

IN THE SUPREME COURT OF INDIA

WP(C) 182 OF 2019

IN THE MATTER OF:

Dr. Thol. Thirumavalavan

...Petitioner

Versus

Union of India

...Respondent

SHORT WRITTEN SUBMISSIONS ON BEHALF OF PETITIONER IN THE EWS MATTER

- **Ms. Meenakshi Arora, Sr. Adv.**

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

First, Section A on the Equality in the Indian Constitution and its facets.

Second, Section B on how the Impugned Amendment is destructive of equality.

Third, Section C suggests a possible reading down.

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

1. The Equality Code has the following non-derogable facets[1]:
 - 1.1 Formal equality- all equal persons are treated equally, without discrimination, or special hereditary privilege[2].
 - 1.2 Special provisions for *backward classes* in public employment in the form of reservations based on lack of representation and subject to administrative efficiency[3].
 - 1.3 Special provisions for the *socially and educationally backward classes* (“SEBC”) in the form of reservations in education[4].
2. The object of reservations, “*is to see that backward classes of citizens move forward so that they may march hand in hand with other citizens of India on an equal basis*”[5]. Reservations have been so designed to address the problem of inadequacy of representation caused by class disadvantage.
3. Backwardness of social classes[6] is the lynchpin for reservations. It was designed as a qualifying phrase to ensure that the exception does not eat the rule[7]. When reservations are made to remove such backwardness of classes, they further the ideal of substantial equality rather than act as an exception to equality[8].
4. Reservations that ignore the issue of backwardness[9] or are based only on a single criterion such as caste[10], or income[11] have consistently been struck down. The requirement for detailed and constantly evolving criteria to determine reservations has been a *sine qua non* of court decisions for over 60 years[12].
5. Reservations prior to this amendment are subject to important *guardrails* to avoid abuse:
 - 5.1 Backwardness must be determined on multiple factors by expert committees[13].

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

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

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

- 7. Reservations for PEWS suffer at least 3 constitutional defects:
 - 7.1 They impermissibly discriminate against backward classes;
 - 7.2 They do not further the cause of substantial equality; and
 - 7.3 They destroy the reparative character of reservations
- 8. The 103rd amendment discriminates against the backward classes as follows:
 - 8.1 Reservation for PEWS need not be justified on the basis on “backwardness”[19].
 - 8.2 There is no logical end point of PEWS reservation as there will always be people poorer than others in a capitalist system. There is no class, as “section” means people of all classes, regardless of backwardness or historical injustice.
 - 8.3 The government is free to choose any economic criteria it chooses for eligibility of this reservation.
 - 8.4 There is no such requirement of balancing administrative efficiency for PEWS.
- 9. With this Amendment there is now a Jim Crow like dual structure for the backward and forward poor. To pretend that PEWS and the backward classes both need reservation is akin to Anatole France’s observation, “*The poor have to labour in the face of the majestic equality of the law, which forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.*”
- 10. The 103rd amendment detracts from substantial equality because:
 - 10.1 PEWS are not a “class” but are a “section” comprising of all classes except the backward who are specifically excluded. This converts a class based remedy to an individual one. Further, there is no way to determine adequacy of representation or even to determine the 50% rule.
 - 10.2 Without having to objectively account for backwardness or efficiency, there is no principled way in which reservations can be restricted leaving governments open to reserve posts for any group that is politically favored.
- 11. The 103rd Amendment, through its 10% reservation for economically weaker individuals *who nonetheless belong to groups that do not suffer from inadequate representation*, violates the foundations of the equality code. It directly *boosts* the representation of groups that are already adequately represented, and thereby necessarily *dilutes* the representation of the SEBCs that are the original beneficiary groups of the State’s reservation policies.

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

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

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

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

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

C. Reading down of the Amendment

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

- a) Striking down the ban on SEBCs, SCs, STs etc and other vulnerable groups from being granted reservation under the PEWS category.
- b) And further clarifying that that PEWS may be implemented only after fully exhausting the 50% *Indira Sawhney* limit for all other SEBC, SC and ST reservations.

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Time Sought: 2 hours

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[15] Art. 355

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

[17] *Indira Sawhney*, ¶¶ 482, 492

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

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

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

Index of case law

1. *Gen. Manager v. Rangachari*, (1962) 2 SCR 586 ¶ 27;
2. *Balaji v. State of Mysore*, [1963] Supp. (1) SCR 239 ¶¶ 23, 34, 35
3. *T Devadasan v. Union of India*, AIR 1964 SC 179, ¶¶ 26, 29, per Subba Rao, J(diss.)
4. *Chitralkha v. State of Mysore*, (1964) 6 SCR 368 ¶¶ 20, 21
5. *Triloki Nath v. State of J&K*, (1967) 2 SCR 265 ¶¶ 4, 7;
6. *State of AP v. P Sagar*, (1968) 3 SCR 595: AIR 1968 SC 1379 ¶ 7
7. *Janki Prasad Parimu v. State of J&K*, (1973) 1 CC 420, ¶ 24;
8. *State of UP v. Pradip Tandon*, (1975) 1 SCC 267, ¶¶ 24, 26
9. *KS Jayasree v. State of Kerala*, (1976) 3 SCC 730, ¶ 22;
10. *State of Kerala v. NM Thomas*, (1976) 2 SCC 310, ¶¶ 46, 78, 184.
11. *KC Vasanth Kumar v. State of Karnataka*, 1985 Supp. SCC 714 ¶ 28-30, 3480, 140
12. *Indira Sawhney v Union of India*, 1992 Supp. (3) SCC 217 ¶¶ 143, 145, 146, 207-208, 217, 250-255, 261, 294, 356-359, 407, 415, 419, 482, 492, 640, 788;
13. *M Nagaraj v. Union of India*, (2006) 8 SCC 212, ¶¶ 102, 120
14. *Ram Singh v. Union of India*, (2015) 4 SCC 697, ¶¶ 54,55;
15. *Jarnail Singh v. Union of India*, (2018) 10 SCC 396, ¶ 26;
16. *Mukesh v. State of Uttarakhand*, (2020) 3 SCC 1