them in regard to these matters, we have to do something special for them …. Therefore one has to keep a balance between the existing fact as we find it and the objective and ideal that we aim at." (Emphasis supplied)

In fact, an amendment proposed by K.T. Shah to include economic criteria was specifically rejected, with Nehru noting that "'Socially' is a much wider word including many things and certainly including economically".

(d) In *Indra Sawhney*'s case, concurring Justice S R Pandian explained the reasoning as:

> 143... The very object of Article 16(4) is to ensure equality of opportunity in matters of public employment and give adequate representation to those who have been placed in a very discontent position from time immemorial on account of sociological reasons. To put it differently, the purpose of clause (4) is to ensure the benefits flowing from the fountain of this clause on the beneficiaries — namely the Backward Classes — who in the opinion of the Constitution makers, would have otherwise found it difficult to enter into public services, competing with advanced classes and who could not be kept in limbo until they are benefited by the positive action schemes and who have suffered and are still suffering from historic disabilities arising from past discrimination or disadvantage or both. However, unfortunately all of them had been kept at bay on account of various factors, operating against them inclusive of poverty. They continue to be deprived of enjoyment of equal opportunity in matters of public employment despite there being sufficient statistical evidence in proof of manifest imbalance in Government jobs which evidence is sufficient to support an affirmative action plan. If candidates belonging to SEBCs (characterised as mediocre by anti-reservationists), are required to enter the open field competition, along with the candidates belonging to advanced communities without any preferential treatment in public services in their favour and go through a rigid test mechanism being the highly intelligence test and professional ability test as conditions of employment, certainly those conditions would operate as "built-in head winds" for SEBCs. It is, therefore, in order to achieve equality of employment opportunity, clause (4) of Article 16 empowers the State to provide permissible reservation to SEBCs in the matters of appointments or posts as a remedy so as to set right the manifest imbalance in the field of public employment.
>
> **146.** The basic policy of reservation is to off-set the inequality and remove the manifest imbalance, the victims of which for bygone generations lag far behind and demand equality by special preferences and their strategies. Therefore, a comprehensive methodological approach encompassing jurisprudential, comparative, historical and anthropological conditions is necessary. Such considerations raise controversial issues transcending the routine legal exercise because certain social groups who are inherently unequal and who have fallen victims of societal discrimination require compensatory treatment. Needless to emphasise that equality in fact or

> substantive equality involves the necessity of beneficial treatment in order to attain the result which establishes an equilibrium between two sections placed unequally.

(e) The same view also formed part of the calculus of the dissenting judges in *Indra Sawhey*'s case. Dissenting Justice Thommen in para's 250-255 of *Indra Sawhney* also states that the *raison d'etre* of reservation is upliftment of the backward classes to bring them up to the standard of the rest of the population. His opinion further provides:

> **273.** What is sought to be identified for the purpose of Article 15(4) or Article 16(4) is a socially and educationally backward class of citizens. A class means 'a homogeneous section of the people grouped together because of certain likeliness or common traits, and who are identifiable by some common attributes'. *TrilokiNath*v. *State of J & K(II)* [(1969) 1 SCR 103, 105 : AIR 1969 SC 1 : (1970) 1 LLJ 629] . They must be a class of people held together by the common link of backwardness and consequential disabilities. What binds them together is their social and educational backwardness, and not any one of the prohibited factors like religion, race or caste. What chains them, what incapacitates them, what distinguishes them, what qualifies them for favoured treatment of the law is their backwardness: their badges of poverty, disease, misery, ignorance and humiliation. It is conceivable that the entire caste is a backward class. In that event, they form a class of people for the special protection of Articles 15(4) and 16(4), not by reason of their caste, which is merely incidental, but by reason of their social and educational backwardness which is identified to be the result of prior or continuing discrimination and its ill effects and which is comparable to that of the Scheduled Castes and the Scheduled Tribes. It is also conceivable that a class of people may be identified as backward without regard to their caste, provided backwardness of the nature and degree mentioned above binds them as a class. *M.R. Balaji* [1963 Supp 1 SCR 439 : AIR 1963 SC 649] at pp. 458, 474; *Minor P. Rajendran* v. *State of Madras* [(1968) 2 SCR 786, 790 : AIR 1968 SC 1012] ; *State of A.P.* v. *P. Sagar*[(1968) 3 SCR 595 : AIR 1968 SC 1379] ; *A. Peeriakaruppan* v. *State of T.N.*[(1971) 1 SCC 38, 48 : (1971) 2 SCR 430, 443] ; *State of A.P.* v. *U.S.V. Balram*[(1972) 1 SCC 660 : (1972) 3 SCR 247] ; *Triloki Nath* v. *State of J & K(II)* [(1969) 1 SCR 103, 105 : AIR 1969 SC 1 : (1970) 1 LLJ 629] ; *State of U.P.* v. *Pradip Tandon*[(1975) 1 SCC 267 : (1975) 2 SCR 761, 766] ; *K.S. Jayasree* v. *State of Kerala*[(1976) 3 SCC 730 : (1977) 1 SCR 194] ; *Akhil BharatiyaSoshitKaramchari Sangh (Railway)* v. *Union of India* [(1981) 1 SCC 246, 289 : 1981 SCC (L&S) 50 : (1981) 2 SCR 185, 234] and *R. Chitralekha* v. *State of Mysore* [(1964) 6 SCR 368, 388 : AIR 1964 SC 1823] .

