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A FALLACIOUS RESCUE TO REVERSE DISCRIMINATION: EWS

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ABSTRACT

The long-standing goals of the Indian Constitution which serve as a driving force towards building a society that finds its roots in justice, liberty, equality and fraternity. We have seen under the Citizenship Amendment Act, 2019, where these objectives were trampled upon by the Parliament. In this article, the Citizenship Amendment Act would not be the impugned topic for discussion, lieu, it will be the Constitution (103rd Amendment) Act, 2019 being the subject-matter for consideration. This act empowers the "Economically Weaker Citizens" by providing them 10 per cent reservation, in addition to the already-existing reservationists and explicitly excludes such reservationists from the purview of this act. The act has faced a juggernaut of criticisms on various grounds which I will be discussing in this article. Indeed, reverse discrimination is happening at this time as the forward classes are not subjected to the special provisions made in this behalf for their counterparts, i.e. the backward classes of citizens. They are availing such benefits by virtue of the fact that they have sustained a long-standing disadvantageous position in the society due to various compelling forces and now, it's the time for them to stand beside the forward groups. This is the essence of substantive equality and thus, the Constitution (103rd Amendment) Act is an attempt of sowing seeds for reviving the historical discrimination in response to the reservation provisions for the backward groups. This act finds its inception in a premise which is backed by a misunderstood necessity.

I will be discussing in detail about the Constitution (103rd Amendment) Act and the reasons of its enactment. Then, the focus will be shifted on the "Proportionality Test"; for the purpose of screening the impugned Act through each rung of the test and analyzing the extent of its correctness.

I. A NEW BORN RESERVATION

When our constitution was being framed, the framers had it in their mind that the backward classes of citizens shall get an equal opportunity in order to emancipate themselves from their historically-disadvantageous position and get adequate representation in every facet of development. Before the constitution came into being, the Scheduled Castes and Scheduled Tribes were the crystal clear groups who were known to be strangulated and stranded in a vicious circle of social exploitation. Thus, these groups were on the forefront of the policies of the constitution makers and this later led to the inclusion of special provisions for them in the form of Article 15(4) & 15(5)[1], along with

[1] Article 15(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.

Article 16(4)[2]. But a dilemma arose later with regard to the recognition of 'Other backward Classes' to be subjected to the same special provisions meant for the SC's and ST's. The OBC's claimed that they also ought to be the beneficiaries of such provisions on account of their backwardness, whether in terms of social, educational or economic backwardness. The court construed them to be socially and educationally backward in Article 15(4) & 15(5) and a much broader perspective was seen in Article 16(4), by referring them to be backward classes. This was a step towards their amelioration and thereby bringing in 'social democracy'.

After taking into consideration social and educational backwardness as a determining principle for reservation, it is also imperative to consider economic backwardness which is an analogous principle and has much to do with reservation. Seemingly, it is also the only criterion for me to ponder upon, as another ground for reservation. Over the years, there has been a drastic change in the status and conditions of the SC/ST/OBC's, whether in education or employment. These opportunities were catered to them by way of special provisions enshrined in the Fundamental Rights.

Had not been poverty alleviation and access to basic necessities of life one of the key concerns of any democratic government? If I am not wrong, the Fundamental Rights Chapter was embedded in our constitution to instill dignity, autonomy, liberty and equality amongst the persons or citizens. For instance, there are two boys Ronaldo and Dybala, where Ronaldo belongs to a well-to-do family and has access to more than the required necessities of life, whereas, Dybala on the other hand, lives in a slum area with her mother, who works as a maid in different places. Do you think that both of them share the same lifestyle and are getting equal opportunities in any race of life? No. In fact, Dybala might be perceived as a less dignified person because of his filthy clothes and thus, may be seen as a thief. He may not have autonomy to make choice in his decisions and does not possess the same amount of liberty to access certain amenities, unlike Ronaldo.

Seeking to the aforesaid case, the compelling reason of such inequality in opportunities is economic backwardness. In such situation, unless the person being economically incapacitated will not be uplifted, there will be nothing worse than that for him. Thus, till the time, Dybala will not become educated and employed in any occupation, very less time will be left for him and his family to crumble down. This could only become possible through an 'Affirmative Action Program' like reservation.

Therefore, instead of acting as a lackadaisical person and seeking to the exigency of time, the Parliament brought the Constitution (103rd Amendment) Act, 2019 which seeks to provide 10 per cent reservation to the 'Economically Weaker Sections' of citizens by amending Articles 15 and 16 and adding

[2] Article 16(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.

