

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Drawn by:

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