(f) In his dissenting opinion Justice Kuldip Singh described the purpose as understood in the Constituent Assembly Debates as under:

> **356.** Constituent Assembly Debates Volume 7 (1948-1949) pages 684 to 702 contains the speeches of stalwarts like R.M. Nalavade, Dr Dharma Prakash, Chandrika Ram, V.I. Muniswamy Pillai, T. Channiah, Santanu Kumar Das, H.J. Khandakar, Mohd. Ismail Sahib, Hukum Singh, K.M. Munshi, T.T. Krishnamachari, H.V. Kamath and Dr B.R. Ambedkar on the draft Article 10(3) [corresponding to Article 16(4)]. In a nutshell the discussion projected the following viewpoints:
>
> (1) The original draft Article 10(3) did not contain the word 'backward'. The original Article only contained the expression "any class of citizens". The word "backward" was inserted by the Drafting Committee at a later stage.
>
> (2) The opinion of the members of the Constituent Assembly was that the word "backward" is vague, has not been defined and is liable to different interpretations, It was even suggested that ultimately the Supreme Court would interpret the same. Mr T.T. Krishnamachari even stated in lighter tone that the loose drafting of the chapter on fundamental rights would be a paradise for the lawyers.
>
> (3) Not a single member including Dr Ambedkar gave even a suggestion that "backward class" in the said Article meant "socially and educationally backward".
>
> (4) The purpose of Article 10(3) according to Dr Ambedkar was that "there must at the same time be a provision made for the entry of certain communities which have so far been outside the Administration … 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.
>
> (5) According to Dr Ambedkar the said Article was enacted to safeguard two things namely the principle of equality of opportunity and to make provision for the entry of certain communities which have so far been outside the Administration. Dr Ambedkar further stated:
>
> "Unless you use some such qualifying phrase as 'backward' the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain. That I think, if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word 'backward' which, I admit, did not originally find a place in the fundamental rights in the way in which it was passed by this Assembly."
>
> **357.** The reading of the Constituent Assembly Debates makes it clear that the only object of enacting Article 16(4) was to give representation to the classes of citizens who are inadequately represented in the services of the State. The word "backward" was inserted later on only to reduce the number of such classes who are inadequately represented in

the services of the State. The intention of the Framers of the Constitution, gathered from the Constituent Assembly Debates, leaves no manner of doubt that the two "classes" to be identified in the two articles are different and as such the expressions used in the two articles cannot mean the same. Article 16(4) enables the State to make reservations for any backward section of a class which is inadequately represented in the services of the State. Almost every member who spoke on the draft Article 10(3) in the Constituent Assembly complained that the word "backward" in the said Article was vague and required to be defined but in spite of that, Dr Ambedkar in his final reply did not say that the word "backward" meant "socially and educationally backward", rather he gave the explanation, quoted above which supports the reasoning that the word "backward" was inserted in Article 16(4) to identify the backward section of any class of citizens which is not adequately represented in the State services and for no other purpose.

(g) In his concurring opinion Justice Sawant writes:

> **419.** The objectives of reservation may be spelt out variously. As the U.S. Supreme Court has stated in different celebrated cases, viz., *Oliver Brown* v. *Board of Education of Topeka [347 US 483 : 48 L Ed 2d 873 (1954)]* ; *Spottswood Thomas Bolling* v. *C. Melvin Sharpe* [347 US 497 : 98 L Ed 884] ; *Marco DeFunis* v. *Charles Odegaard [40 L Ed 2d 164 : 416 US 312 (1974)]* ; *Regents of the University of California* v. *Allan Bakke [57 L Ed 2d 750 : 438 US 265 (1978)]* ; *H. Earl Fullilove* v. *Philip M. Klutznick [448 US 448 : 65 L Ed 2d 902 (1980)]* and *Metro Broadcasting Inc.*v. *Federal Communications Commission [58 IW 5053 (decided on June 27, 1990)]*rendered as late as on June 27, 1990, the reservation or affirmative action may be undertaken to remove the "persisting or present and continuing effects of past discrimination"; to lift the "limitation on access to equal opportunities"; to grant "opportunity for full participation in the governance" of the society; to recognise and discharge "special obligations" towards the disadvantaged and discriminated social groups"; "to overcome substantial chronic under-representation of a social group"; or "to serve the important governmental objectives". What applies to American society, applies *ex proprio vigore* to our society. The discrimination in our society is more chronic and its continuing effects more discernible and disastrous. Unlike in America, the all pervasive discrimination here is against a vast majority.