Clause (6)[3] to both the Articles.[4] Though, no citizen could benefit from this law unless he has fulfilled certain conditions[5], as prescribed in that behalf.

But the law restricts its application to certain categories of citizens, which are Scheduled Castes, Scheduled Tribes and the Non-Creamy Layer of Other Backward Classes.[6] This part of the law is like an elephant in the room and has to be discussed in great detail. This leads us to screening the impugned law through each stratum of the 'Proportionality Test' and reviewing its credibility.

II. A 'PROPORTIONATE' REVIEW OF A LAW

It is paramount for a law to be unequivocally proportionate in its application. By and large, it may not be possible for the maker of a law to foresee its far-reaching ramifications but it should not become implausible on the face of it. What and how a law brings a disproportionate impact is the subject-matter of the 'Proportionality Test'. It uncovers all the latent and patent effects of a law, after the law goes through its Four-Layer Passage. Hereupon, I will be discussing the four elements of the proportionality test by placing them against the new reservation law.[7]

A. Legitimate Goal: First Stage

This element talks about the *interest(s)* that must exist in a law in order to justify the interference with another interest or right. The new reservation policy aims to provide those *means* by which the economically weaker sections (EWS) of citizens could achieve certain level of prosperity, other than the already existing reservationists. The purpose at this stage is to weigh the interest(s) that must hold such good in order to outweigh the competing interest. To put it conversely, what is that competing interest here and will

[3] Article 15(6): Nothing in this article or sub-clause (g) of clause (1) of Article 19 or clause (2) of Article 29 shall prevent State from making:
(a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and
(b) any special provision for the advancement of any economically weaker sections of citizens other than the clauses mentioned in clauses (4) and (5) insofar as such special provisions relate to their admissions to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent of the total seats in each category.
Explanation— For the purpose of this article and Article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantages.
Article 16(6): Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent of the posts in each category.

[4] See K. Ashok Vardhan Shetty, *Can the Ten per cent Quota for Economically Weaker Sections Survive Judicial Scrutiny?*, The Hindu Centre, available at: https://www.thehinducentre.com/publications/policy-watch/article26436396.ece (last visited on April 20, 2020)

[5] *Id.*, In its Office Memorandum no. 20013/01/2018-BC-II dated January 17, 2019, the Ministry of Social Justice and Empowerment, Government of India has stipulated that only persons whose families have a gross annual income less than Rs.8 lakhs, or agricultural land less than 5 acres, or residential flat less than 1,000 sq. ft., or residential plots less than 100 sq. yards in notified Municipalities, or residential plots less than 200 sq. yards in areas other than notified Municipalities, are to be identified as EWS for the benefit of reservation.

[6] *Id.*

[7] Kai Möller , "Proportionality: Challenging the critics" 10 *Journal of Oxford University Press and New York University School of Law* 711 (2012)

it be legit to forgo such interest? The interest with which the present law is interfering with has multiple facets of it.

Talking about the case of M. Nagaraj v. Union of India[8], where the court laid down two tests, the 'width test' which takes within its ambit all the constitutional principles alleged to have been infringed by the impugned amendment and the other was the 'identity test' which further identifies any abridgement of the basic structure of the constitution by the same amendment.[9]

When we talk about the impediments of the amendment, we have to certainly refer to Articles 15 and 16. This amendment came into being to uplift those who are economically backward but does it conform to the previous amendment made in both the Articles. It actually doesn't, as first of all, Article 15(4) and 15(5) clearly lay down that the citizen invoking reservation must be 'socially and educationally backward' and in furtherance, Article 16(4) also lays down that the citizen shall 'not be adequately represented in the services under the state'. But when the amendment here, is made, explicitly excludes the SC, ST, OBC-NCL, it comes in clear conflict with the provisions of Articles 15 and 16. It is only those excluded groups who fulfil the requisite conditions for reservation and when groups other than those had been placed on the same parlance, it is a clear violation of Article 14 of the Indian Constitution. In our further discussion, we will come across certain facts which will show that the economically weaker sections of citizens under Articles 15(6) and 16(6) are not so economically backward.[10]

In Minerva Mills v. Union of India[11], it was held that Articles 14, 19 and 21 of the Constitution form the 'Golden Triangle' and in no case can be violated, as they form part of the Basic Structure of the Constitution. This amendment thus, alters the basic character of the constitution by violating Article 14.