(h) In para 640 of the plurality opinion by Justice BP Jeevan Reddy, he opines while discussing the stigma attached to the lower castes in Hindu society:

> "They were conditioned to believe it. This mental blindfold had to be removed first. This was a phenomenon peculiar to this country. Poverty there has been — and there is — in every country. But none had the misfortune of having this social division — or as some call it, degradation — super-imposed on poverty. Poverty, low social status in Hindu caste system and the lowly occupation constituted — and do still constitute — a vicious circle. The Founding Fathers were aware of all this — and more."

(i) As per this Hon'ble Court in *Jarnail Singh* v. *Lachhmi Narain Gupta* (2018) 10 SCC 396 " *The whole 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.*"

(f) In *Triloki Nath* v. *State of J&K*, (1967) 2 SCR 265, this Hon'ble Court held that reservation based only on inadequate representation without reference to reservation was bad in law. It held:

> "7. ...The sole test of backwardness under Article 16(4), the argument proceeds, is the inadequacy of representation in the services under the State; that is to say, however advanced a particular class of citizens, socially and educationally, may be, if that class is not adequately represented in the services under the State, it is a backward class. This contention, if accepted, would exclude the really backward classes from the benefit of the provision and confer the benefit only on a class of citizens who, though rich and cultured, have taken to other avocations of life. It is, therefore, necessary to satisfy two conditions to attract clause (4) of Article 16, namely, (*i*) a class of citizens is backward i.e. socially and educationally, in the sense explained in *Balaji case* (*i*); and (*ii*) the said class is not adequately represented in the services under the State.

(g) As submitted above, and in summary, a perusal of the history of reservations in India, which began in Mysore state in the end of the nineteenth century, and in

other princely states such as Baroda before implementation in Madras Presidency in the 1920s also shows that the object had always been to remove backwardness and increase representation of the then called “depressed classes”.

Indeed if there is a golden thread to the concept of reservations in education and in public employment from its beginnings in the last 1800’s, to the discussions in the Constituent Assembly Debates as well as in the judgments of this Hon’ble Court, it has been that reservations are inextricably connected with *group* or *class* backwardness. It is also pertinent to note that these are not the only provisions of the Constitution that envisage special status for backward classes. Articles 38 and 46 containing Directive Principles of State Policy, as well as the Articles providing for reservation in political representation are also proof of the fact that amelioration of backwardness was a signal concern in our Constitution.

G. BECAUSE Sections 2 and 3 of the Impugned Act result in codifying discrimination and as such constitutionally sanctioning extreme social stratification, arguably a modern age form of untouchability. From *NM Thomas* onwards, it has been abundantly clear that reservations for the backward classes are in furtherance of the principle of equality. However, by banning backward classes the Impugned Act excludes from the benefit of reservations a class that was denied representation for reasons of historic disability

specifically in order to benefit more privileged classes. Since the object is to exclude rather than to include, the Amendment seeks to protect the strong against the weak and cannot in any way be deemed to be furthering substantive equality.

H. **BECAUSE** understanding of substantive equality in the Indian Constitutional context has always been informed by the historical experience of inequality and in particular the hardship faced by the backward classes. Equal opportunities for all imply the same starting point which implies affirmative action for the backward who are so far behind that start point that they need a government knudge to reach such starting point. Privileges for those who are not backward does not further the cause of equality but in fact furthers the cause of inequality. Poverty as the sole criteria of reservation is alien to affirmative action in India and everywhere and raises issues that need to be addressed. For example, For the "poor", can it even be tested whether the poor are adequately represented? What is the percentage of the rich and the percentage of poor who want government jobs? The dangers of representation based on poverty alone have been elaborately dealt with by this Hon'ble Court in para 207 and 208 of the concurring opinion of Justice S R Pandian in *Indra Sawhney*. Whereas there is plenty of sociological, historical and legal precedent for special provisions for the socially and educationally backward even in our Constitution, there is nothing for poverty alone. In fact this Hon'ble Court has specifically held that reservations are not meant for poverty alleviation but are intended for adequate sharing of

power. Viewed in this context reservation for the forward poor is entirely distinct from the backward poor and this special reservation, insofar as it does not work towards including those in the power structure who have been wrongfully denied their place, is in violation of the very principle of equality and thus of the basic structure of the Indian Constitution.

I. BECAUSE the entire history of litigation on reservation has been themed on the identification of rational criteria for backwardness and reservation. This Court has consistently struck down as unconstitutional reservations that are based on backwardness relying upon factors deemed improper by this Hon'ble Court.

(a) The issue of reservations reverberates through the law reports from the 1960's onwards. There is extensive debate on the criteria of what constitutes backwardness for the purpose of reservations. This Hon'ble Court has consistently considered various government orders, and committee reports to determine whether or not a class has been validly included in reservations or whether a government notification can withstand judicial scrutiny. A Caste only criteria was specifically rejected in *Balaji* v. *State of Mysore*, 1963 Supp 1 SCR 239 and income only criteria have been struck down in *Indra Sawhney*, 1992 Supp 3 SCC 217; *KC Vasanth Kumar* v *State of Karnataka*, 1985 Supp SCC 714; *Janaki Prasad* v. *State of J&K*, (1973) 1 SCC 420; *State of UP* v. *Pradip Tandon*, (1975) 1 SCC 267. The modern position remains that both poverty and caste are to

be considered while determining who all deserve reservation. In *Chitralekha* v. *State of Mysore*, (1964) 6 SCR 368 this Hon'ble Court laid down:

> **21.** We do not intend to lay down any inflexible Rule for the Government to follow. The laying down of criteria for ascertainment of social and educational backwardness of a class is a complex problem depending upon many circumstances which may vary from State to State and even from place to place in a State. But what we intend to emphasize is that under no circumstance a "class" can be equated to a "caste" though the caste of an individual or a group of individuals may be considered along with other relevant factors in putting him in a particular class. We would also like to make it clear that if in a given situation caste is excluded in ascertaining a class within the meaning of Article 15(4) of the Constitution, it does not vitiate the classification if it satisfied other tests.

(b) In *K.S. Jayasree* v. *State of Kerala* (1976) 3 SCC 730, this Hon'ble Court held:

> **22.** The problem of determining who are socially and educationally backward classes is undoubtedly not simple. Sociological and economic considerations come into play in evolving proper criteria for its determination. This is the function of the State. The Court's jurisdiction is to decide whether the tests applied are valid. If it appears that the tests applied are proper and valid the classification of socially and educationally backward classes based on the tests will have to be consistent with the requirements of Article 15(4). The commission has found on applying the relevant tests that the lower income group of the communities named in Appendix VIII of the report constitute the socially and educationally backward classes. In dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens. It is necessary to remember that special provision is contemplated for classes of citizens and not for individual citizens as such, and so, though the caste of the group of citizens may be relevant, its importance should not be exaggerated. If the classification is based solely on caste of the citizen, it may not be logical. Social backwardness is the result of poverty to a very large extent. Caste and poverty are both relevant for determining the backwardness. But neither caste alone nor poverty alone will be the determining tests. When the commission has determined a class to be socially and educationally backward it is not on the basis of income alone, and the determination is based on the relevant criteria laid down by the Court. Evidence and material are placed before the commission. Article 15(4) which speaks of backwardness of classes of citizens indicates that the accent is on classes of citizens. Article 15(4) also speaks of scheduled castes and scheduled tribes. Therefore, socially and educationally backward classes of citizens in Article 15(4) cannot be equated with castes. In *R. Chitralekha* v. *State of*

Mysore [(1964) 6 SCR 368 : AIR 1964 SC 1823] this Court said that the classification of backward classes based on economic conditions and occupations does not offend Article 15(4).

(c) In *Ram Singh* v. *Union of India* (2015) 4 SCC 697, this Court held:

> 54 ...Backwardness is a manifestation caused by the presence of several independent circumstances which may be social, cultural, economic, educational or even political. Owing to historical conditions, particularly in Hindu society, recognition of backwardness has been associated with caste. Though caste may be a prominent and distinguishing factor for easy determination of backwardness of a social group, this Court has been routinely discouraging the identification of a group as backward solely on the basis of caste. Article 16(4) as also Article 15(4) lays the foundation for affirmative action by the State to reach out the most deserving. Social groups who would be most deserving must necessarily be a matter of continuous evolution. New practices, methods and yardsticks have to be continuously evolved moving away from caste centric definition of backwardness. This alone can enable recognition of newly emerging groups in society which would require palliative action. The recognition of the third gender as a socially and educationally backward class of citizens entitled to affirmative action of the State under the Constitution in *National Legal Services Authority vs. Union of India* is too significant a development to be ignored. In fact it is a path finder, if not a path- breaker. It is an important reminder to the State of the high degree of vigilance it must exercise to discover emerging forms of backwardness. The State, therefore, cannot blind itself to the existence of other forms and instances of backwardness. An affirmative action policy that keeps in mind only historical injustice would certainly result in under-protection of the most deserving backward class of citizens, which is constitutionally mandated. It is the identification of these new emerging groups that must engage the attention of the State and the constitutional power and duty must be concentrated to discover such groups rather than to enable groups of citizens to recover "lost ground" in claiming preference and benefits on the basis of historical prejudice.
>
> **55.** The perception of a self-proclaimed socially backward class of citizens or even the perception of the “advanced classes” as to the social status of the “less fortunates” cannot continue to be a constitutionally permissible yardstick for determination of backwardness, both in the context of Articles 15(4) and 16(4) of the Constitution. Neither can backwardness any longer be a matter of determination on the basis of mathematical formulae evolved by taking into account social, economic and educational indicators. Determination of backwardness must also cease to be relative: possible wrong inclusions cannot be the basis for further inclusions but the gates would be opened only to permit entry of the most distressed. Any other inclusion would be a serious abdication of the constitutional duty of the State. Judged by the aforesaid standards we must hold that inclusion of the politically organised classes (such as Jats) in the List of Backward Classes mainly, if not solely, on the basis that on same parameters other