Also, since the case of M.R. Balaji v. State of Mysore[12], the court had been consistent about the '50 Per Cent Rule of Total Reservation'. Under any circumstances, the 50 per cent cap shall not be breached and the same has been done by the 103rd Amendment, by exceeding the limit to 59.50 per cent.[13] Over the years, the courts have been stringent about the 50 per cent rule whether in matters of education or employment and the Parliament has simply overlooked the precedent, *without there being any compelling exceptional circumstances*[14] and thereby, failing the width test. Thus, interference with the basic tenets of the constitution under the pretense of alleviating 'economic backwardness'; does not justify the amendment to have a 'legitimate goal'.

B. Rational Connection: Second Stage

Indeed, when the purpose of an amendment is not legitimate, there is no point of discussing the other elements of the test.[15] But, irrespective of this fact, the scope of my essay is to place the amendment against each

[8] AIR 2007 SC 71
[9] *Supra* Note 4
[10] *Supra* Note 4
[11] AIR 1980 SC 1789
[12] AIR 1963 SC 649
[13] *Supra* Note 4
[14] See Devika, *Reservation to the Economically Backward Class — Indian Constitutional Perspective*, The SCC Online Blog, available at: https://www.scconline.com/blog/post/tag/articles-156-and-166-in-constitution-of-india/ (last visited on April 20, 2020)
[15] Madhav Khosla, "Proportionality: An assault on human rights?: A reply", 8 *Journal of Oxford University Press and New York University School of Law* 299 (2010)

of such elements. There must be a rational nexus between the interference and the goal sought to be achieved. The beneficiaries of this amendment are 'General' or 'Other Categories' of citizens, other than SC, ST and OBC-NCL. Where, such classes of citizens are holding the maximum number of posts or jobs, whether in private sector or government jobs. In fact, in a report given by the Union Minister of State Personnel, Jitendra Singh has shown that till January 2016, 52.47% posts have been held by the General Category of Citizens.[16]

Here in this case, the Parliament has prescribed 10 per cent reservation for the EWS category of citizens without any rationale or adequate determining principle like any authentic data to make it reasonable for such per cent of reservation and thereby brings this case into the fold of 'Manifest Arbitrariness', one of the levels of Graded Equality. In Shayara Bano v. Union of India[17], Nariman J said that *when the Parliament has made any legislation that is excessive and disproportionate, it would be considered as manifestly arbitrary*.[18] Comparatively, the 50 per cent rule of total reservation was carved out as a mid-way for the general and backward classes of citizens, unlike the 10 per cent rule.

Also, the amendment does not seek to provide reservation freely to the EWS category; it imposes certain conditions like that of Rs. 8 Lakhs and other limitations on assets. However, these restrictions are not *suitable* enough to justify the interference with the Basic Structure of the Constitution. In one of the sessions of Lok Sabha in August 2018, a report submitted by the Union Minister of State for Statistics, Vijay Goel, mentioned that India's per capita income was Rs. 82,229 in 2016-2017 and currently tax becomes payable for an income above Rs. 2.50 Lakhs and around 97 per cent of the country's population fall below this limit.[19] Thus, the income limit of Rs. 8 Lakhs would include almost the whole of population and needy people would again be deprived of the benefits, as was happening in the case of Creamy-Layer amongst the OBC's. This makes the *means* of achieving the so-called legitimate goal as *irrational* and thus, our goal of minimizing economic backwardness by way of reservation will not be served by such policy measures and will remain as a mere interference only.

C. Necessity: Third Stage

Now, if I reiterate the goal of the reservation policy, it was to uplift the *economically backward classes* of citizens. For me, economic backwardness is apparently the sole criterion left for reservation *but this does not make the policy adopted by the Parliament necessarily to be the least restrictive one*.[20] The conditions discussed above in the last element for entry into the EWS category are not correct and there may have been any other alternative measure which could have served the purpose well. Although, the amendment is facing the foremost critique for the inclusion of false classes within its purview and is stretching the wrong further, by laying down inappropriate conditions of the their inclusion

[16] *Supra* Note 4
[17] AIR 2017 SC 4609
[18] See Nivedhitha K., *The Citizenship (Amendment) Bill is Unconstitutional*, Indian Constitutional Law and Philosophy, available at: https://indconlawphil.wordpress.com/2019/12/05/guest-post-the-citizenship-amendment-bill-is-unconstitutional/ (last visited on April 20, 2020)
[19] *Supra* Note 4
[20] *Supra* Note 7 at 713

which will ultimately go against the purpose of amendment.