> groups who have fared better have been so included cannot be affirmed."

A perusal of the extensive case law in this field reveals that the determination of backwardness and the weight accorded to each component of backwardness has been of vital importance to determine the Constitutionality of the reservation in question. Indeed, it is important to note that these concepts are not variable or simply a few among many possible readings of the Constitution, but they flow *directly from the conception of equality as laid out in the equality code, and as submitted above.* In other words, social, group and class-based backwardness is *inextricably connected* with the vision of equality set out in the Constitution, and which is indisputably part of the basic structure. Thus, social backwardness remains the bedrock upon which the entire structure of reservations is based. The creation of a new species of reservation to magnify one of the components of backwardness, namely poverty, and exclude all others can be viewed as an attempt to sidestep the rigorous criteria laid down in *Indra Sawhney* and *Ram Singh* that flows directly from the Constitutional principle of equality, and cannot be departed from without destroying that constitutional principle itself. This Trojan's horse in Articles 15 and 16 could possibly result in what has been termed as a "fraud on the basic structure of the Constitution" by which criteria that forms an integral part of equality is simply read out of the Constitution or rendered ineffective – thereby damaging and destroying the basic structure.

J. BECAUSE Introducing poverty as the sole criteria breaks with the consistent view of the Supreme Court and the ideals of the founding fathers that backwardness can form the only basis of reservations.

(a) In *Balaji* v. *State of Mysore*, 1963 Supp. (1) 439, this Hon'ble Court held in para 21 that for purposes of Article 15(4),

> "it is necessary to remember that the concept of backwardness is not intended to be relative in the sense that any classes who are backward in relation to the most advanced classes of the society should be included in it. If such relative tests were to be applied by reason of the most advanced classes, there would be several layers or strata of backward classes and each one of them may claim to be included under Article 15(4)."

In Para 23 the Hon'ble Court held that both poverty and caste were relevant factors.

(b) In *Janki Prasad Parimoo* v. *State of J&K*, (1973) 1 SCC 420, this Hon'ble Court held in Para 24,

> "…In India social and educational backwardness is further associated with economic backwardness and it is observed in *Balaji case* referred to above that backwardness, socially and educationally, is ultimately and primarily due to proverty. But if proverty is the exclusive test, a very large proportion of the population in India would have to be regarded as socially and educationally backward, and if reservations are made only on the ground of economic considerations, an untenable situation may arise. Even in sectors which are recognised as socially and educationally advanced there are large pockets of poverty. In this country except for a small percentage of the population the people are generally poor — some being more poor, others less poor. Therefore, when a social investigator tries to identify socially and educationally backward classes, he may do it with confidence that they are bound to be poor. His chief concern is, therefore, to determine whether the class or group is socially and educationally backward. Though the two words "socially" and "educationally" are used cumulatively for the purpose of describing the backward class, one may find that if a class as a whole is educationally advanced it is generally also socially advanced because of the reformative effect of education on that class. The words "advanced" and "backward" are only relative terms — there being several layers or strata of classes, hovering between "advanced" and "backward", and the difficult task is which class can be recognised out of these several layers as been socially and educationally backward."

(c) In *Indra Sawhney*, reservation based on economic criteria alone was struck down as unconstitutional not only on account

of 16(4) but also on the touchstone of equality. As per Thommen, J in his dissent:

> **281.** Poverty by itself is not the test of backwardness, for if it were so, most people in this country would be in a position to claim reservation. *Janki Prasad Parimoo* v. *State of J & K* [(1973) 1 SCC 420 : 1973 SCC (L&S) 217 : (1973) 3 SCR 236, 252] . Reservation for all would be reservation for none, and that would be an ideal condition if affluence, and not poverty, was its basis. But unfortunately the vast majority of our people are not blessed by affluence but afflicted by poverty. Poverty is a disgrace to any nation and the resultant backwardness is a shame. But the Constitution envisages reservation for those persons who are backward because of identified prior victimisation and the consequential poverty. Poverty invariably results in social and educational backwardness. In all such cases the question to be asked, for the purpose of reservation, is whether such poverty is the result of identified historical or continuing discrimination. No matter what caused the discrimination and exploitation; the question is, did such inequity and injustice result in poverty and backwardness.
>
> **283.** Poverty reduces a man to a state of helplessness and ignorance. The poor have no social status. They have no access to learning. Over the years they invariably become socially and educationally backward. They may have no place in society and no education to improve their conditions. For them, employment in services on the basis of merits is a far cry. All these persons, along with other disadvantaged groups of citizens, are the favourites of the law for affirmative action without recourse to reservation. What is required for the further step of reservation is proof of prior discrimination resulting in poverty and social and educational backwardness. It is not every class of poverty-stricken persons that is chosen for reservation, but only those whose poverty and the resultant backwardness are traceable to prior discrimination, and whose backwardness, furthermore, is comparable to that of the Scheduled Castes and the Scheduled Tribes. This is a fair and equitable adjustment of constitutional values without placing any undue burden on particular classes of citizens. *State of U.P.* v. *Pradip Tandon* [(1975) 1 SCC 267 : (1975) 2 SCR 761, 766] ; *State of Kerala* v. *N.M. Thomas* [(1976) 2 SCC 310, 380 : 1976 SCC (L&S) 227 : (1976) 1 SCR 906] ; *K.S. Jayasree* v. *State of Kerala* [(1976) 3 SCC 730 : (1977) 1 SCR 194] ; *K.C. Vasanth Kumar* v. *State of Karnataka* [1985 Supp SCC 714 : 1985 Supp 1 SCR 352] .
>
> **282.** It is possible that poverty to which classes of citizens are reduced making them socially and educationally backward is the ultimate result of prior discrimination and continuing exploitation on account of their religion, race, caste, sex, descent, place of birth or residence. Identification of their social and educational backwardness with reference to their poverty is valid, if the ultimate cause of poverty is prior discrimination and its continuing evil effects, albeit, by reason of their religion, race, caste etc. Members of religious minorities or low castes or persons converted from amongst tribals or harijans to other religions, but still suffering from the stigma of their origin, or persons of particular areas or occupations subjected to discrimination rooted in religious or caste prejudices and the like or to economic exploitation, forced labour, social isolation or other victimisation may find themselves

> sinking deeply into inescapable and abysmal poverty, disease, bondage and helplessness. 'The classes of citizens who are deplorably poor automatically become socially backward'. *M.R. Balaji* v. *State of Mysore* [1963 Supp 1 SCR 439 : AIR 1963 SC 649] . In all these cases, if classes of victims afflicted by poverty and disease are identified as socially and educationally backward, as in the case of the Scheduled Castes and the Scheduled Tribes, by reason of past societal or governmental or any other kind of discrimination or exploitation, they qualify for reservation. See *Janki Prasad Parimoo* v. *State of J & K* [(1973) 1 SCC 420 : 1973 SCC (L&S) 217 : (1973) 3 SCR 236, 252] .

(Also relevant is Para 482 in the concurring opinion by Justice Sawant and para 799 in the plurality judgment of Justice Jeewan Reddy which has also been agreed to by Justice SR Pandian.)

(d) In *KC Vasanth Kumar*'s case, the opinions of Justice Chinappa Reddy and Venkatramaiah further clarify that reservations seek to address social poverty and not individual poverty.

(e) To paraphrase the famous opinion of Justice Blackmun of the US Supreme Court in *Regents of the University of California* v. *Bakke*, 438 US 265 (1978) just as you need to take account of race to ameliorate racism, you need to take account of social backwardness to ameliorate the historic inequalities that reservations seek to correct.

Insofar as the Impugned Act relies upon economic criteria as the sole basis for reservation, it is contrary to the aforesaid judgments and the principle of equality.

It is pertinent to iterate that reservations for backward classes are part of the right to equality insofar as they seek to redress past discrimination and the structural issues that impede the path of

backwards in education and public employment. The basic structure of equality consists of the two engines of equal opportunity for all with special help to backward classes. Introducing reservation for those who do not fall into backward classes creates an exception to equality unlike the reservations under 16(4) and 15(4). As Justice Thommen noted in his dissent in para 318:

> "The only legitimate object of excluding the generality of people and conferring a special benefit upon the chosen classes is to redeem the latter from their backwardness."

It is abundantly clear that non discrimination and upliftment of backward classes are the twin engines on which equality as per the Indian Constitution rests. The entire point of both limbs is to ensure a level playing field and an equality of opportunity. It is further pertinent to rely upon the Justice Subba Rao noted in his landmark dissent in *T Devadasan* v. *Union of India*, (1964) 4 SCR 680 quoted above.

As held by the judgment in *NM Thomas*, such reservation is founded on an idea central to every conception of justice- that like be treated like and unalike be treated unalike. Reservation based on economic criteria alone does not pass this essential feature of equality as it is not at all clear that all of the poor are deprived in the same sense that the backwards are. Reservation not based on backwardness fouls afoul of the principle of substantive equality for the reasons as stated in the judgments above.