Recapitulating the income criteria of Rs. 8 Lakhs which provides a disproportionate benefit to the subjects of the amendment could have been superseded by an *alternative measure.* I have mentioned about the India's per capita income of Rs. 82,229 in the last element, *the income limit must be even less than this amount in order to facilitate proper apportionment of reservation benefits to the poorest of the poor class*.[21] Thus, the amendment fails to clear the necessity stage of the test.

D. Balance: Last Stage

In the last stage of the Proportionality Test, we have to determine that amongst the Right of the Economically Weaker Sections of Citizens and the Basic Structure of the Constitution, which has to be given an upper hand. A balancing is done when two rights or interests are on the same parlance and one has to be chosen out of them.[22] In Aruna Ramchandra Shanbaug v. Union of India[23], the court allowed 'Passive Euthanasia' and for the first time, a person was allowed to die at the instance of the other person. In the context of balancing, this case is the best example of two interests competing with each other on the same footing (Life). Thus, between both the conflicting interests, the court recognized Right to Die.

It may not be necessary every time that both the interests have a *common standard of assessment*, this would lead to 'incommensurability'. Incommensurability in its literal sense means, when two things cannot be measured on a common scale. In Internet and Mobile Association of India v. RBI, the court quashed the circular of RBI as it was infringing Article 19(1) (g)[24] by disallowing the banks from providing services to persons who deal in 'cryptocurrencies' and the court rejected RBI's plea of Article 19(6)[25], which talks about reasonable restrictions in the interest of the general public.[26] Though, the court didn't go into each prong of the test but did examine on the basis of the *Necessity* prong. Ultimately, both the conflicting interests belonged to the general public only (Trade) as one was giving them the right to trade and the other was restricting the same in their interest. Unlike in Aruna Shanbaug case, where both the competing interests shared the same scale and were flowing in the same direction, to save the victim from further

[21] *Supra* Note 4
[22] *Supra* Note 7 at 719
[23] AIR 2011 SC 1290
[24] Article 19(1) (g) To practise any profession, or to carry on any occupation, trade or business
[25] Article 19(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,
(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise
[26] See Suhrith Parthasarathy, *The Supreme Court's Cryptocurrency Judgment*, Indian Constitutional Law and Philosophy, available at: https://indconlawphil.wordpress.com/2020/03/10/guest-post-the-supreme-courts-cryptocurrency-judgment/ (last visited on April 20, 2020)

suffering. On the other hand, in the Cryptocurrency Judgment, trade of cryptocurrencies should be allowed as it is a fundamental right to trade and at the same time, it should also be barred as it poses undue risk upon the general public. Thus, there exist a 'Strong Incommensurability'[27] and one has to be chosen.

Although, it is not a straight-jacketed rule that incommensurability has to be judged on the face of it, instead, *it is also possible to integrate two interests by building a relation between them* and this brings the concept of 'Weak Incommensurability'.[28] In the case in hand, on one side, a fundamental right is enabling the upliftment of the EWS category of citizens [Articles 15(6) and 16(6)][29] and on the other side, another fundamental right is getting abridged due to the former one (Article 14)[30], for the reasons noted under the previous headings. Irrespective of the fact that whichever incommensurability exist, weak or strong as both the interests are in the furtherance of certain classes of citizens and thus, one has to be upheld seeking to the *relevant reasoning*.[31]

The relevant considerations in regard of the present case can be one which we have discussed above in the text and the same could also include a 'Cost-Benefit Analysis'.[32] When it comes to assessing the cost for introducing a particular scheme, it has to be weighed in terms of the benefit it will provide. Here, it will become imperative for the states to appoint a competitive body for scrutinizing the applications for *EWS Quota* and for that, costs need to be incurred. But when the law does not find legitimacy in its inception, then there is no point of selecting its beneficiaries.

III. CONCLUSION

Lord Devlin in one of his works has stated that "the suppression of vice is as much the law's business as the suppression of subversive activities".[33] Here, in the case in hand, the 'vice' can be related to the abrupt act on the part of the Parliament which seeks to upgrade those classes or category of citizens which are not so degraded, at the cost of breaching certain fundamental constitutional principles. Thus, from this essay, my concluding remark would be that the repository of positive discrimination shall not be showered upon those who have never been at a disadvantageous position.

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[27] *Supra* Note 7 at 719
[28] *Supra* Note 7 at 720
[29] *Supra* Note 3
[30] The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
[31] *Supra* Note 7 at 722
[32] *Id.*
[33] V.D. Mahajan (ed.), *Jurisprudence and Legal Theory* 94 (EBC Publishing (P) Ltd., Lucknow, 5th edn.)