K. BECAUSE the Impugned Act fails the basic structure test laid down by this Hon'ble Court in *M Nagaraj* v. *Union of India*,

(2006) 8 SCC 212 insofar as it removes all reference to backwardness and efficiency and in fact introduced the truncated criteria of poverty as the sole criteria for upper class reservation. Introducing reservation for those who do not fall into backward classes creates an exception to equality unlike the reservations under 16(4) and 15(4). In *M Nagaraj*, the amendments were upheld because they did not alter the basic scheme of 15 and 16 and interfere in the balance laid down in *Indra Sawhney*. Empowering persons who may not be socially and educationally backward turns the entire scheme on its head and is destructive of every idea of equality.

O. **BECAUSE** PEWS are not a homogenous 'class' as understood in the Constitution and thus cannot be the unit for reservation. "Social and/or educational backwardness" has to be considered in conjunction with poverty in order to determine a class.

(a) In a country such as India there are many different causes of poverty. What reservations seek to redress are historical or structural inequalities. However, reservations based on poverty alone violate equality as they treat unequals equally by failing to distinguish between structural poverty and poverty that is situational and non-systematic, and which may be remedied by individual action.

(b) In *State of UP* v. *Pradip Tandon*, (1975) 1 SCC, this Hon'ble Court held:

> 17 ...The expression "classes of citizens" indicates a homogeneous section of the people who are grouped together because of certain likenesses and common traits and who are identifiable by some common attributes.
> **24.** The 1971 Census showed population in India to be 54.79 crores. 43.89 crores or 80.1 per cent live in rural areas. 10.91 crores or 19.9 per cent live in cities and towns.

> In 1921 the rural population in India was 88.8 per cent. In 1971 the rural population was reduced to 80.1 per cent. The rural population of Uttar Pradesh in 1971 was roughly seven and a half crores. The population in Uttrakhand was roughly seven and a half lakhs. The population of hill areas in Uttar Pradesh was near about twenty-five lakhs. It is incomprehensible as to how 80.1 per cent of the people in rural areas or 7 crores in rural parts of Uttar Pradesh can be suggested to be socially backward because of poverty. Further, it is also not possible to predicate poverty as the common trait of rural people. This Court in *J.P. Parimoo* v. *State of J.& K.* [(1973) 1 SCC 420 : (1973) 3 SCR 236] said that if poverty is the exclusive test a large population in our country would be socially and educationally backward class of citizens. Poverty is evident every where and perhaps more so in educationally advanced and socially affluent classes. A division between the population of our country on the ground of poverty that the people in the urban areas are not poor and that the people in the rural areas are poor is neither supported by facts nor by a division between the urban people on the one hand and the rural people on the other that the rural people are socially and educationally backward class.

(c) As Per Thommen, J in *Indra Sawhney*

> (*13*) Poverty demands affirmative action. Its eradication is a constitutional mandate. The immediate target to which every affirmative action programme contemplated by Article 15 or Article 16 is addressed is poverty causing backwardness. But it is only such poverty which is the continuing ill-effect ofidentified prior discrimination, resulting in backwardness comparable to that of the Scheduled Castes or the Scheduled Tribes, that justifies reservation.

L. Because, even assuming that poverty is a valid ground for reservation, specifically excluding backward classes from reservation goes against the very grain of reservation and converts it into a sort of poverty alleviation tool, which is completely contrary to its purpose. Deliberate exclusion of the backward would certainly be a violation of Articles 29(2), 15 and 16 of the Constitution being discriminatory against the very people the constitution seeks to protect, and further entrenching hierarchies that this Constitution has always sought to annihilate. If poverty is valid as a sole determinant for reservation, denying such benefit to the backwards excludes those among the poor who need such reservations the most.

M. **BECAUSE** even if it is assumed that the poor of the forward classes merit reservations over the backward classes, the way the Impugned Act works is to create a completely unequal structure for reservations.

(a) While reservation for the backward has to be justified by testing for social and educational backwardness, which tests are supposed to evolve perpetually, reservation for the forwards needs no such justification.

(b) While this Court has consistently held that backward class reservation must end when the class is no longer backward, forward class reservation has no such end point and may continue in perpetuity as there will always be those poorer than others.

(c) Further, while backwardness is properly determined by commissions appointed by the President or by the states, the 103rd amendment leaves such determination to the Government of what constitutes economic disadvantage.

(d) In addition the presence of Article 335 of the Constitution would imply that while reservation of SC and ST candidates needs to be balanced against administrative efficiency, there is no such requirement of balancing for the forward poor.

Thus, the immediate consequence of the 103rd Amendment is the creation of a dual structure for the backward and forward poor. They are separate and they are unequal, akin to a Jim Crow system that was struck down in *Brown* v. *Board of Education* 347 US 483 (1953). To pretend that forward class poor and backward class poor are equal and thus both need reservation to protect them against each other 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.

To paraphrase George Orwell, all the poor are equal but some poor and more equal than the others.

N. BECAUSE the Right to Equality under the constitution has accumulated decades of progressive constitutional wisdom in its essence and the Impugned Act seeks to turn that understanding on its head as it creates special high-speed bylanes and sidelanes of privilege to the exclusion of SCs, STs and SEBCs and OBCs, virtually authorising a constitutionally sanctioned form of untouchability.

O. BECAUSE since *Golak Nath* & *Kesavananda* (1967 (2) SCR 762 & (1973) 4 SCC 225 respectively), a constitutional amendment is recognised as an exercise of 'public reason' and not merely of 'public will' and that the manner in which the Bill for the Impugned Act was introduced and passed within two days without presentation or consideration of necessary evidence justifying the need for a sudden and hasty amendment to the chapter on fundamental rights, vitiates the Impugned Act for manifest arbitrariness, the right against which is guaranteed as part of the right to equality which is a basic feature of the Constitution.

P. BECAUSE the Impugned Act suffers from gross and manifest arbitrariness to the extent that :-

i. No justification exists for carving a separate class of PEWS, independent of their social and educational

backwardness (SEDBCs) and/or centuries of oppression (in the case of SCs and STs), as if to suggest the latter has nothing to do with poverty in purely economic terms;

ii. No justification exists for excluding SCs, STs and SEDBCs from access to the PEWS quota even as all available evidence suggests that there is a strong positive correlation between social and educational backwardness and economic disadvantage (poverty).

iii. No justification exists for the arbitrary number of a maximum of 10% for PEWS;

Q. BECAUSE the Impugned Act is not only manifestly arbitrary and therefore a violation of the right to equality, but that it is destructive of basic structure inasmuch as it seeks to amend the chapter on the right to equality given its own disregard for the essential value behind that right and its disregard for the constitutional vision enshrined in the Preamble.

31. That the Petitioners have not filed any other petition in any High Court or the Supreme Court of India on the subject matter of the instant Petition.

D. PRAYERS

In the above premises, this Hon'ble Court may be pleased to issue appropriate declarations, writs, orders and directions as set out below:

a) Issue a Writ in the nature of Mandamus or any other appropriate writ declaring the Constitution (One Hundred and Third) Amendment Act, 2019 as unconstitutional, void and inoperative for violating the right to equality guaranteed, *inter alia*, under Articles 14, 15, 16 read with

the Preamble of the Constitution therefore in violation of the basic structure of the Constitution and therefore *ultra-vires* the amending power of the Parliament under Article 368 of the Constitution; and/or

b) Issue a Writ in the nature of Mandamus or any other appropriate writ declaring Section 2 of the Constitution (One Hundred and Third) Amendment Act, 2019 as unconstitutional, void and inoperative for violating the right to equality guaranteed, *inter alia*, under Articles 14, 15, 16 read with the Preamble of the Constitution therefore in violation of the basic structure of the Constitution and therefore *ultra-vires* the amending power of the Parliament under Article 368 of the Constitution, to the extent that the benefit of reservation vide the provisions in Clause (6) of Article 15 is to the exclusion of persons who belong to Clause (4) and Clause (5) i.e. Scheduled Castes, Scheduled Tribes, Socially &Educationally Backward Classes; and/or

c) Issue a Writ in the nature of Mandamus or any other appropriate writ declaring Section 3 of the Constitution (One Hundred and Third) Amendment Act, 2019 as unconstitutional, void and inoperative for violating the right to equality guaranteed, *inter alia*, under Articles 14, 15, 16 read with the Preamble of the Constitution therefore in violation of the basic structure of the Constitution and therefore *ultra-vires* the amending power of the Parliament under Article 368 of the Constitution, to the extent that the benefit of reservation vide the provisions in Clause (6) of the amended Article 16 is to the exclusion of persons who belong to Clause (4) i.e. Scheduled Castes, Scheduled Tribes and Other Backward Classes that are not adequately represented in the services of the State; and/or

d) Pass any other writ, order or direction as this Hon'ble Court deems fit in the interests of justice and in the facts and circumstances of this case.

AND FOR THIS ACT OF KINDNESS , THE PETITIONERS SHALL, AS IN DUTY BOUND , EVER PRAY

DRAWN BY:

MR. RAHUL NARAYAN

MR. PRASANNA S

GAUTAM BHATIA

ADVOCATES

FILED BY:

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MR. RAHUL NARAYAN

ADVOCATE-ON-RECORD (CODE:1885)

FOR THE PETITIONERS

Drawn on:16.01.2019

Filed On: 28.01.2019